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RIN: 1250-AA02

Ms. Barbara Bingham
Acting Director
Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
Room N3422
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Bingham:

Thank you for the opportunity to comment on your Advanced Notice of Proposed Rulemaking regarding Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act, as Amended, RIN number 1250-AA02.

Without inclusion of people with disabilities, the American workforce fails to reflect and benefit from the full diversity of our country. We applaud OFCCP's intention to undertake a comprehensive review of the Section 503 regulations to make them more effective. Such a review and improvement is sorely needed. Despite the passage of Section 504 of the Rehabilitation Act in 1973 and the passage of the ADA in 1990, the employment rate of Americans with disabilities remains dramatically lower than the employment rate of people without disabilities. The recent recession has affected the employment of individuals with disabilities even more severely than the general population.

Although discrimination is a major cause of underrepresentation of people with disabilities in the workforce, nondiscrimination laws, such as Section 504 and the ADA, alone, cannot be expected to overcome the legacy of disability discrimination. Affirmative action is needed to redress past and present hiring discrimination that cannot be proved (because applicants with disabilities are not told why they are not hired and employers do not record their discriminatory reasoning), to overcome pervasive negative employer attitudes that will not even be examined in the absence of affirmative obligations (people with disabilities cannot demonstrate their abilities until they are present in the workforce), and to break the pattern of invisibility of the group (if an employer has never hired a person with a disability, it is unlikely to even notice that its workforce does not include anyone with a disability).¹

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¹ See Weber, M., "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities," 46 Buffalo L. Rev. 123 (1998).

Federal contractors represent a large group of employers. According to some reports, nearly one in four American workers (approximately 22 million employees) is employed by a Federal contractor.² That is close to 200,000 businesses with contracts amounting to over \$700 billion.³

Federal and state affirmative action requirements for racial and ethnic minorities and women have been shown to make a positive difference in the employment of those groups. According to one study, “In the contractor sector affirmative action has increased the demand relative to white males for black males by 6.5%, for nonblack minority males by 11.9%, and for white females by 3.5%. Among females, it has increased the demand for blacks relative to whites by 11.0%. For a program lacking public consensus and vigorous enforcement, this is a surprisingly strong showing.”⁴

However, similar strides have not been seen in response to the disability affirmative action requirements of Section 503. We believe this is because the Section 503 requirements have not been made clear, measurable, and results-oriented, and have not been adequately communicated, monitored, and enforced. Absent concrete mandates and clear guidance, the current regulations have resulted in little more than paperwork assurances concerning nondiscrimination. Meaningful requirements, coupled with increased guidance and technical assistance from OFCCP, could begin to significantly impact un-employment and under-employment of people with disabilities.

Many of the improvements to Section 503 regulations could apply equally as well to those for the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA). VEVRAA prohibits discrimination and requires affirmative action in all personnel practices regarding covered veterans – including all veterans with disabilities, not just those from the Vietnam era. Federal contractors or subcontractors are required to develop and maintain specific written VEVRAA affirmative action plans *See* 41 CFR Part 60-250 and 41 CFR Part 60-300. Unfortunately, there are deficiencies in compliance and enforcement of contractor VEVRAA obligations as serious as those with regard to Section 503. Although OFCCP has sought comments on Section 503 with this ANPRM, we urge the agency to incorporate proposed improvements to its VEVRAA regulations when it issues the future notice of proposed rulemaking. As a result, many comments in this document are directed toward Section 503 as well as VEVRAA obligations of federal contractors and subcontractors.

1. How can the affirmative action requirements of Section 503 be strengthened to measurably increase employment opportunities of covered contractors for individuals with disabilities? If available, include examples or information illustrating the effectiveness of the suggested new requirements.

A number of improvements are available to increase the effectiveness of Section 503 and, thus, to increase employment of people with disabilities by federal contractors. Affirmative action requirements and programs covering race, ethnicity and gender under Executive Order 11246 and its implementing regulations (41 C.F.R. Chapter 60) provide an important model, including numerical placement goals, changes to qualification standards, quantitative analyses, measurable action steps, reporting, and accountability. These measures, as well as a clear statement of purpose (41 C.F.R. §60-2.10), should be incorporated in regulations implementing Section 503 for both construction and nonconstruction contracts. Incorporation of these elements is critical to send a clear message to contractors that disability affirmative action stands on parallel footing to affirmative action on other factors. Many of the

² “Plan to Seek Use of U.S. Contracts as a Wage Lever,” *New York Times*, February 26, 2010.

³ R. Bjorklund, FedSources Market Intelligence Services, “Federal Budget Analysis: 2011” (2010).

⁴ Leonard, J., “The Impact of Affirmative Action on Employment,” *Journal of Labor Economics*, 2(4), pp. 439-463 (1984)

improvements we recommend are explained in depth, with supporting research and analysis, in a report by Economic Systems Inc, Bender Consulting Services and Powers, Pyles, Sutter and Verville, PC for the Department of Labor.

Current OFCCP regulations implementing Section 503 require covered federal contractors and subcontractors to develop affirmative action plans that include 10 major components: an equal opportunity policy statement; review of personnel processes to ensure that job applicants and employees are considered for all job vacancies and training opportunities and are not stereotyped in a manner which limits their access to all jobs for which they are qualified; review of all job qualification standards to ensure that they are job-related for the position in question and consistent with business necessity; making reasonable accommodations to the known functional limitations of otherwise qualified individuals with disabilities; development and implementation of procedures to ensure that employees with disabilities are not harassed because of disability; pursuit of appropriate outreach and positive recruitment activities; dissemination of information about affirmative action policies within a company in order to ensure greater employee cooperation and participation; design and implementation of an audit and reporting system to measure the effectiveness of an affirmative action program; assignment of a company official to be responsible for the implementation of affirmative action activities; and training of all personnel involved in recruitment, screening, selection, promotion, disciplinary action and related processes to ensure that affirmative action steps are taken.

In order to achieve the goals of Section 503, the regulations should be amended to:

- Add a new component relating to quantitative analysis, including the establishment of placement goals.
- Separate into two distinct components “external dissemination of policy” and “outreach and recruitment--strategic partnerships and linkages.”
- Add a new component focused on accessible information and electronic technology.
- Include specific examples of exemplary practices under each component.

