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VIA ELECTRONIC SUBMISSION:  http://www.regulations.gov

Barbara J. Bingham
Acting Director
Division of Policy, Planning & Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W., Room N4322
Washington, D.C. 20210


Dear Ms. Bingham

The Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) appreciate this opportunity to comment on the efforts of the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) to strengthen the affirmative action obligations of the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (Rehabilitation Act), as announced in the Federal Register on July 23, 2010. These comments were prepared on behalf of SHRM and CUPA-HR by Jackson Lewis LLP.¹

STATEMENT OF INTEREST

SHRM is the world’s largest association devoted to human resource management.

¹ For more than 50 years, Jackson Lewis has placed a high premium on preventive strategies and positive solutions in the practice of workplace law. With over 650 employment law practitioners in 46 offices nationwide, the firm partners with employers to devise policies and procedures promoting constructive employee relations and limiting disputes. Jackson Lewis has a robust affirmative action compliance practice. The Firm prepares more than 1700 affirmative action plans every year and regularly represents Federal contractors during OFCCP compliance audits.
Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including 90 percent of all U.S. doctoral institutions, 70 percent of all master’s institutions, more than half of all bachelor’s institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

Many of SHRM’s and CUPA-HR’s members are Federal contractors subject to the Rehabilitation Act and the current regulations at 41 CFR Part 60-741.

**COMMENTS ON THE ADVANCED NOTICE OF PROPOSED RULEMAKING**

SHRM and CUPA-HR strongly support nondiscrimination on the basis of disability and believe that employment decisions should be based on an individual’s qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. As organizations, we regularly seek to promote best practices for advancing equal employment opportunity for all, including individuals with disabilities. For example, in 2006, SHRM signed an Alliance Agreement with the Department’s Office of Disability Employment Policy (ODEP) in order to further advance employment opportunities for individuals with disabilities. As part of that initiative, which was renewed in late 2009, SHRM created a Disability Employment Resource Page on its website, offering its members a wealth of resources, articles and links to help source, recruit, retain and develop people with disabilities. SHRM also provides training to its members on disability law and affirmative action requirements and its member employers regularly engage in outreach efforts to civil rights and disability organizations, both as part of their current affirmative action obligations and as a sound business practice. CUPA-HR also has created significant online resources promoting equal opportunity, including an Americans with Disabilities Act toolkit with resources, articles and links to help HR professionals advance opportunities for individuals with disabilities. CUPA-HR annual, regional and chapter conferences also frequently include sessions related to disability law and affirmative action requirements. With this in mind, we respectfully submit the comments below on the specific questions raised by the OFCCP.

I. An Individualized, Functional Assessment of Disability Status Is Required By Law

For almost 40 years, Congress and the Courts have consistently recognized that the Rehabilitation Act requires an individualized, case-by-case analysis of whether someone is disabled. *Rezza v. U.S. Dep’t of Justice*, No. 87-6732, 1988 WL 48541, at *2 (E.D. Pa. May 16, 1988) (quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)). “It is the impaired individual who must be examined not just the impairment in the abstract.” *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (determining whether a disability is a qualifying handicap under the Rehabilitation Act requires a case-by-case analysis); 29 CFR Part 1630 Appendix (“capabilities of qualified individuals with disabilities must be determined on an individualized,
case by case basis”). As a result, unlike race, gender or other protected classifications, a person’s status as an individual with a disability who is entitled to affirmative action under the Rehabilitation Act and the OFCCP’s implementing regulations cannot be determined without an individualized, legal assessment.

Given that disabilities are individual in nature, gross statistical comparisons based on self-identification of disability status will be of limited value to Federal contractors in measuring the effectiveness of their affirmative action efforts towards individuals with disabilities. For example, diagnostic analyses of the type required under Executive Order 11246 will not help a Federal contractor determine if it is satisfying its obligation to provide reasonable accommodations to individuals entitled to them under the law.

