February 20, 2012

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

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

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

Dear Ms. Carr:

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 Department of Labor Office of Federal Contract Compliance Programs’ (OFCCP) Notice of Proposed Rulemaking (NPRM) with respect to the agency’s regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (Section 503 or Rehabilitation Act), as announced in the Federal Register on December 9, 2011. (76 Fed. Reg. 77056). These comments were prepared on behalf of SHRM and CUPA-HR by Jackson Lewis LLP.1

SHRM and CUPA-HR strongly support the underlying goals of the proposed rules – to enhance outreach to qualified individuals with disabilities, strengthen the knowledge of federal contractors’ workforces to ensure that individuals with disabilities have an equal opportunity to succeed, and support overall employment opportunities for individuals with disabilities. Following a careful review of the regulations and an informal survey of our members regarding the benefits

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.
and burdens of the proposed rules, we have concluded that, although well-intended, the regulations as proposed focus primarily on creating a set of “one size fits all” requirements that fail to appreciate the complexity involved in compliance and that will significantly increase the burdens and costs on federal contractors without evidence that these substantial new burdens will significantly expand opportunities for individuals with disabilities. While we appreciate OFCCP’s belief that “what gets measured gets done”, we respectfully submit that measuring progress through onerous paperwork requirements and inherently unreliable data does not advance the OFCCP’s stated goals and, indeed, only detracts from federal contractors’ current efforts to provide meaningful employment opportunities and supportive environments for individuals with disabilities and other protected groups.

We look forward to continuing to work with the OFCCP to achieve the shared goal of improving employment opportunities for individuals with disabilities. To that end, we offer some recommendations below that we believe will allow the OFCCP to achieve its stated goals without unduly burdening federal contractors, intruding on the privacy of individuals with disabilities, or compromising the important principle of equal employment opportunity for individuals with disabilities and other protected groups. Both SHRM and CUPA-HR would be willing to convene a group of our members to provide expertise from the human resource profession and identify alternative approaches to better reach the stated goals of the rule.

**STATEMENT OF INTEREST**

These comments are submitted on behalf of two of the nation’s leading organizations representing human resource professionals – the individuals responsible for implementing and overseeing recruitment, hiring, training, affirmative action and nondiscrimination processes in most organizations. The comments are informed by years of practical experience regarding the implementation and design of affirmative action plans, policies and procedures that can serve as useful management tools. Our members approach affirmative action plan development and implementation as far more than a paperwork exercise and are committed to ensuring equal employment opportunity.

SHRM is the world’s largest association devoted to human resource management. Representing more than 260,000 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 ninety percent (90%) of all U.S. doctoral institutions, seventy percent (70%) 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 fifty (50) states.

As organizations, SHRM and CUPA-HR regularly seek to promote effective 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 for the third time in January 2012, 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 through conference programming and webcasts on disability law and affirmative action requirements. SHRM’s member organizations 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.

COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

As OFCCP itself has described, the NPRM proposes “several major changes” to the current affirmative action requirements for individuals with disabilities. (76 Fed. Reg. at 77058). OFCCP Director Patricia Shiu has described the proposal as a “sea change” and one of the “most significant developments” in the context of Section 503. Given that Executive Order 13563 provides that the comment period for proposed regulations “should generally be at least 60 days” and that OFCCP itself appears to recognize the proposal’s significance and possible impact, we were surprised and disappointed that the agency did not timely grant our request and that of others for a sixty-day extension of the comment period. The agency’s last-minute decision to provide an additional two weeks by which to submit comments was insufficient and thus has not allowed us to prepare more detailed responses to the agency’s proposal. Accordingly, we request that the agency reconsider extending the comment period an additional 60 days and allow those who have already filed comments to file amended versions. This rulemaking effort is an important and significant one, and all stakeholder groups involved should have the requisite time needed to provide thorough responses.

Because of the limited comment period, SHRM and CUPA-HR were unable to comprehensively survey our respective memberships to provide more detailed comments and information to address the range of issues raised by the proposed rule. We did, however, conduct an informal survey of a variety of our members. The survey sought to gather anecdotal data regarding federal contractors’ current practices in providing affirmative action to individuals with disabilities, as well as feedback regarding the potential benefits and burdens of the OFCCP’s proposal. Results of the survey are discussed in greater detail below with respect to specific aspects of the proposed rules.

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2 While we appreciate that the OFCCP engaged in efforts to collect information from interested stakeholders prior to the release of this NPRM through various means, including an advance notice of proposed rulemaking, those efforts in no way alleviate the agency from its responsibility to provide stakeholders sufficient time to provide meaningful comments on actual proposed text for a rule.
Generally speaking, our members appreciate the agency’s efforts to bring consistency to the definitions used in Section 503 and those found in the Americans with Disabilities Act, as amended (ADA). The federal contractor community and individuals with disabilities are well-served by a consistent and uniform approach to defining those who are covered by these laws. We urge the OFCCP to work collaboratively with the Equal Employment Opportunity Commission (EEOC) to ensure that the agencies’ enforcement efforts with respect to individuals with disabilities are consistent. This type of collaborative approach to enforcement matters benefits everyone, reduces the costs of compliance, and increases the likelihood that organizations will be able to understand and comply with the panoply of employment laws applicable to their workforces. Indeed, we cannot underscore enough the importance of collaboration between the OFCCP and the EEOC in this area, which is already complicated by the maze of different laws that may apply, particularly in the disability leave health management area.