The scope of the policy statement required by the regulations should include not only “equal opportunity” but also cover the contractor’s obligation to undertake “affirmative action.” Moreover, we believe that, in addition to posting its policy statement on bulletin boards, the contractor should post its policy on its Intranet (if one exists) and its external-facing Internet website. Provisions in the current regulation encouraging the inclusion of specific topics should be made mandatory. Specifically, the revised regulation should read as follows:

The policy statement “shall” indicate the chief executive officer’s attitude on the subject matter, provide for an audit and reporting system, and assign overall responsibility for the implementation of affirmative action activities. Additionally, the policy “shall” state, among other things, that the contractor will:

- Recruit, hire, train, and promote persons with disabilities in all job titles
- Ensure that all other human resources actions are administered in a nondiscriminatory manner
- Ensure that all employment decisions are based only on valid job requirements and do not screen out qualified individuals with disabilities

The provisions in the regulations should be amended to include reference to the following additional topics:

- Link the policy statement to the company's overall mission and vision statements, including expression of the contractor's commitment to modify, on a systemic and ongoing basis, the corporate culture and work environment to welcome and ensure the advancement of veterans and persons with disabilities
- Establish annual numerical goals for hiring and advancement of people with disabilities and clear communication of these goals to managers and supervisors, including holding them accountable for making progress toward achieving these goals.
- Commit to adopt and use exemplary practices regarding the hiring, retention, and advancement of qualified persons with disabilities.
- Include a disability component in diversity initiatives.
- Establish a team consisting of the CEO and managers and supervisors throughout the various departments in the company committed to the hiring, retention, and promotion of persons with disabilities.
- Emphasize the business case for the hiring, retention, and promotion of persons with disabilities.

In addition, it is important to require contractors' disability affirmative action plans to address specific action steps that are necessary to increase employment of people with disabilities. Successfully increasing employment of people with disabilities may require more than simply avoiding prejudice. Because assumptions about people with disabilities have literally been built into our communities (in the form of steps, curbs, voice-only telephones, and printed text, among others), and because people with disabilities have often been segregated from the rest of the community, disability-based affirmative action plans should be required to address targeted outreach and recruitment (for example, by requiring implementation of the outreach and positive recruitment offered in the current regulation at §60-741.44 (f) (1), (2), and (3)), testing and qualifications standards, staff training, confidentiality protections, physical and communications accessibility, and reasonable accommodations.

Because employees with disabilities have traditionally been excluded from integrated employment, it is particularly important to emphasize the prohibition of segregated facilities (similar to 41 C.F.R. §60-1.8) by federal contractors. In addition, in order to ensure that affirmative action supports economic empowerment of people with disabilities, and not just something to occupy them during the day, federal contractors who have received certificates allowing them to pay employees with disabilities less than the federal minimum wage under Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. § 14(c), should be monitored to ensure that they are in full compliance with the requirements of their certificates and should not be permitted to count sub-minimum wage workers in assessing their compliance with their Section 503 affirmative action obligations.

Legal requirements may be ineffective if they are not understood by contractors in practical context. Therefore, guidance should also be developed and disseminated to assist contractors to be inclusive of employees with disabilities, including best practices for outreach and recruitment, hiring incentives, testing and interviewing, qualifications standards, confidentiality systems, inclusion, retention and advancement, and centralized accommodations funding. In addition, OFCCP could work through existing federally-funded disability training and technical assistance organizations to disseminate requirements, guidance, and best practices for affirmative action programs. Such organizations include the National Institute of Disability Research and Rehabilitation's (NIDRR) Disability and Business Technical Assistance (DBTAC)/ADA Centers, and the Rehabilitation Services Administration's Technical Assistance and Continuing Education Centers for Vocational Rehabilitation.

2. What measures have contractors and subcontractors taken to fulfill the current affirmative action requirements of Section 503? How much did these measures cost?

N/A

3. What barriers currently impede Federal contractors from hiring people with disabilities?

Literature discussing barriers to hiring persons with disabilities among federal contractors is sparse. The lack of mandated tracking and reporting on hiring, retention, and advancement of people with disabilities makes it difficult to demonstrate what the barriers and facilitators are. The greatest barrier to increasing employment of people with disabilities among federal contractors appears to be their failure to take the obligation to hire people with disabilities seriously by engaging in targeted recruitment, working with partners, adopting accommodation and inclusion strategies, and even simply including disability in their diversity policies. Additional barriers are often caused by employers themselves, including lack of web-based recruitment accessibility (see Question 13), employer attitudes, and lack of training. Barriers to legal enforcement also inhibit potential employees with disabilities from getting jobs with federal contractors.

Employers claim to fear the cost of accommodating a person with a disability, though these concerns have been shown to stem from misinformation about the cost of reasonable accommodations.⁵ Research is consistently demonstrating that providing reasonable accommodations to qualified employees carries minimum or no cost. Average costs of provided accommodations are about \$25; almost half (49%) of all provided accommodations have no cost whatsoever, and those with costs average \$600.⁶ Together, three-fourths of accommodations cost \$500 or less.⁷ Furthermore, accommodations determined through an interactive process are particularly low cost, as well as beneficial and effective.⁸ A frequently overlooked factor in the analysis of accommodation costs is the financial benefit to employers.⁹ Studies show employers that implement reasonable accommodations often benefit by retaining current employees, improving worker productivity, and avoiding turnover costs of job searches and new employee training.¹⁰ For instance, in a recent study by the Job Accommodation Network, among small businesses surveyed 90% reported a direct benefit from making an accommodation to retain an employee.¹¹ 61% of all

⁵ Scharztz, H.A., Hendricks, D.J. & Blanck, P., "Workplace accommodations: Evidence based outcomes," *Work*, 27(4), 345-354 (2006).

⁶ Scharztz, H.A., Hendricks, D.J. & Blanck, P., "Workplace accommodations: Evidence based outcomes," *Work*, 27(4), 345-354 (2006).

⁷ Acemoglu, D. & Angrist, J., "Consequences of employment protection? The case of the Americans with Disabilities Act" (National Bureau of Economic Research Working Paper No. 6670) (1998); Blanck, P.D., "Empirical study of the employment provisions of the Americans with Disabilities Act: Methods, preliminary findings, and implications," *New Mexico Law Review*, 22(3), 119-241(1992); Blanck, P. & Steele, P., "The emerging role of the staffing industry in the employment of persons with disabilities - A Case Report of Manpower Inc." (1998); Scharztz et al. (2006); Solovieva, T.I., Dowler, D.L. & Walls, R.T., "Employer benefits from making workplace accommodations," *Disability and Health Journal*, 2(4), 196-205 (2009).

⁸ Schreuer, N., Myhill, W.N., Samant, D., Aratan-Bergman, T. & Blanck, P., "Workplace accommodations: Occupational therapists as mediator in the interactive process," *Work*, 34(2), 149-160 (2009).

⁹ Scharztz et al., 2006.

¹⁰ Schreuer et al., 2009; Solovieva et al., 2009.

¹¹ Solovieva et al., 2009.

businesses estimated the direct benefit to the company of accommodation to be \$1000 or greater.¹² A similar study, found the mean benefit was \$11,335 and the median benefit was \$1000.¹³

In addition, reasonable accommodations contribute to a positive workplace culture. Workplace culture has a significant impact on worker productivity and performance, shaping employee values and organizational citizenship, the economic productivity of the business, rates of retention, turnover and related human resource costs, the quality of employee interactions, and organizational policies.¹⁴ In companies where employees report experiencing strong company fairness and responsiveness, employees with and without disabilities report high job satisfaction, willingness to work hard, loyalty, and low turnover intentions.¹⁵ In contrast, where fairness and responsiveness are reported to be low, employees generally report lower satisfaction, willingness, loyalty, and higher turnover intentions, and employees with disabilities report these factors even less favorably. Notably, turnover is a significant employer expense, with the average administrative costs for replacing an employee being between \$1,800 and \$2,400.¹⁶

Among negative attitudes, employers believe that persons with disabilities present a risk of poor attendance and productivity.¹⁷ Both private and public-sector employers maintain negative attitudes toward hiring persons with mental and/or emotional disabilities.¹⁸ In regard to persons with mental disabilities, employers also are concerned about their ability to interact with other employees.¹⁹ These negative employer and supervisor attitudes are based largely on myths and stereotypes. They can be addressed through training programs, corporate policies, and other approaches.