Even defining what “disability data” should be collected and analyzed by Federal contractors under the Rehabilitation Act is highly problematic. The requirement that disability status under the Rehabilitation Act be determined on a case-by-case basis requires an examination in each case of whether an individual’s particular impairment functionally limits any major life activity at a relevant point in time. Presumably, the OFCCP intends that Federal contractors will gather data using the definition of disability under the ADA Amendment Act of 2008, Pub L. 110-325. If so, how will an individual be able to reliably and accurately self-identify as to whether they meet that legal definition of disability? If some other definition is used, how will the self-identification process account for the individualized analysis of disability mandated by the Rehabilitation Act, and how will employers determine whether an individual’s self-identified medical impairment “substantially limits one or more major life activities” or is otherwise a disability as defined by applicable law?

For a variety of reasons, many individuals with impairments may chose not to self-identify as disabled, even if they understand the parameters of the questions being asked. For example, some individuals may not wish to disclose their disability status to their employer because they do not require accommodation. Other individuals may mistakenly believe that they are not disabled, while still others erroneously will believe that they are. In addition, it seems likely that an individual might answer questions about disability for Census purposes in one way, while answering the same or similar questions in an employment-context in a totally different way. Further, there are significant groups that will not want to reveal their condition to their employer for fear of stereotyping and prejudice – regardless of medical privacy rules – such as those with a mental illness or with HIV. The OFCCP must keep these unique challenges in mind when considering whether reliable data about disability status exists or can be collected.

Moreover, unlike race or sex, a person’s disability may be relevant to their ability to perform a particular job. Traditional affirmative action principles under Executive Order 11246 presume that individuals of different races or sexes have, at least statistically, relative equal qualifications for employment. That is not necessarily the case for individuals with disabilities, even those with the identical impairment. For example, two individuals with Autism may have vastly different abilities and limitations, depending on the severity of each individual’s impairment.

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2 This is the Equal Employment Opportunity Commission’s regulation interpreting the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (ADA). However, the Rehabilitation Act incorporates the relevant provisions of the ADA. 29 U.S.C. § 705(20).
A statistical comparison would not account for these differences in qualifications, even though the law permits a Federal contractor to assess whether an individual with a disability is qualified to perform, with or without a reasonable accommodation, the essential functions of the position he holds or desires, when making employment decisions. Likewise, diagnostic analyses of disability status would not take into consideration whether a requested reasonable accommodation posed an undue hardship or whether the individual posed a direct threat to themselves or others.

II. Disability Status Is Not An Immutable Characteristic, But Is Constantly Changing

Any revisions to the affirmative action obligations of Federal contractors also must reflect the fact that disability status, unlike other protected characteristics such as race or sex, is not an immutable characteristic. An individual may be disability-free one day, and disabled the next, or vice versa. Similarly, the impact of an individual’s disability on his or her ability to work can change over time and must be evaluated in the context of the particular work the individual is seeking to perform. Likewise, individuals with identical medical impairments may have very different capabilities, limitations, and need for reasonable accommodation.

For example, an individual with dyslexia may not self-identify as being disabled if, when surveyed, he or she is performing a job that is not impacted by his or her medical impairment. The same individual might identify as being disabled if questioned about his or her disability status when performing a job that was being impacted by his or her dyslexia. Likewise, an individual asked about disability status on the first day of employment may not self-identify as disabled because he or she does not have any medical impairments. Over time, as that person ages, he or she may develop medical impairments that may or may not be substantially limiting. Another employee may accurately self-identify as being disability-free one day, and then become disabled the very next day. What is important to recognize about these examples is that disability status, unlike race and ethnicity, changes over time, and, in some cases, even overnight.

It is critical that the OFCCP keep these very basic and fundamental, differences between disability status and other protected characteristics in mind when revising the regulations applicable to Federal contractors under the Rehabilitation Act. We respectfully submit that, given the myriad of factors that influence whether one may or may not self-identify as disabled to his or her employer at any given time, the collection of “disability data” – no matter how that term is defined – is fraught with unreliability.