Our members expressed significant concern, however, that the proposed rules unwisely focus on expanded processes and “one size fits all” requirements for federal contractors, without data to support that the proposed changes will be effective in increasing the employment of individuals with disabilities. In addition, the rules appear to deemphasize the individualized assessment of an individual’s unique limitations and a contractor’s ability to accommodate those limitations without undue hardship required by law. Before the OFCCP mandates that contractors learn and implement special and extensive recruiting, recordkeeping, training, communication, data collection and hiring mechanisms, at the very least, the agency should offer some basis beyond its own belief that all these new, time-consuming and costly procedures will result in increased employment of individuals with disabilities. Our members also are concerned that their obligations are heavily tied to a factor outside of their control and which the agency has not adequately studied – that being whether individuals with disabilities will voluntarily and reliably self-identify as having a disability to their employer in a manner and fashion that makes qualitative analyses useful for measuring progress in this area.

Feedback from our members also suggests that the OFCCP has grossly underestimated the amount of time and money that will be required to implement many of the proposed changes, and to maintain appropriate records. The OFCCP estimates of the burden are too low by several orders of magnitude, and not realistic. Given the current economic climate, and calls for organizational efficiency and effectiveness, the OFCCP should more fully recognize the unique and extraordinary additional administrative compliance burdens that the proposed regulations will impose and the resistance the proposals are likely to meet from all sides. With respect to the multiplicity of tasks asked of federal contractors in the agency’s proposal - from the frequent requests to collect disability status information from applicants and employees, to the mandatory, specified multi-faceted outreach program, to the massive collection and maintenance of five years of referral and hiring data, to special, and very prescriptive, reasonable accommodation procedures, to detailed, individualized personnel logs that document every employment-related opportunity for which an individual with a disability may have been considered, to special annual updates of all job descriptions, the OFCCP fails to take into account the extensive cost in time and money that these activities will impose on federal contractors and individuals alike.
In light of the potential burdens of the agency’s proposal, we strongly urge the OFCCP to give much more thought and consideration to any proposed changes, and after due diligence to ensure valid measures, then and only then, consider a phased implementation of any proposed changes, similar to the approach adopted when the Joint Reporting Committee (comprised of the OFCCP and the 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. 70 FR 71300 (Nov. 28, 2005). A tiered implementation schedule makes particular sense given the breadth of the proposed changes, the need for federal contractors to first develop systems to gather any required disability status data, then to collect the data, and finally to analyze the data once collected. Accordingly, we recommend that the OFCCP allow federal contractors a minimum of one year from the effective date of any final rule to redesign their systems to begin collecting any required disability status data and furthermore, that the agency not require any analyses of that data until the first affirmative action plan year following a full year of data collection.

I. Collection of Disability Status Information, Sections 60-741.42

Under the OFCCP’s proposal, federal contractors would be required to allow individuals an opportunity to self-identify their disability status twice during the hiring process and on an annual basis thereafter. Our members have three primary concerns with the agency’s proposal: (1) the suggested frequency for data collection is unduly burdensome to federal contractors and significantly increases the chance that an individual with disability will find such questioning by their employer intrusive; (2) the collection of disability status data, no matter how frequent, is inherently fraught with unreliability, given the complex legal definitions of covered medical impairments, the likelihood that many individuals with qualifying disabilities will not wish to provide such information to their employers, and the likelihood that other individuals may identify themselves as having a disability when in fact their status would not meet existing definitions; and (3) the requirement that such data be collected anonymously, while laudable from certain perspectives, makes it impossible for a contractor to conduct the data analyses required by the proposed rules.

We are particularly concerned that the OFCCP’s proposal requires the collection of disability status information in a manner and frequency that is different than the way in which other demographic data (e.g. race, ethnicity, and gender) is currently collected by federal contractors. Resurveying is not required under Executive Order 11246, or in order to complete the EEO-1 Report each year. As a result, only a very small handful of our members who responded to our informal survey currently have mechanisms in place to regularly resurvey employees for race, gender or ethnicity information on an annual basis. To require that federal contractors begin collecting disability status information on such a frequent basis will unnecessarily raise questions for employees, particularly given the well-established understanding of employees that such data generally need not be disclosed to one’s employer unless a reasonable accommodation is required or for other reasons that are job-related and consistent with business necessity.

Furthermore, the proposed survey frequency is overly burdensome and imposes significant costs on federal contractors. The agency’s estimate that it would only take five minutes per contractor to incorporate a pre-offer invitation to self-identify into its hiring process and an additional five minutes per contractor to conduct an annual resurvey of employees is grossly
underestimated. Most federal contractors use an on-line application system to accept applications for employment. Those systems are generally created and programmed by third-party vendors, not by federal contractors themselves. It will take federal contractors weeks, or months, not minutes, to work with vendors or to re-engineer such systems themselves in order to be able to incorporate a separate pre-offer invitation to self-identify disability status. Almost sixty percent (60%) of the members who responded to our informal survey estimated that it would take more than fifty (50) hours to develop a system for collecting pre-offer disability status information, with many estimating more than 100 hours.