Most courts have found that Section 503 does not provide a private cause of action. As such, cases against federal contractors under Section 503 are repeatedly dismissed. Additionally, the requirement that federal contractors “take affirmative action” to employ persons with disability is vague and—without providing for private enforcement—largely ineffective.²⁰ Because of the limited legal recourse for individuals with disabilities to enforce Section 503 and the inherent difficulty of proving discrimination in the hiring process (because an applicant with a disability is not given an explanation for non-selection), it is essential that OFCCP undertake serious monitoring and enforcement activities.

4. Are there changes that could be made to the existing language on permissible qualifications standards that would better ensure equal employment opportunities for individuals with disabilities?

The current regulations instruct contractors to periodically review physical and mental qualifications for employment, and ensure that, “to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business

¹² Solovieva et al., 2009.

¹³ Scharz et al., 2006.

¹⁴ Samant, D., Soffer, M., Hernandez, B., Adya, M., Akinpelu, O., Levy, J. et al., “Corporate culture and employment of people with disabilities: Role of social workers and service provider organizations.” *Journal of Social Work in Disability & Rehabilitation*, 8, 171–188 (2009).

¹⁵ Schur, L., Kruse, D., Blasi, J. & Blanck, P., “Is disability disabling in all workplaces? Workplace disparities and corporate culture,” *Industrial Relations*, 48(3), 381-410 (2009).

¹⁶ Scharz, H.A., Hendricks, D.J. & Blanck, P., “Workplace accommodations: Evidence based outcomes,” *Work*, 27(4), 345-354 (2006).

¹⁷ Unger, D.D., “Employers' Attitudes Toward Persons with Disabilities in the Workforce: Myths or Realities?,” *Focus on Autism and Other Developmental Disabilities*, 17(1), 2-10 (2002).

¹⁸ Scheid, T.L., “Stigma as a Barrier to Employment: Mental Disability and the Americans with Disabilities Act,” *International Journal of Law and Psychiatry*, 28(6), 670-690 (2005); Unger.

¹⁹ Unger.

²⁰ Wright, W.A., “Equal Treatment of the Handicapped by Federal Contractors,” *Emory Law Journal*, 26(1), 65-106 (1977).

necessity.” 41 CFR 60-741.44(c)(1). It is imperative that the regulations clearly require that such job-related, necessary qualifications be very narrowly tailored to avoid disqualifying individuals who can fully perform the tasks inherent in the job. It should be emphasized that qualification standards must be drafted based on the essential functions of the job, on what constitutes a direct threat to health or safety, and not on assumptions about disabilities or on how the job is usually (or has traditionally been) done.

One example, commonly seen in job announcements that require travel, is the statement that the job requires a driver’s license and access to a vehicle to travel between offices. In reality, such a job merely requires the ability to travel between offices (by public transportation, by taxi, by private vehicle driven by a friend or driver, etc.), but stating it as a driver’s license requirement unnecessarily forecloses applications by people with vision or mobility disabilities. As another example, a contractor may state that a candidate for a commercial driving position must have ‘no history of seizures’ as a condition of employment. Although it may be necessary and business-related to require that a candidate for a position involving driving currently have no uncontrolled seizures, the requirement is overly broad on its face, because there are many people with a history of epilepsy or seizures who do not currently have seizures, and who can, therefore, drive despite their history. Additionally, it would be improper to require that a non-interstate driver (such as a mechanic or delivery driver) have no established medical history or clinical diagnosis of epilepsy, unless the position in issue actually requires, as an essential function, driving a commercial motor vehicle in interstate commerce. Only such commercial interstate driving duties are subject to the Department of Transportation’s medical certification standards (see 49 CFR 391.41(b)(8)), which impose this requirement. A contractor’s adoption of such a requirement with regard to other types of driving duties (or where driving in interstate commerce is not an essential job function) would tend to improperly screen out individuals with epilepsy. Similarly, a requirement that a candidate for a position involving driving (whether or not involving commercial motor vehicles, intrastate or interstate) not have insulin-treated diabetes would be impermissible, as the large majority of such persons do not pose a direct threat. (Note there is no federal prohibition on driving commercial motor vehicles in interstate commerce by persons with insulin-treated diabetes; rather, DOT rules specify that such individuals be assessed on an individualized basis.)

We suggest that this regulation be revised to provide examples of its application, such as the ones above, so that contractors better understand this obligation. In addition, the regulation should recommend that someone with disability expertise be consulted in determining essential job functions.

5. If OFCCP were to require Federal contractors to conduct utilization analyses and to establish hiring goals for individuals with disabilities, comparable to the analyses and establishment of goals required under the regulations implementing Executive Order 11246, what data should be examined in order to identify the appropriate availability pool of such individuals for employment?

The current Section 503 regulations fail to mandate the specific, measurable analyses and outcomes found in affirmative action programs related to women and minorities. Instead, the existing regulations merely require vague, indefinite efforts by federal contractors. Such requirements merely restate existing antidiscrimination law and fail to require any measurable, concrete efforts by federal contractors. The goals of Section 503 would be better served by mandating quantitative analyses like those required by other affirmative action programs, such as the organizational profiles and job group analyses found in 41 CFR 60-2.11-12.

Regulations pertaining to women and minorities state that employers “*must* establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities.” 41 CFR 60-

2.16(c) [emphasis added]. In contrast, contractors implementing a Section 503 affirmative action plan are instructed to “take positive steps to attract qualified individuals with disabilities.” 41 CFR 60-741.44(f)(6). Such ‘positive steps’ are not set out as concrete requirements, but rather as a series of suggestions which federal contractors ‘*should*’ undertake. *See* 41 CFR 60-741.44(f). The Section 503 regulations should follow the model for race and gender affirmative action and require contractors to set percentage annual goals. OFCCP monitoring and audit systems should be updated to effectively assess the adequacy of contractors’ affirmative action plans and the effectiveness of the contractors’ implementation of the plans.

The American Community Survey (ACS) survey items serve as the best available statistical information for including disabilities covered by Section 503. The ACS data items were developed after extensive research and rigorous testing by the government agencies responsible for their development to ensure inclusivity, reliability, and higher response rates. The ACS data is the most current and discrete statistical information available for conducting quantitative labor analyses, particularly for determining whether people with disabilities are being underutilized by federal contractors and establishing placement goals at local geographic areas. The ACS data enable measurement of the availability of people with disabilities by labor market status, occupation, education, age, and geographic location.