Moreover, even if such data initially could be collected by Federal contractors, because disability status is not static, contractors would have to continually resurvey their workforce in order to capture the most reliable data regarding the disability status of their workforce. As OFCCP well knows, resurveying on an annual, or even a regular basis, is not required under Executive Order 11246. Indeed, when the Joint Reporting Committee (comprised of the OFCCP and the Equal Employment Opportunity Commission (EEOC)) revised the EEO-1 Report, which is the government reporting form used to collect race, ethnicity and gender data about an employer’s workforce, the Committee specifically rejected any mandate that employers resurvey their workforce in order to “minimize the burden for employers.” 70 FR 71300 (Nov. 28, 2005). However, because of the changing nature of disability status and in order to ensure some level of
reliability of the data being analyzed, regular resurveying of a Federal contractor’s workforce likely would be necessary if Federal contractors were required to collect, report and analyze data regarding disability status. Regular resurveying of a Federal contractor’s workforce for this purpose raises significant cost and burden issues for Federal contractors. In addition, our members are concerned that employees will find such regular questioning about their disability status by their employer intrusive.

HR professionals and employers take their obligations under the Rehabilitation Act and the ADA very seriously and have invested in training to ensure that they respect an employee’s right not to disclose a disability. Although voluntary self-identification may be allowed for purposes of affirmative action, we recommend that if any proposed regulation includes a requirement to survey applicants about disability status prior to an offer of employment being made, it also include language providing complete assurance that this does not violate any requirements of the Rehabilitation Act, the ADA, or the Equal Employment Opportunity Commission’s implementing regulations and guidance.

Given the sensitive nature of requesting disability information, our members also are concerned about how they will be expected to handle what is likely to be a significant percentage of individuals who decline to self-identify their disability status. Under Executive Order 11246, a Federal contractor is permitted to use visual identification or other employment records in order to identify an individual’s race, ethnicity and gender. See, e.g., OFCCP ADM Notice 283 (August 14, 2008) (noting that “contractors may use post-employment records or visual observation when an individual declines to self-identify his or her race or ethnicity”); OFCCP ADM Notice 265 (April 21, 2004) (“while self-identification is the preferred method, visual observation also can be an acceptable method for identifying the gender, race and ethnicity of applicants, although it may not be reliable in every instance. Visual observation may be used when the applicant appears in person and declines to self-identify his or her gender, race or ethnicity.”). However, it is unlikely that Federal contractors will be able to – or even legally should – follow the same process when an individual declines to provide disability status information. First, many disabilities are hidden and not subject to visual observation. Second, information regarding the medical condition or history of any applicant or employee is cloaked in confidentiality by law. 41 C.F.R. § 60-741.23. Third, there is a significant concern that identifying as disabled an individual who has not self-identified as such may be evidence that the employer has impermissibly “regarded” the individual as disabled. If any regulatory revisions include a self-identification requirement, the OFCCP should not require that Federal contractors identify the disability status of individuals who refuse to self-identify as disabled for purposes of conducting utilization analyses or setting placement goals. OFCCP also must recognize that, without data on the entire workforce, any required utilization analyses would be far less accurate and of limited value.

III. The Department Should Continue To Focus On Dismantling Barriers To Employment For Individuals With Disabilities

We recommend that the OFCCP focus on efforts to encourage Federal contractors to remove barriers to employment for individuals with disabilities. In this regard, we are supportive of a requirement that Federal contractors create written reasonable accommodation policies. Such policies should clearly explain who should be contacted to request a reasonable accommodation,
any forms or other documentation that may need to be provided as part of the process, the time frame for responding to requests for accommodation, any resources available to decisionmakers to assist in exploring potential accommodations, and any process for appealing denials of requests for accommodation or for specific accommodations. We believe that this type of initiative would serve both Federal contractors and individuals with disabilities well, while still being true to the underlying goals of the Rehabilitation Act.