It is similarly unrealistic to assume that most federal contractors will use a paper process to resurvey their workforce on an annual basis. Accordingly, conducting an annual resurvey for disability status information will require that many contractors design, build, test and implement systems to gather and store this additional data. More than fifty percent (50%) of the members who responded to our informal survey estimated that this piece of the agency’s proposal alone would require more than fifty (50) hours. Only about ten percent (10%) thought it would take less than ten (10) hours. Consistent with these estimates by human resource professionals, when the Joint Reporting Committee revised the EEO-1 Report, 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).

Even with less frequent collection, our members are concerned that individuals will not reliably or accurately be able to provide disability status information, given the complex legal definition of a disability, and the individualized, case-by-case analysis required to determine whether someone has a covered disability. For a variety of reasons, many individuals with impairments may choose not to self-identify as disabled to their employer, even if they understand the parameters of the questions being asked. For example, some individuals may not wish to disclose their disability status 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. Further, there are significant groups that will not want to reveal their disability status because they do not require accommodation. This runs contrary to the notion embodied in the ADA that information regarding one’s medical conditions is only relevant to employers to the extent that it pertains to the individual’s ability to perform the essential functions of the job. Not only does this well-established principle protect employee privacy, it helps prevent employers from impermissibly acting on such information and greatly limits the circumstances where an employee may believe his or her employer has acted impermissibly on such information, when that is not the case. The OFCCP’s proposal turns this privacy expectation on its head, and places the burden squarely on
federal contractors to show that they only used the information for affirmative action purposes and not for some other unlawful reason.

We also question the requirement in proposed section 60-741.42(e) that contractors maintain self-identification information in a separate data analysis file. Federal contractors should be allowed to maintain this information in any system, or any way, they find most efficient and effective; provided it is maintained in a confidential manner. While our members certainly appreciate the advantages to having disability status data reported anonymously, we are perplexed as to how the agency expects federal contractors to then use such data to conduct the referral and hiring analyses in the proposed rule. Unless a federal contractor knows the name and other identifying information of all individuals who have self-identified as disabled, it cannot determine its progress towards meeting utilization goals by job group because there will be no way to determine in which job groups individuals with disabilities should be placed. Nor will federal contractors be able to conduct a compliant annual review of their personnel processes. Similarly, without identifying information regarding each individual with a disability, federal contractors will not be able to create the personnel log for each individual with a disability proposed in the NPRM.

In our view, when balancing the need to collect reliable data versus the desire to conduct artificially-created qualitative analyses, collecting information on a confidential, voluntary, and anonymous basis is preferable. This approach reduces the risk to federal contractors that an individual will claim he or she was not selected for an employment opportunity because of a known disability and makes it more likely that individuals with disabilities will provide accurate information. Accordingly, if the agency maintains the self-identification requirements, we recommend that the OFCCP revise the data collection requirements of the proposed rule to account for anonymous collection of disability status information. While we acknowledge that this may require significant revisions to the text of the proposed rule, and may even require that the agency abandon certain of its proposed qualitative analyses of hiring, referral, training and promotion activity, we believe that the balance must be struck in favor of collecting more reliable data about disability status.

If the agency decides that such data should not be collected on an anonymous basis, the agency must address how federal contractors should handle individuals with a known disability

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3 Indeed, the OFCCP’s proposal exposes federal contractors to a wide variety of potential claims under the ADA and Section 503. Perhaps rather obviously, an individual might assert that a federal contractor acted negatively to the disclosure of an actual medical condition, thus giving rise to a potential claim of discrimination based on an actual disability. Alternatively, an individual with a disclosed disability also may claim that an employer failed to provide a reasonable accommodation, despite having knowledge of the individual’s disability through the self-identification process. It is just as likely that voluntary self-identification of disability status by individuals will lead to a federal contractor having erroneous information about an individual’s disability status, thereby creating an opportunity for regarded as claims based on the individual’s own assertion about his or her disability status. That the OFCCP, or a court, may ultimately find that a federal contractor acted permissibly is beside the point. The cost of defending a claim, whether meritorious or not, is substantial.
who decline to self-identify as disabled. This issue is of particular concern to our members, particularly when coupled with the data analyses required by the proposed rules. On the one hand, federal contractors will want to include as many individuals as possible when analyzing whether they have satisfied any utilization goal or whether their referral and outreach efforts are sufficiently effective. On the other hand, an employer’s decision to identify an employee as disabled when the employee has not so self-identified could potentially result in an admission of covered status under the ADA or a claim that the federal contractor unlawfully “regarded” the individual as disabled.

Three additional points deserve attention with respect to this section of the proposed rules. 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 the OFCCP’s position is that voluntary self-identification pre-offer is allowed for purposes of affirmative action, we note that our members have significant concerns that the EEOC or a federal court could find otherwise. Indeed, we seriously doubt that the narrow “affirmative action” exception under the ADA for otherwise impermissible inquiries was intended to permit the collection of disability status information from hundreds of thousands of job seekers, as required by the agency’s proposal. Accordingly, if the agency decides to move forward with this piece of its proposal, we urge the OFCCP to create an explicit safe harbor in its regulations to provide complete assurance that a federal contractor’s compliance with any requirement to survey applicants about disability status prior to an offer of employment being made does not violate any requirements of the Rehabilitation Act, the ADA, the EEOC’s implementing regulations and guidance, or any applicable state or local laws.