The new ACS disability measures can be incorporated into the process to replace the Census 2000 Special EEO file with multi-year aggregation of ACS estimates for race and gender categories. Employers then could develop their AAP for the employment of people with disabilities within the same framework that they currently use for race and gender.

ACS data on veterans and disability should, therefore, be used to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. The ACS data should also be used to determine if people with disabilities are not employed at a rate to be expected given their availability in the relevant labor pools (i.e., the percentage of people with disabilities is less than would reasonably be expected given their availability percentage in a particular job group). ACS data can be used by contractors to establish a placement goal for applying good faith efforts to measure progress toward achieving equal employment opportunity. With the ACS data on disability, it is now possible to amend the Section 503 regulations to provide “parity” and “resemblance” to the Executive Order 11246 regulations in terms of undertaking a quantitative analysis and establishing measurable goals.

6. Would the establishment of placement goals for individuals with disabilities measurably increase their employment opportunities in the Federal contractor sector? Explain why or why not.

Establishing goals has been shown to expand employment opportunities for people with disabilities. In California, for example, measurable increases have been documented through a program aimed at achieving a state government workforce that reflects the working age population with disabilities. Under a 1978 statute, state agencies must “ensure individuals with a disability, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population.”²¹ In 2009, people with disabilities were 9.3% of the state government workforce.²² That percentage has increased steadily over an economically difficult decade (from 7.4% in 2000).

²¹ California Government Code Section 19232.

²² Annual Census of Employees in the State Civil Service 2008-2009, California State Personnel Board, February, 2010 <http://www.spb.ca.gov/WorkArea/showcontent.aspx?id=5634>.

The measurable progress achieved in California results from the focus on clear goals and ongoing attention of the state's Personnel Services Board and executive agencies. The Board analyzes data on public/private employment of people with disabilities, identifies recruitment and retention strategies, and establishes standards to guide state agencies' efforts.²³ The agencies submit annual affirmative action plans to the Board with concrete targets and timetables for employment of persons with disabilities.²⁴ Plans identify any categories of persons with disabilities excluded from positions on "non-job-related basis" and specify the actions needed to "correct that underrepresentation."²⁵ Agencies submit Corrective Action Plans if the proportion of their workforce comprised of people with known disabilities falls below 80% of the proportion of the state's working age population with disabilities. The Board monitors the workforce composition, as well as upward mobility of people with disabilities, and reports outcomes annually to the state legislature and Governor.²⁶

7. What experience have Federal contractors had with respect to disability employment goals programs voluntarily undertaken or required by state, local or foreign governments?

One example of a company that has successfully implemented a voluntary disability affirmative action program is Walgreens. In 2002, Walgreens senior vice president of supply chain and logistics wanted to create a way to provide job opportunities for individuals with disabilities. In 2007, Walgreens opened a distribution center with new systems, machines and processes, as well as universal design in Anderson, South Carolina. Simultaneously, Walgreens worked with local agencies to train and attract applicants with disabilities for employment at the facility.

Since 2007 the Walgreens Supply Chain division incorporated the lessons learned in Anderson and rolled out a plan for filling 10 percent (1000) of all production jobs at its distribution centers with employees with disabilities by the end of the fiscal year 2010. Their fiscal year ended August 31, 2010 and they were successful at filling 8 percent (800) of all production jobs.²⁷

8. What specific employment practices have been verifiably effective in recruiting, hiring, advancing, and retaining individuals with disabilities?

Provisions in the Section 503 regulations relating to reasonable accommodation should be amended to include reference to the following exemplary practices:

The contractor shall adopt meaningful and effective methods of administration regarding making reasonable accommodations, including those listed below:

- Establish an administrative mechanism, such as centralizing funding of reasonable accommodations, to minimize the cost of an accommodation being assigned to a line manager's budget.
- Establish an administrative mechanism, such as a centralized source of expertise, for assessing, evaluating, and making reasonable accommodation (including assistive technology). The purpose of this is to ensure the effectiveness and efficiency of the reasonable accommodations process.
- Create an online system for tracking accommodations, including assistive technology accommodations, in order to document successful accommodations.
- Assign a full time Director of Section 503, VEVRAA, and ADA services.

²³ California Government Code Section 19233.

²⁴ California Government Code Section 19232.

²⁵ California Government Code Section 19234.

²⁶ California Government Code Section 19237.

²⁷ See http://www.walgreens.com/topic/sr/disability_inclusion_home.jsp for more information.

- Allow line managers to authorize reasonable accommodations, but require a team to review of denials; and require that all denials be signed by upper level management.
- Establish a universal policy providing workplace flexibility and accommodations for all applicants and employees, with and without disabilities, who can document the need for such flexibility and accommodations.

9. *To what extent does workplace flexibility, including flexibility in work schedules, as well as job-protected leave, impact recruitment and retention of individuals with disabilities?*

10. *Has training of employees and/or managers been effective in increasing advancement and/or retention of individuals with disabilities? If so, how?*

Literature discussing the effectiveness of training of employees and/or managers regarding the increase of advancement and/or retention of individuals with disabilities is minimal. However, training of supervisors has been found to be essential to diversity and accommodations efforts.²⁸ Supervisor training on disability management practices was also found to contribute to reducing workers' compensation claims and returning employees to work.²⁹ This research indicates that training of supervisors would also increase the advancement and retention rate of individuals with disabilities.

Anecdotal data and training evaluations from the ADA National Network (also known as the Disability and Business Technical Assistance Centers) indicates that employers want additional training for supervisors, Human Resource managers, and staff about the obligations under the various disability-related laws as well as on disability issues such as recruitment, retention, and reasonable accommodation for employees with disabilities.

However, neither the regulations, nor the appendices accompanying the regulations, include specific examples of how a contractor is expected to implement the training requirement. Provisions in the Section 503 regulations relating to training practices should be amended to specify that the contractor shall adopt appropriate practices related to training, including the following:

- Mandatory training on disability-related issues to all supervisors, including affirmative action policies, nondiscrimination, and targeted programs for hiring, retaining, and advancing people with disabilities and qualified veterans with disabilities.
- Mandatory training on disability-related issues to all employees, including overcoming discriminatory treatment of and stereotypes about people with disabilities, detailed instructions on reasonable accommodation procedures, and nondiscrimination policies and procedures.
- Recognition and awards programs recognizing individuals responsible for achieving progress and positive outcomes.
- Review of selection criteria and selection procedures with responsible managers to ensure that they are familiar with the contractor's nondiscrimination and affirmative action policies.

²⁸ Stensrud, R., Developing relationships with employers means considering the competitive business environment and the risks it produces. *Rehabilitation Counseling Bulletin*, 50(4), 226-237 (2007).

²⁹ Shaw, W.S., Robertson, M.M., McLellan, R.K., Verma, S., & Pransky, G. A Controlled case study of supervisor training to optimize response to injury in the food processing industry. *Work*, 26, 107-114 (2006).