We support regular training of managers and employees regarding the reasonable accommodation process and other disability-related issues. Training is an effective means of dismantling barriers to employment for all individuals, including those with disabilities, because it raises awareness of the issues that may arise, highlights available resources and existing Organization policies and procedures, and provides positive, proactive solutions for managers and employees who may need to address such issues in the future. Our members also have found that flexible work arrangements and policies can be a valuable tool in addressing the work-life balance needs of employees, including those with disabilities. Many of our members have instituted policies and practices that permit employees to telecommute, work flexible hours, reduced or part-time schedules, take extended leaves of absence, or work other similar flexible arrangements. It is our experience that the most effective programs are those that are tailored to the needs of the business. The OFCCP should gather and publish effective practices such as these to further assist employers in breaking down barriers to employment. We believe the sharing of these best practices will go a long way to help employers maximize their hiring efforts for individuals with disabilities.

We also encourage the OFCCP to act as a clearinghouse for information on organizations that work with persons with disabilities who are seeking employment. Employers would welcome a resource that would provide them avenues to locate qualified job-seekers with disabilities. To facilitate these relationships, the OFCCP should consider more regular updates to the Employment Resource Referral Directory listed on its website. Since many Federal contractors rely on sources provided by district offices in the agency, each region also should take proactive steps to regularly update and monitor the referral sources it recommends to Federal contractors.

We believe that the OFCCP can play a critical role in helping Federal contractors identify potential barriers to employment for individuals with disabilities. The agency should consider making public any common barriers to employment for individuals with disabilities that it identifies through its compliance audit process so that Federal contractors can analyze whether the identified problem is posing a barrier in their own workplace. In this regard, we point the OFCCP to its on-line accessibility initiative, undertaken in 2008. After identifying a potential barrier to equal employment opportunity for individuals with certain impairments, the OFCCP took positive, proactive steps to ensure that Federal contractors were satisfying their obligation to provide reasonable accommodation during the application process. Through webinars, in-person training, and a unique partnership with the ODEP that allowed Federal contractors to test the accessibility of their online systems, the agency effectively helped Federal contractors remove a potential barrier to equal employment opportunity for individuals with disabilities. We encourage the OFCCP to approach its current initiatives with the same partnership spirit.
Finally, in crafting any new requirements, the OFCCP must be cognizant of the significant barriers to the employment of people with disabilities that are beyond a Federal contractor’s control. For example, many people with disabilities choose not to work due to inadequate family or community support systems, poor or non-existent public transportation options, or financial and other disincentives brought about by government and other benefit programs. To be truly effective, any effort to increase employment opportunities for people with disabilities must seek to address these significant barriers to employment. For this reason, we recommend that the Department continue to fund research, community programs, and other activities focused on advancing the employment of individuals with disabilities through its Employment and Training Administration and ODEP programs.

CONCLUSION

SHRM and CUPA-HR wholeheartedly support the OFCCP’s primary objective – to increase employment opportunities of people with disabilities in the Federal contractor sector. However, we strongly believe that it would be misguided for the agency to focus on achieving this result though the use of utilization analyses and the establishment of placement goals – particularly where any data collected by a Federal contractor is highly likely to be unreliable due to the inherent individualized and changing nature of any given individual’s disability status and the significant difficulties involved in obtaining full and accurate self-identification of disability. Simply put, we believe that requiring Federal contractors to collect and analyze highly sensitive “disability data,” however that term may be defined, will not yield a reliable and measurable means of increasing employment opportunities for individuals with disabilities, but instead only will serve to undermine the underlying premise of the Rehabilitation Act – which is that the capabilities of any individual with a disability be examined on a case-by-case basis and not be based on stereotypes or common misperceptions about a condition or impairment.

We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,

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