We also urge the agency to incorporate the definition of an applicant, including the definition of an Internet Applicant, found in the Executive Order 11246 regulations at 41 CFR 60-1.3, when defining the pool of candidates from whom disability status information would be collected. To do otherwise would only further highlight the different treatment of individuals with disabilities and other protected groups and increase the likelihood that individuals with disabilities would find the requests confusing and intrusive. Furthermore, having different standards for data collection based on particular protected traits imposes significant additional costs to federal contractors, who would be required to redesign their current applicant tracking systems at substantial costs. We believe the simplest way to address this issue is to add a definition of an “applicant” in proposed section 60-741.2 which incorporates the definition of an applicant, including an Internet applicant, found in the Executive Order 11246 regulations.

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4 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.
Finally, any self-identification form designed by the agency should be optional so that federal contractors have the flexibility to prepare a self-identification form that is tailored to their specific organizational needs. While some of our members appreciate the agency’s development of a standard form, others would prefer to create a form that is more consistent with their organizational culture and other communications regarding the collection of demographic data. We see no reason to require that federal contractors use a specific form to collect this data, provided the data is collected in accordance with applicable legal requirements. We also request that the OFCCP modify its proposed invitation to self-identify disability status form to allow an individual to respond in one of the following three manners: (1) Yes, I have a disability. (2) No, I do not have a disability; or (3) I do not wish to provide this information. This proposed change is consistent with the manner in which the Federal government currently collects disability status information for its own employment purposes.

II. Utilization Goal – Section 60-741.46

The OFCCP’s proposed rule also would establish a seven percent (7%) utilization goal for individuals with disabilities in each affirmative action program job group. While we appreciate the OFCCP’s desire to use more tangible measurements to judge federal contractors’ affirmative action efforts, we believe that what is being measured should be based on reliable and accessible data that is relevant to a particular contractor and/or industry, given the significant burdens imposed on federal contractors by any required data analyses.

As an initial matter, we still have serious concerns about the agency’s decision to require any type of utilization goal for individuals with disabilities. Quite simply, disability status is not an immutable characteristic like race or gender. The very definition of a covered disability under the ADA and Section 503 makes clear that determining one’s “disability status” requires an individualized, fact-intensive, determination that makes statistical analyses wholly inappropriate. 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. Accordingly, we urge the OFCCP to rethink any requirement that federal contractors judge their affirmative action progress through the lens of a utilization goal based on a voluntary self-reporting mechanism that cannot adequately account for an individual’s actual ability to perform a particular job.

Even assuming gross statistical comparisons are to be pursued in the disability context, there is a complete lack of data to support the agency’s proposed national utilization goal. As the OFCCP itself recognizes, the agency’s national utilization goal is based on figures from various sources, none of which sought to gather disability status information that comports with the definition of disability under Section 503 or the ADA. In essence, the OFCCP’s proposal asks federal contractors to compare apples and oranges, and holds contractors accountable if that comparison is not favorable. Most troubling is that the agency cites no data whatsoever to support its conclusion that its proposed national utilization goal is a reasonable one, or that it even comes close to approximating the availability of individuals with disabilities, as that term is defined under the ADA and Section 503, who are actively seeking employment. Given the significant costs
associated with soliciting disability status information from applicants and employees and conducting the proposed statistical analyses, we respectfully request that the OFCCP consider less burdensome methods of ensuring that federal contractors effectively recruit and consider individuals with disabilities until the Federal government is able to provide the necessary data to facilitate realistic and valid identification, recruitment and hiring measures for individuals with disabilities covered by the provisions of Section 503.

If the agency decides to move forward with a utilization goal, we urge the agency to adopt a contractor- or establishment-wide goal that is based solely on the number of individuals with disabilities actually looking for work (versus including individuals with disabilities who have been discouraged from looking for work). As the OFCCP recognizes in its proposal, the placement goal framework used for other protected groups does not include consideration of discouraged workers when computing overall availability figures. We do not agree with the OFCCP’s conclusion that placement goals for individuals with disabilities deserve “special” treatment. If individuals are discouraged from seeking employment because of discriminatory behavior by federal contractors, that will be true whether the discrimination is due to disability, race, ethnicity, gender, military status, or other protected status. Furthermore, the OFCCP’s consideration of discouraged workers when determining an initial utilization goal only compounds the agency’s use of unreliable data, by layering one unreliable calculation upon another.

Given the significant limitations to the data currently available, a contractor- or establishment-wide utilization analysis strikes a more appropriate balance between the agency’s goals and the burdens imposed on federal contractors by its proposal. 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 the same learning disability may have vastly different abilities and limitations, depending on the severity of each individual’s impairment. A statistical comparison by job group would not account for these differences in qualifications, even though the law requires a federal contractor to conduct an individualized assessment to determine 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 by job group would not take into consideration the very real possibility that the legitimate physical requirements of some jobs will make it impossible to achieve a seven percent (7%) utilization goal.