- Employee networks (also known as affinity groups or employee resource groups) to inform managers and supervisors regarding training needs. Employee networks have been noted to provide the ability to recruit and retain employees because of the collaborative atmosphere.³⁰

11. Federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer. The collection of this information allows contractors to monitor the impact of their employment practices by race and gender and to assess progress in meeting their affirmative action goals. Existing Section 503 regulations require contractors to invite applicants to voluntarily and confidentially self-identify as a person with a disability after making an offer of employment but before the applicant begins employment. (See 41 CFR 60-741.42(a).) Would 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 enhance a federal contractor's ability to more effectively monitor their hiring practices with respect to applicants with disabilities? Note that a Section 503 regulation requiring contractors to invite voluntary and confidential self-identification as an applicant with a disability pre-offer for affirmative action purposes would not violate the Americans with Disabilities Act. 29 CFR 1630.15(e); Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC Notice Number 915.002, October 10, 1995).

The Section 503 regulations should be revised to require contractors to invite self-identification at both the pre-offer and post-offer stages for affirmative action purposes. Because many disabilities are hidden, without self-identification employers will not be able to assess the success of their affirmative action programs and make needed improvements, or identify departments or supervisors who are discriminating. Assessments of compliance or progress should not be based on employers' assumptions about their employees' disabilities, their visible disabilities, or requests for accommodations. Moreover, self-identification should be invited periodically during employment, in order to facilitate assessment of retention and advancement, as well as to account for the employment experiences of people who develop disabilities after they are hired.

The invitation should permit the applicant to voluntarily choose whether the self-identification shall be used solely for data collection and/or may be used for affirmative action in hiring and should specify who will have access to the information and the purposes for which the information will be used (e.g., data collection and/or hiring preferences). Although there are good reasons to treat pre-offer invitations differently than post-offer invitations, primarily centered on the ADA's protection of individuals from pre-employment inquiries about disability, on balance we think that it is useful to require that an invitation be made both pre- and post-offer, so long as legal and practical safeguards are in place. The safeguards that should be mandated include:

- a requirement that the contractor provide to the individual a clear statement of the voluntary nature of the self-identification and description of the contractor's affirmative action program for people with disabilities;
- a copy of the affirmative action plan;
- choice by the individual between keeping the information anonymous and for data collection only or for disclosure as a preferential factor to supervisors and others in the selection process; and
- that the details of the disability will not be disclosed other than the assertion of the presence of a covered disability.

³⁰ Arnold, J.T., Employee networks. *HR Magazine*, 51(6), 145-150 (2006, June).

It is important that the self-identification process minimize the burden of disclosure on the part of the applicant to ensure that any stigma or misunderstanding related to a disability plays no role in the hiring process. It is also important that the reasonable accommodation process be separated from the hiring process, in order to ensure that concerns about accommodation costs or difficulty will not affect the determination of whether the applicant with a disability is qualified for the position. However, once an offer of employment is made, applicants with disabilities identified during the affirmative action process should be made aware of the process for requesting accommodations. Information received about disability during the affirmative action process must be maintained confidentially in accordance with the ADA (i.e., maintained on separate forms and in separate medical files and treated as a confidential medical record).

12. How can linkage agreements between Federal contractors and organizations that focus on the employment of individuals with disabilities be strengthened to increase effectiveness? Do linkage agreements have better outcomes when higher level company officials are responsible for their implementation/execution? Include examples of cooperative agreements between employers and disability or community recruitment organizations that have been helpful in hiring persons with disabilities.

The current regulations provide suggestions for outreach and positive recruitment (§60-741.44 (f) (1), (2), and (3)), including

- Enlisting assistance of community recruiting resources (including state employment security agencies, State vocational rehabilitation agencies or facilities, sheltered workshops, college placement officers, State education agencies, labor organizations and organizations of or for individuals with disabilities);
- Recruiting efforts in schools that incorporate special efforts to reach students with disabilities; and
- Meaningful contacts with appropriate social service agencies, organizations of and for individuals with disabilities, and vocational rehabilitation agencies or facilities, for such purposes as advice, technical assistance and referral of potential employees.

These activities are widely available and should be required activities.

In addition, we suggest that OFCCP refer to the Office of Disability Employment Policy's [Affirmative Action for People with Disabilities and Disabled Veterans Volume II Modernizing the Affirmative Action Provisions of The Section 503 and VEVRAA Regulations](#) prepared by Economic Systems, Inc. for additional exemplary recruitment, outreach and linkage practices which should be recommended. The following linkage suggestions from the report are especially worthwhile:

- Use of online application and recruitment websites and social networking sites to create places where jobseekers with disabilities can learn about the company, hiring initiatives – of course employers must ensure that such online recruitment and application sites, whether their own or those of external employment aggregators, are fully accessible.
- Involvement in employer networking groups that recognize and promote best practices in hiring, retention, and promoting jobseekers with disabilities. The US Business Leadership Network is an example of one such network.
- Development of a pipeline of qualified applicants with disabilities by utilizing accessible web-based “job boards” that specialize in identifying qualified individuals with disabilities
- Designation of a coordinator for outreach and employment programs responsible for targeted outreach programs, including websites, schools and employment assistance programs serving people with disabilities and disabled veterans.

13. *What impact would result from requiring that Federal contractors and subcontractors make information and communication technology used by job applicants in the job application process, and by employees in connection with their employment fully accessible and usable by individuals with disabilities? What are the specific costs and/or benefits that might result from this requirement?*

Online approaches to recruitment, screening, and hiring are increasingly the norm.³¹ According to one 2008 report, “last summer, some fifty-two million Americans looked online for information about jobs. On average, there are more than four-million searches online for jobs on any given day.”³² Every Fortune 500 company now uses online recruitment.³³ Employers use their own e-recruitment websites, the sites of online employment aggregators, such as Monster.com and Yahoo! Hot Jobs, or a combination of both. Ninety-six percent of job seekers use online resources in their job searches.³⁴ A 2008 survey by the Society for Human Resource Management found that that job postings on a company web site, and national online job boards were two of the top three methods for employee recruiting (the third method was employee referrals).³⁵

Yet many people with disabilities, including people with vision disabilities, are unable to independently use these online application and job-seeking tools because they are not designed and maintained to be accessible. A study of 31 corporate e-recruiting web sites in 2002 found that accessibility of these sites was lacking.³⁶ A recent study found that nearly all employment aggregator web sites had accessibility barriers for blind individuals.³⁷ A 2005 study showed that fewer than half of federal agencies and contractors’ web sites were accessible.³⁸

The inaccessibility of online application processes, online training, and online employee information (e.g., employment policies, benefits selection systems) poses significant barriers to recruitment, retention, and advancement of qualified persons with disabilities. Common problems encountered by people with disabilities include

- websites that cannot be navigated via the keyboard;
- forms or frames that do not have meaningful labels (for instance, “form1” isn’t a meaningful label);
- pages that fail to use relative sizing and positioning;
- pictures without captioning or webcasts without subtitles;
- long pages of text that are difficult to scan;
- an inconsistent layout;
- insufficient contrast; and

³¹ See, e.g., Younger, J., “Online Job Recruitment: Trends, Benefits, Outcomes, and Implications,” Accolo (2008); “The Potential of Online Job Boards,” <http://www.imediaconnection.com/content/2013.imc> (2003).