Moreover, the burden imposed by the requirement to analyze utilization by job group is substantial. The OFCCP’s estimate of sixty (60) minutes the first year and thirty (30) minutes in subsequent years per federal contractor is woefully inadequate. Large federal contractors in particular may have hundreds of job groups. To think that it will take such federal contractors only thirty (30) minutes to thoughtfully analyze whether individuals with disabilities are being utilized in each job group at a level that meets the OFCCP’s pre-established goal is unrealistic. Indeed, even with only 100 job groups, that would mean the federal contractor is conducting the required analyses for each job group in about three (3) minutes.
Given the lack of currently reliable data with which to establish any type of goal and the burden to federal contractors of conducting utilization analyses by job group, we believe that the OFCCP should focus on a federal contractor’s outreach and other good faith efforts until reliable availability data can be developed. To the extent that additional data, once collected, supports the establishment of a utilization goal in the future, it should be applied contractor- or establishment-wide. For the same reasons, we do not believe that it is appropriate for the OFCCP to establish a sub-goal for individuals with targeted disabilities.

III. Voluntary Priority Consideration Programs – Section 60-741.47

Some of our members have expressed concern regarding the OFCCP’s proposal to allow federal contractors to provide voluntary priority consideration for employment opportunities to individuals with disabilities. Our organizations strongly believe in the principle of equal employment opportunity for all. Implementation of priority consideration for any protected group, when not required by statute, runs afoul of the basic principles of nondiscrimination and only serves to expose the federal contractor to claims of disparate treatment on other bases. It also needlessly highlights the differences among various protected groups and encourages individuals to perceive a particular employment decision as being “unfair”, even when it is not.

Because the hiring of individuals with disabilities by any federal contractor is voluntary, any decision to provide priority consideration is exposed to scrutiny and challenge under Title VII and all other equal employment laws by other applicants, including applicants protected by the Executive Order. For these reasons, a voluntary priority consideration program is legally perilous for any federal contractor to undertake and should not be encouraged by an agency that is charged with enforcing nondiscrimination principles. It is our opinion that the agency’s overall mission is best served when the most qualified candidate is selected for a position, without regard to any protected status. For these reasons, we urge the agency to delete Section 60-741.47 of the proposed rules.

IV. Annual Review of Personnel Processes and Job Descriptions – Section 60-741.44(b) and (c)

Section 60-741.44 of the proposed rules would require federal contractors to conduct comprehensive annual reviews of their personnel processes and job descriptions, once again using a set of very prescriptive, “one size fits all” requirements applicable to all federal contractors, regardless of size, available resources, or industry. The proposed requirements include:

- Identifying the vacancies and training programs for which applicants and employees with disabilities are considered;
- Providing a statement of reasons explaining circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations;
- Describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs;
- Annually reviewing all physical and mental job qualification standards and providing a written explanation as to why each requirement is related to the job; and
- Ensuring that the use of information and communication technology is accessible to applicants and employees with disabilities.

In essence, the proposed rule requires federal contractors to develop a “personnel log” for individuals with disabilities – something federal contractors are not required to do for any other protected group. Again, SHRM and CUPA-HR question the wisdom, no matter how well-intended, of creating “special” procedures and processes for individuals with disabilities. We also believe it is beyond the agency’s authority to create such formalized procedures. While Section 503 and the ADA require employers to provide reasonable accommodation and apply qualification standards in a manner that is job-related and consistent with business necessity, neither law contains specific mandates for accomplishing these tasks nor contemplates the extensive recordkeeping proposed by the OFCCP.

Furthermore, our members are concerned about their ability to actually comply with this requirement, no matter the amount of good faith efforts expended. To fulfill this obligation, a federal contractor must know whether an individual is disabled; whether that individual is being contemplated for any type of vacancy or training program, no matter how informally; whether that individual requested an accommodation; and whether an individual manager considered an accommodation of some sort in selecting that individual for hire, promotion or a training opportunity. Quite simply, many of the decisions that the OFCCP wishes to have federal contractors document are not made on such a formalized basis. Nor do we think that it advances the employment of individuals with disabilities to require that these decisions be made in a more formalized manner. With good reason, the EEOC always has encouraged employers to view the interactive process required to process a reasonable accommodation request as an informal process. To formalize this process only means that managers will be required to complete more paperwork and jump through more hoops to provide reasonable accommodations and opportunities for individuals with disabilities. Given this onerous compliance burden, we are concerned that the OFCCP’s proposal will actually discourage, rather than encourage, the employment of individuals with disabilities.

Our members also are concerned about the requirement that federal contractors make these personnel logs available to applicants or employees upon request. Again, this requirement is not imposed with respect to a federal contractor’s decisions regarding other protected groups, thus calling into question the OFCCP’s stated goal of providing greater transparency for a federal contractor’s employment decisions. Why is greater transparency needed with respect to decisions relating to individuals with disabilities versus those relating to women, minorities, or other protected groups? Furthermore, how is a contractor to explain that it only is required to provide this information to individuals with disabilities and that it need not provide such information to a female non-disabled candidate who is not selected? We respectfully submit that this practice will only serve to increase the number of complaints filed against federal contractors, not decrease them as the OFCCP suggests.
Our members also think it is unnecessary, and unduly burdensome, to require federal contractors to review all physical and mental job qualification standards on an annual basis. In many organizations, this would require human resources and/or hiring managers to review every job description for hundreds, and in some cases thousands, of positions on an annual basis. Very few, if any, federal contractors have the resources to complete this type of review on an annual basis. Practically speaking, our members also question the utility of an annual review since most jobs change incrementally over time, and are not significantly changed from year to year. Given this, we encourage the OFCCP to only require federal contractors to review physical and mental job qualification standards when significant changes are made to the essential functions of a position. Alternatively, the OFCCP might consider requiring such a review before any position is posted for hiring. We believe these suggestions strike a more reasonable balance between the agency’s reasons for requiring a review of job qualifications and the burden on federal contractors of complying with such a requirement.