³² See, e.g., Younger, J., “Online Job Recruitment: Trends, Benefits, Outcomes, and Implications,” Accolo (2008) (referring to Pew Research report).

³³ Younger, at 2.

³⁴ Id.; “Online Applications for Hourly Jobs Skyrocket: Internet Deemed Preferred Application Method Among Hourly Job-Seekers,” Business Wire. New York: Jun 27, 2006. p. 1, at http://findarticles.com/p/articles/mi_m0EIN/is_2006_June_27/ai_n26908905/?tag=content;col1.

³⁵ Society for Human Resource Management, “Online Technologies and Their Impact on Recruitment Strategies: Using Social Networking Websites to Attract Talent,” (2008).

³⁶ Bruyere, S., Erickson, W., & VanLooy, S., “Information technology and the workplace: Implications for persons with disabilities,” *Disability Studies Quarterly*, 25(2), 1-15 (2005).

³⁷ Lazar, J., Biggers, D., Delair, J., Donnelly, M., Eludoyin, K., Henin, A., et al., “Societal Inclusion: Evaluating the Accessibility of Job Placement and Travel Web sites,” *Proceedings of the Paper under review* (2010).

³⁸ Loiacono, E., McCoy, S., Chin, W., *Federal web site accessibility for people with disabilities*, *IT Pro*, Jan-Feb, 27-31. Retrieved Sept 2, 2010 from <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=01407801> (2005).

- lack of text equivalents for images;
- use of color as a differentiator, which assistive technology is not able to process;
- timeout features that limit the response time for completion, which causes difficulties for those who require extra time to input data;
- patterned backgrounds;
- inconsistent design and navigation;
- inability to adjust font size;
- links that do not indicate clearly their target/ where they lead (such as the ubiquitous “click here”); and
- animated content that cannot be turned off.³⁹

Supplementary documents posted on websites, such as expanded job descriptions, are often only provided in inaccessible Portable Document Format (PDF), even though it is possible to make PDFs accessible.⁴⁰ Lack of a site map or list of contents, a search function and a skip navigation feature also greatly decrease usability.⁴¹

Although some employers may offer alternative means for people with disabilities to apply, such alternative means require applicants to take additional steps (such as calling during business hours), reveal personal information to third parties (e.g., to have a staff member complete a form), and face competitive disadvantages (such as when qualification tests are inaccessible).⁴² Moreover, such accommodations may require applicants to reveal their disabilities to the prospective employer, even though disability-related inquiries are generally prohibited under the ADA and other disability rights laws at the pre-employment stage. Similarly, requiring employees to seek special accommodations in order to use their employers’ information and communication technology or online training, creates a barrier to advancement and inclusion of employees with disabilities.

Most federal contractors are required by Section 504 and/or the ADA to make their recruitment, employee information and training materials accessible by providing auxiliary aids and services needed to ensure effective communication or reasonable accommodation. In addition, their information and communication technology (ICT), including websites, email, etc., is required to comply with Section 508 of the Rehabilitation Act, which provides specific compliance standards, to the extent the federal contract requires the use of such ICT in the performance of specifications or deliverables under the contract.

We believe extending Section 508 standards to the employment-related websites, ICT, and online trainings of federal contractors makes sense, would increase the accessibility of e-recruitment, communication and online training opportunities, and, thus, increase employment opportunities for people with disabilities. Section 508 provides clear technical standards of accessibility, which are commonly understood by web developers and which have been available and in force for years. Although Section 508 is the legal standard for federal government technology, it has been widely adopted by private entities

³⁹ Klein, D., Myhill, W., Hansen, L., Asby, G., Michaelson, S. & Blanck, P., “Electronic doors to education: Study of high school web accessibility in Iowa,” *Behavioral Sciences and the Law*, 21(1), 27-49 (2003); Web Accessibility Initiative. *Evaluating websites for accessibility: Preliminary review of websites for accessibility*. Retrieved Sept 2, 2010, from <http://www.w3.org/WAI/eval/Overview.html>.

⁴⁰ Hudson, R., *Web usability - PDF and accessibility* (2004), retrieved Sept 2, 2010 from: <http://www.usability.com.au/resources/pdf.cfm>.

⁴¹ Klein et al., 2003.

⁴² Lazar, J., Biggers, D., Delair, J., Donnelly, M., Eludoyin, K., Henin, A., et al., “Societal Inclusion: Evaluating the Accessibility of Job Placement and Travel Web sites,” Proceedings of the Paper under review (2010).

and state laws.⁴³ Compliance with the Section 508 requirements also satisfies the requirements of Section 504 and the ADA. Compliance with the Section 508 standards can be effectively evaluated through a combination of automated and user testing. Consistent compliance of employer websites, online training, and employment aggregators would facilitate applications by individuals with disabilities, reduce the need for them to reveal their disabilities at the pre-offer stage, and, thus, reduce the risk of discrimination. Requiring accessibility of employment-related systems, such as benefits, payroll, and training would facilitate retention, inclusion and advancement of employees with disabilities.

A common misconception is that creating accessible web pages is expensive and time-consuming. In fact, the primary barriers to accessible ICT are lack of training and lack of prioritization of the issue. If accessibility features are built in and maintained, the costs are negligible. Even for existing websites with accessibility barriers, many of the obstacles that people with disabilities encounter can be fixed through simple adjustments. Given that federal contractors are already required, by Section 508, by Section 504, and/or by the ADA, to make online recruitment, training, and other information accessible to their employees, and often accomplish accessibility through less effective and much more staff-intensive and expensive means (such as staffing telephone lines or printing materials in Braille), compliance with Section 508 would not increase their costs, and may actually reduce their costs. Requiring compliance with the Section 508 standards would also have the benefit of automatically incorporating updates to the Section 508 standards as amendments are made (the Access Board is currently considering amendments to the Section 508 standards), thus avoiding potential inconsistency among standards under the different laws. In addition, to the extent a contractor does need to incur substantial costs in order to make its ICT accessible, the Section 508 exception for cases of undue burden is available.

Therefore, we recommend that the Section 503 regulations be updated to require compliance with the Section 508 standards for all ICT used to communicate with applicants, potential applicants, and employees, including websites, intranets, online recruitment tools (of the employer and of employment aggregators used by contract), online benefits systems, e-mail, and online training tools. To implement this requirement, federal contractors should be required to adopt policies and procedures to

- Ensure that ICT procured, leased, developed or used by the contractor is accessible, including policies for automated and user testing;
- Periodically assess and repair accessibility problems with existing ICT;
- Incorporate accessibility in training of web developers, training developers, and others involved in design, development and maintenance of ICT and online training;
- Incorporate accessibility requirements in contracts for procurement, lease, development or maintenance of ICT;
- Incorporate accessibility requirements in contracts for use of employment aggregator sites, online job boards and similar tools;
- Incorporate accessibility into the infrastructure of ICT development and maintenance, including, for example, establishing mechanisms for applicants and employees to provide feedback on accessibility, designating staff or teams responsible for checking accessibility and providing expertise on accessibility and assistive technology, and providing for regular reporting on accessibility to leadership.

⁴³ Lazar, J., Beavan, P., Brown, J., Coffey, D., Nolf, B., Poole, R., et al., "Investigating the Accessibility of State Government Web Sites in Maryland," in P. Langdon, P. Clarkson & P. Robinson (Eds.), *Designing Inclusive Interactions--Proceedings of the 2010 Cambridge Workshop on Universal Access and Assistive Technology* (London: Springer-Verlag 2010), 69-78.

14. What other specific changes to the Section 503 regulations might improve the recruitment, hiring, retention, and advancement of individuals with disabilities by Federal contractors?

The regulations need to clearly state the purpose of affirmative action programs so that contractors understand that they have an obligation to not discriminate *and* to actively recruit, hire, train and fairly pay people with disabilities. The purpose section of the regulation should mirror the language found in §60-2.10 concerning women and minorities. The regulations need to specify what must be included in affirmative action plans, including measurable goals based on relevant population data, timetables, action steps and continuous monitoring and documentation. The regulations should include examples of exemplary practices for all ten of the components of affirmative action programs. An additional eleventh component should be added concerning accessible communication and information technology (see Question 13). In addition, affirmative action plans should require that periodic reviews of managers and supervisors measure their performance with respect to the recruitment, hiring, advancement, and retention of persons with disabilities.

§60-741.4 Coverage and waivers. Part (b) of this section discusses waivers that the Deputy Assistant Secretary may make “where such waiver will substantially contribute to convenience in administration of the act.” This language should be omitted. The regulations should enumerate with specificity the conditions under which waivers might be appropriate in the national interest or when acting on individual requests when a class of contracts is concerned would be impractical. There should be no exceptions to the nondiscrimination and affirmative action requirements of Section 503 because of administrative convenience.

§60-741.44(b) Review of Personnel Processes. The provisions in the Section 503 regulations relating to personnel practices should be amended to include reference to the following exemplary practices:

- Preference policies under which disability is taken into consideration as a selection factor.
- Indication in job announcements that the contractor is seeking to recruit or hire qualified individuals with disabilities. The announcement may state that the employer is specifically recruiting qualified applicants with disabilities or indicating that it will prefer qualified applicants with disabilities for jobs.
- A “mandatory” interview policy for anyone with a disability who meets the minimum qualification for a job.
- Consideration of applicants with known disabilities for all available positions for which they may be qualified when the position applied for is unavailable.
- Internal targeted recruitment initiatives to fill jobs. Employment records are reviewed to determine the availability of promotable and transferable qualified individuals with disabilities and qualified disabled veterans presently employed and determine whether their present and potential skills are being fully utilized or developed.
- Development of training opportunities, including apprenticeship, mentorship and leadership development programs, on-the-job training, and tuition reimbursement for existing employees.
- Individualized training and development plans for employees with disabilities to enhance advancement and retention, consistent with their consent; and
- Customized employment as a personnel policy (i.e., the process for individualizing the employment relationship between a job seeker and/or employee and an employer in ways that meet the needs of both). This will be based on individualized negotiation (including negotiations of the essential responsibilities and requirements of the job and job carving) that addresses the

strengths, conditions, and interests of the job seeker and/or employee and the identified business needs of the employer).

In addition, the following recordkeeping provisions regarding the personnel process should be required, rather than merely permitted:

- The application or personnel form of each known applicant with a disability shall be annotated to identify each vacancy for which the applicant was considered, and the form shall be quickly retrievable for review by the DOL and the contractor's personnel officials for use in investigations and internal compliance activities.
- The personnel or application records of each known individual with a disability shall include the identification of each promotion for which that employee was considered and the identification of each training program for which that individual with a disability was considered.
- In every case where an employee or applicant who has a disability is rejected for employment, promotion, or training, the contractor shall prepare a statement of the reason, as well as a description of the accommodations considered. The statement of the reason for rejection (if the reason is medically related), and the description of the accommodation considered, shall be treated as confidential medical records in accordance with 60-741.23(d). These materials shall be available to the applicant or employee concerned upon request.
- Where applicants or employees are selected for hire, promotion, or training, and the contractor undertakes any accommodation that makes it possible for him or her to place an individual with a disability on the job, the contractor shall make a record containing a description of the accommodation. The record shall be treated as a confidential medical record in accordance with 60-741.23(d).

§60-741.44(f) External dissemination of policy, outreach and positive recruitment. The current regulation only requires that contractors "undertake appropriate outreach and positive recruitment activities...that are reasonably designed to effectively recruit qualified individuals with disabilities". This section contains no concrete requirements, but merely sets out a series of suggestions that contractors should undertake while noting that "[i]t is not contemplated that the contractor will necessarily undertake all the activities listed." The techniques in sections §60-741.44(f)(1), (2), and (3) are readily available and should be included as specific requirements of a disability affirmative action plan. The components relating to external dissemination of policy should be amended to require:

- Written notification of company policy to all subcontractors, vendors, and suppliers requesting appropriate action on their part.
- Posting of affirmative action policies, reasonable accommodation policies, special recruitment and hiring initiatives, and targeted internship, mentoring and shadowing programs on any internal and external websites.

§60-741.44(g) Internal Dissemination and Disability Management. We further recommend that reference be made to the following additional practices:

- Disability employee resource groups that are aligned with the company's diversity program, composed of existing employees with disabilities and employees with family members or friends with disabilities. The purpose of such groups is to help identify policies and procedures that can create a positive work environment for people with disabilities and disabled veterans.
- Mechanisms for tracking accommodations provided on an ad hoc, case-by-case basis, and then, based on the data, adopting company-wide practices that reduce or eliminate the need for individual accommodations.

- Policies that all managers and supervisors share responsibility for the successful implementation of the affirmative action program and that evaluations will include an assessment of how a manager contributes to the contractor's affirmative action program.
- As part of existing employee assistance programs, adoption of disability management and prevention programs, with the goal that workers who become injured on the job remain part of the workforce

§60-741.44(e) Harassment. This section should be strengthened by including examples of actions that could constitute harassment (for example, verbal abuse, graphic and written statements, conduct that is physically threatening, harmful, or humiliating) and examples of contractors' responsibilities (prompt response to harassment, for example).

§60-741.44(h) Audit and Reporting System. The current regulations require that contractors implement auditing and reporting systems to measure the effectiveness of affirmative action programs and identify the need for any remedial action, determine the degree to which objectives have been achieved, id., and bring into compliance those programs found to be deficient, CFR 60-741.44(h). However, contractors are not currently required to determine or disseminate 'best practices' for affirmative action program effectiveness. Requiring the determination and communication of best practices would further the purposes and enhance the efficiency of the Section 503 affirmative action program. OFCCP, the Employment and Training Administration, and the Office of Disability Employment Policy should work together to identify best practices in employment of people with disabilities and to develop and disseminate training and technical assistance materials on best practices for federal contractors.