We also request clarification of the agency’s proposed requirement that federal contractors make all information and technology accessible to individuals with disabilities. To the extent that the OFCCP intends to require that federal contractors make all information and technology fully accessible, we respectfully suggest that the agency has far exceeded its authority under Section 503. As the agency itself has recognized in its own guidance on this subject, federal contractors have an obligation to provide an effective reasonable accommodation to individuals with disabilities, including with respect to any information technology that is required to enjoy equal access to employment opportunities. However, the law does not require that a federal contractor provide a particular accommodation, such as full accessibility, when another accommodation, such as assistance with utilizing any non-accessible technology, might be equally effective at addressing the conflict between the individual’s medical impairment and the term or condition of employment to which he or she seeks access.

The agency should revise this section of its proposal to make clear that federal contractors must provide reasonable accommodations to individuals with disabilities, including with respect to information technology, unless doing so would impose an undue hardship. The OFCCP also should make clear that full accessibility is not required under any circumstances. The agency also should remove any reference to the requirements imposed on federal agencies under Section 508 of the Rehabilitation Act, as it suggests that federal contractors also must comply with those requirements, which simply is not the case.

Taken together, the burden imposed on federal contractors by these proposed requirements is substantial. The agency’s estimate that it will take a federal contractor thirty minutes to complete all personnel logs per year, thirty minutes to record each accommodation request, and no additional time to review and document the job-relatedness of all physical and mental qualification standards is far too low and entirely unrealistic. Of the members who responded to our informal survey, most estimated that it would require between 100-500 hours to create and maintain the required personnel logs on an annual basis, and another 100-500 hours to conduct an annual review of all physical and mental job qualifications. In fact, many of our members indicated that they would need to hire additional personnel in order to create the personnel logs and conduct the annual review of all job descriptions contemplated by this piece of the agency’s proposal. Given these significant burdens, and the lack of data to support that these requirements will have real and
significant benefits for individuals with disabilities, we urge the OFCCP to reconsider its proposal that these procedures be mandatory, rather than permissive as they are currently.

Similarly, any requirement that federal contractors provide fully accessible information technology systems would impose substantial burdens that are unaccounted for in the agency’s burden analysis. The vast majority of members who responded to our survey do not currently maintain their systems to be fully compatible with assistive technology nor are they in compliance with the Section 508 requirements federal agencies must follow. Our members’ burden estimates varied widely, often based on the size or industry of the covered entity. What is most troubling to our members, however, is that the agency appears to be imposing these significant burdens on federal contractors without explaining why the agency’s on-line accessibility initiative, undertaken in 2008, is ineffective at addressing this potential barrier to equal employment opportunity for individuals. Rather than imposing a “one size fits all” solution without any analysis of the proposed burdens, the agency should first conduct a study of the effectiveness of its 2008 initiative in addressing this issue.

V. Required Job Listings and Linkage Agreements – Section 60-741.44(f)

The OFCCP’s proposal also sets forth prescriptive requirements regarding federal contractors’ required recruitment efforts, including that federal contractors must enter into a minimum of three different linkage agreements with specified recruitment sources and that federal contractors must list job openings with the nearest local employment delivery system. While we believe that partnerships with disability organizations and referral sources are key ways to identify qualified candidates with disabilities for available employment opportunities, we are concerned by the very narrow and specific steps federal contractors would have to follow in order to be in compliance with the proposed rules. This is yet another example of how the OFCCP’s proposal under Section 503 has strayed far from the notion embodied in Executive Order 11246 that an affirmative action plan should be a “management tool” and not a mere paperwork exercise.

In particular, we do not believe it is wise to enshrine the job listing requirements of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) into the OFCCP’s Section 503 regulatory scheme, particularly in light of the fact that the Department of Labor eliminated its centralized and free America’s Jobs Bank service several years ago. Since then, state and local employment offices have developed a multitude of different formats for posting job listings. Many federal contractors have had to engage for-profit companies to help them list jobs with the appropriate state and local employment offices, and even companies that provide this service as their business are unable to always comply with every office’s particular requirements.

Given this reality, the requirement that federal contractors satisfy this listing requirement in the “manner and format required by the appropriate employment service delivery system” is unwieldy under the current system. Ideally, the Department of Labor would work with state and local employment offices to redevelop a free, centralized listing service before it expands the current decentralized model used to satisfy the VEVRAA job listing requirements to Section 503. At a minimum, it would be helpful for the OFCCP to develop a standardized format that federal contractors can use to provide the job posting data in a uniform fashion to all government employment offices and require the appropriate employment service delivery system conform to that format. These
offices do not operate independently of the Federal government and, accordingly, it is proper and legal for the Federal government to require the service delivery system to adopt a specified format. For example, requiring a listing using a readily available template, based on a Word or Excel format that is compatible with the typical recruitment records and software, that could be transmitted electronically, would be a significant improvement. SHRM and CUPA-HR would be interested in working with the OFCCP to identify, through the expertise of our members, the best way to create such a template.