In addition, the regulations should recommend:

- Self-assessments aimed at promoting compliance, quality, and timeliness in all facets of the company's affirmative action program, including assisting in identifying trends and/or issues for making informed decisions on issues needing more attention and corrective action.
- Data collection system that allow contractors to track applicant flow data for each selection made by the company identified. This system will be capable of tracking, among other things, disability and the disposition of each application, to monitor trends through review of personnel transactions and other historical data. It will also be capable of tracking recruitment efforts to permit data analysis of these efforts.
- Regular reporting regarding implementation of actions identified in the company's affirmative action program, including completion dates, responsible parties, and accountability.
- Input from employees with disabilities using employee surveys and focus groups and employee diversity and advisory groups regarding the workplace environment.

Including Disability Status on the EEO-1 Survey. The Employer Information Report EEO-1 survey (EEO-1) currently requires that employers provide the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) with employment statistics based on protected classes including gender, race, and ethnicity. The survey has ostensibly been put in place to implement the recordkeeping requirements of Title VII, see 42 U.S.C. § 2000e-8(c), which are required as they are "relevant to the determinations of whether unlawful employment practices have been or are being committed." Id. The EEO-1 survey should be expanded to include the reporting of records relevant to disabled employees. This is necessary to assure that contractors can effectively set goals for hiring and promoting workers with disabilities and measure their attainment of these goals. Such a reporting requirement coincides with the survey's current purpose and goals and the EEOC has already reserved the

right to impose such requirements on employers in order “to accomplish the purposes of Title VII or the ADA.” 29 CFR 1602.11.

Update or Eliminate the Sample Materials on the OFCCP Website to Reflect a Renewed Focus on Removing Barriers to Employment. The OFCCP currently offers a sample Affirmative Action Plan on its website. Although this sample plan covers all the requirements currently set forth in the Section 503 regulations, it illustrates many of the system’s current weaknesses addressed in the above comments. The hypothetical contractor in the sample plan states that it “reviews annually its personnel processes to determine whether its present procedures assure careful, thorough and systematic consideration of the qualifications of known individuals with disabilities”, and plans to “modify the personnel processes when necessary.” However, the contractor provides no benchmarks or solid goals to work towards. Likewise, the contractor states that it “will continue to review physical and mental job qualification requirements ... and will conduct a qualifications review whenever job duties change, but it does not clarify what kind of positive steps it has taken in the past or will take in the future to this end. Rather, it seems to merely acknowledge a duty and desire to comply with Section 503. A more aggressive, comprehensive and explicit sample plan could help establish the kinds of goals and benchmarks that Section 503 seeks to foster. However, in order to ensure that a contractor’s affirmative action plan is not a paper exercise, on balance we advise OFCCP to consider abandoning the sample affirmative action plan approach in favor of another mechanism, such as technical assistance, to ensure that contractors actually engage in the evaluation, assessment and implementation of affirmative action plans that are directly focused on affirmative action for people with disabilities in their own workplace. It is stunning to see that the sample plan currently provided by OFCCP is mirrored almost word for word in the plans of multiple contractors, lending credence to the concern that in fact, employers are not engaging in assessments that are relevant and focused on their industry and practice, but are simply cutting and pasting from the OFCCP website to create an affirmative action plan. We would suggest that OFCCP considering providing technical assistance materials to contractors to assist them in developing their own affirmative action plan rather than promoting the use of the sample plan. Coordination with entities, such as the national network of Disability and Business Technical Assistance/ADA Centers, funded by the Department of Education, could facilitate nationwide dissemination of materials and technical assistance.

Strengthen Enforcement of 503. Under current regulations, enforcement of affirmative action obligations is done through an individual complaint process. When a complaint is filed with OFCCP, the contractor is notified and OFCCP investigates the complaint. If the allegations are proven, OFCCP negotiates what is called “make whole relief.” If no action is taken, other administrative action ensues. This is an inefficient method of enforcement unlikely to affect changes in the hiring practices of most federal contractors. By contrast, the OFCCP’s authority to press for hiring corrections is stronger under the affirmative action program governed by Executive Order 11246. When conducting its compliance reviews, OFCCP should weight its evaluations to reward exemplary 503 and VEVRAA affirmative action plans. In addition, corrective actions for 503 and VEVRAA should align more closely to those applied under Executive Order 11246 enforcement. Finally, if OFCCP monitoring uncovers a pattern and practice of 503 and VEVRAA violations on the part of a federal contractor or subcontractor, steps should be taken to suspend those companies from future contracting opportunities until changes have been made in their hiring, promotion and retention policies governing veterans and people with disabilities.

15. Regulatory Flexibility Act--Consistent with the Regulatory Flexibility Act, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations and small governmental jurisdictions with populations under 50,000. In response to this

ANPRM, the Department encourages small entities to provide data on how additional requirements under Section 503 may impact them.

With respect to proposed planning and reporting requirements, such requirements are long-established and well-understood in connection with affirmative action requirements applicable to other covered populations, including minorities and women. None of the requirements impose novel or excessive burdens on bidders, contractors or subcontractors. Extension of these or comparable requirements to an additional target population (namely, individuals with disabilities), would result in little or no increase in administrative burden.

More importantly, affirmative action efforts cannot be effectively assessed in the absence of some established goals and reporting requirements. Thus, unless the goals of affirmative action, as embodied in the Section 503 statutory mandate, are to be ignored, no viable alternative to a reasonable goal-setting and reporting regime exists. It should also be noted that, though the activities here contemplated are similar in form to those already familiar to, and required of, most contractors, the specific information to be collected is not duplicative of data collected for any other purpose or available from any other source.

16. OFCCP seeks public comment on the types of small entities and any estimates of the numbers of small entities that may be impacted by this rule.

N/A

17. OFCCP seeks public comment on the potential costs of additional 503 requirements on small entities.

Compliance with Section 503 does not create substantial costs for small businesses, and, in fact, can create substantial financial benefits. Section 503 federal contractors are already required to provide reasonable accommodations to qualified workers with disabilities if necessary to perform essential functions. The proposed additional requirements would involve targeted outreach, data tracking, and recordkeeping, none of which adds substantial costs, particularly because those actions are already required of federal contractors for racial minorities and women under Executive Order 11246.

18. OFCCP seeks public comment on any possible alternatives to the proposed measures that would allow the agency to achieve their regulatory objectives while minimizing any adverse impact to small businesses.

As noted above, improvements to Section 503 will impose minimal, if any, additional compliance costs on small businesses. These businesses are already required to have similar programs for women and minorities, so adding data collection and reporting for people with disabilities will not be a substantial change. Moreover, many federal contractors are already covered by the nondiscrimination, reasonable accommodation and accessibility requirements of Section 503, Section 504, the ADA, and other federal and state disability laws. To the extent small businesses face costs in making their technology accessible, they will have access to the Section 508 undue burden exception. Importantly, as the continuing low employment rates for people with disabilities demonstrate, without clear measurable requirements for affirmative action, Section 503 is unable to achieve its purpose. Therefore, we do not believe there are alternatives available that will both achieve the purposes of Section 503 and eliminate the minimal risk of burdens on small businesses.

Thank you again for your consideration of improvements to the Section 503 regulations and for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Tamar Heller".

Tamar Heller, PhD
President