With respect to the linkage agreement requirement, we urge the agency to rethink its current prescriptive approach and allow federal contractors the flexibility to identify the appropriate number and type of referral sources that will be effective at identifying suitable candidates for particular organizational needs. We also do not think it is wise to codify a list of referral sources that likely will need to be updated and revised on a regular basis. Indeed, the link to the Employer Resources section of the National Resource Director provided in the proposal (https://www.nationalresourcedirectory.gov/employment/employer_resources) is already not functioning, despite repeated attempts to access it. Our members also are concerned that the identified sources will be overwhelmed by the sheer number of requests for linkage agreements that they are likely to receive under the OFCCP’s proposal. The rule provides no assurances that these organizations will be able to accept job postings or provide quality referrals. In fact, in our experience, some of the sources identified by the OFFCP are simply not helpful to employers seeking to identify qualified referrals. Furthermore, federal contractors are not confined to a prescriptive list or number of referral sources when recruiting minority or female candidates, and there is no data to suggest that the more flexible approach adopted under Executive Order 11246 would not be workable here. Given this, we urge the OFCCP to abandon the requirement that federal contractors recruit from a minimum number of mandated sources and allow federal contractors to identify appropriate referral and recruitment sources that prove effective for their particular organizations, as is currently the case under Executive Order 11246.

VI. Data Analysis of Referral and Hiring Activities – Section 60-741.44(k)

The OFCCP’s proposed rule also would require federal contractors to collect, calculate, and maintain data regarding the number of disabled referrals, applicants, and hires, as well as data regarding the ratio of disabled versus non-disabled applicants and hires, for a five year period. Specifically, Section 60-741.44(k) requires that federal contractors collect, analyze and potentially report the following data items:

- The number of referrals of individuals with disabilities that a federal contractor receives from the applicable employment delivery system and other referral sources;
- The number of applicants who self-identify as individuals with disabilities, or who are otherwise known to be individuals with disabilities;
- The total number of job openings and total number of jobs filled;
- The ratio of jobs filled to job openings;
- The total number of applicants for all jobs;
- The ratio of applicants with disabilities to all applicants (“applicant ratio”);
- The number of applicants with disabilities hired;
- The total number of applicants hired; and
- The ratio of individuals with disabilities hired to all hires (“hiring ratio”).

As discussed above, SHRM and CUPA-HR have significant concerns about the reliability of the self-identification data that will be used to conduct these required analyses. Quite simply, our members are struggling with the notion that they may be required to undertake significant qualitative analyses, at a substantial cost to their organizations, using data that simply is not reliable. We urge the OFCCP to postpone any required qualitative analyses of disability status information until further study is undertaken regarding the reliability of the data being analyzed. Otherwise, federal contractors will simply be analyzing data for the sake of analyzing data, without any real measurable means of determining whether actual progress has been made with respect to the employment of individuals with disabilities.

The proposed regulations further indicate that the effectiveness of a federal contractor’s outreach efforts will be evaluated by the OFCCP for reasonableness, based primarily on whether qualified individuals with a disability have been hired. SHRM and CUPA-HR believe that the regulatory focus on hiring as the “primary indicator” of compliance is legally perilous. It creates incentives to use utilization goals as quotas, since what will be judged is the ultimate result, not a federal contractor’s good faith efforts to achieve that result. Quite simply, the OFCCP should not engage in any regulatory initiative that blurs the well-established line between lawful goals and impermissible quotas.

As discussed above, we also implore the OFCCP to abandon any requirement that federal contractors collect and analyze disability status data on all job seekers, not just those that meet the definition of applicant, as defined by the Executive Order 11246 regulations. Federal contractors have taken significant and costly steps to understand and comply with the agency’s internet applicant definition. Indeed, many of our members have redesigned their entire application process to comply with the requirements of that rule. We fail to understand the agency’s reasoning for creating a separate definition of an “applicant” for collecting and analyzing disability status information versus other demographic data. Furthermore, we are concerned that this “special” treatment will only serve to confuse applicants, many of whom already find employer requests to collect demographic data intrusive.

The OFCCP estimates that all these analyses will take one hour per contractor. Our members who responded to our informal survey consistently indicated that the OFCCP’s estimate is woefully too low. More than sixty percent (60%) of the members who responded to our informal survey stated that it would take between 100-500 hours to complete the analyses required by this section of the proposal; yet another twenty-six percent (26%) estimated that it would take between 50-100 hours. Given the limitations of the data being analyzed, and the concomitant questionable utility of the analyses, we believe that the burden to federal contractors is not justified by the minimal benefits that might accrue as a result of conducting these analyses.
VII. Development of and Training on Reasonable Accommodation Procedures – Section 60-741.45

Section 60-741.5 of the proposed rules requires that federal contractors develop specific procedures for processing requests for reasonable accommodation, and that federal contractors provide training to their employees regarding these procedures.

SHRM and CUPA-HR support the development of reasonable accommodation procedures as a means of ensuring that individuals with disabilities have equal opportunity to succeed in the workplace. However, we are concerned that the agency’s proposal sets forth a number of specific requirements that may not make sense for every workplace, particularly smaller employers. Indeed, the agency’s proposal has turned what is supposed to be an informal, interactive process into a formal paper exchange. We urge the agency to make clear that federal contractors are free to design reasonable accommodation procedures that are appropriate and effective for their organization, provided that those procedures comply with the requirements of Section 503 and the ADA.

In particular, our members expressed concern about the requirement that all requests for accommodation be confirmed in writing. We question whether a requirement of this nature makes sense for many accommodation requests. For example, does a request for a more ergonomic chair need to be documented in writing if the chair can be provided immediately? Documenting the request will take longer than providing the actual accommodation and serves no useful purpose.

Our members also believe that the OFCCP should not set specific, minimum time periods by which to respond to reasonable accommodation requests. Federal contractors already have a duty to provide reasonable accommodations as promptly as possible; otherwise, they risk exposure to a claim that they failed to timely accommodate an individual with a disability. Inclusion of very specific time periods as “minimum” standards adds little to ensuring that individuals with disabilities receive the accommodations they deserve, particularly when the delay in providing accommodation may be due to a need for medical documentation from the employee’s health care provider – a factor outside of the federal contractor’s control. The OFCCP’s rigid, formulaic approach to the reasonable accommodation process also fails to account for the dynamic nature of many accommodation requests and the ongoing, interactive dialogue that may need to occur between an employee, health care providers, and the employer as an employee’s needs change.

We also do not believe it makes sense to require that all denials of accommodation requests be in writing. Further, we strongly oppose the requirement that federal contractors include a statement of an individual’s right to file a discrimination claim with the OFCCP with every denial. Federal contractors already are required to provide numerous notices to applicants and employees of this right. Demanding that it also be included in any denial of accommodation notice needlessly suggests that the federal contractor’s decision, while perhaps perfectly legitimate, was unlawful.

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. However, we question the utility of conducting training of the scope contemplated by the agency’s proposed rules. Training for the sake of training does not result in the creation of additional employment opportunities for individuals with disabilities. Perhaps what is most telling is that OFCCP itself does not require that its own managers undergo such intensive training regarding the agency’s own reasonable accommodation procedures, presumably because the agency has determined that its training schedule should be more flexible and based on actual need, rather than an annual requirement that must be checked off. Accordingly, while we support the use of training to raise awareness of a federal contractor’s affirmative action and nondiscrimination obligations, we do not believe that the agency should prescribe the manner or frequency of such training.

VIII. Notice Requirements – Section 60-741.5

Section 60-741.5 proposes numerous new and burdensome notice requirements for federal contractors, without any data to support that the proposed changes would effectuate the OFCCP’s stated goals. We oppose creating new notice requirements for the sake of more paperwork and ask the OFCCP to reconsider whether notice requirements that are different than and more burdensome than those required by Executive Order 11246 are justified.

In particular, we question the usefulness of requiring that federal contractors include the EO Clause in subcontracts and purchase orders verbatim. While the OFCCP may view this requirement as a relatively simple one, the agency’s proposal fails to account for current federal contractor procurement practices. Many purchase orders are limited in length to a single page. Indeed, the EO clause itself is longer than many purchase orders used by our members. Requiring federal contractors to incorporate the EO Clause verbatim requires federal contractors to revise their existing agreements, at significant costs, with the result being a more cumbersome and less-user friendly document.

Furthermore, the agency has not explained why the current practice of allowing federal contractors to incorporate the EO Clause by reference is unsatisfactory. Allowing the EO Clause to be included by reference is consistent with the manner by which federal contractors are required to incorporate other Federal laws and requirements into subcontracts and purchase orders, including requirements imposed by the Department of Labor under Executive Order 11246 and wage and hour laws. We can think of no reason why Section 503 should be accorded “special” treatment in this area and urge the agency to reconsider this proposed requirement.

IX. Five-year Recordkeeping Requirement - Section 60-741.80

Generally speaking, unless a complaint has been filed, all affirmative action records required by Section 503 must be maintained for a minimum period of one year for small federal contractors and a minimum period of two years for large federal contractors. This recordkeeping protocol is consistent with the current requirements under Executive Order 11246 and VEVRAA. Proposed section 60-741.80, however, would require that federal contractors maintain data regarding the outreach efforts required by proposed section 60-741.44(f)(4) and the qualitative referral and hiring ratio data required by proposed section 60-741.44(k) for a five-year period.
The agency’s reason for requiring that certain records be maintained for more than double the current retention period is that a longer retention period “will enable the contractor and OFCCP to more effectively review recruitment and outreach efforts.” Yet the agency cites no research to support its conclusion that five years of data is better than two, and we are aware of none, particularly since the extended recordkeeping requirement is not being imposed for all aspects of a federal contractor’s Section 503 affirmative action obligations. Furthermore, a federal contractor should be able to determine whether a particular referral source has referred qualified candidates by looking at just one year of data. Five years of data, or even two years of data, will not make the referrals from a particular organization any better. Instead, it will simply mean that a federal contractor has relied on an unreliable recruiting source for too long, to the detriment of individuals with disabilities. Accordingly, with no good reason to impose a longer recordkeeping requirement for certain aspects of a Section 503 affirmative action plan, the OFCCP should apply the current one-year and two-year recordkeeping requirements uniformly.

CONCLUSION

SHRM and CUPA-HR wholeheartedly support the OFCCP’s primary objective – to increase employment opportunities of individuals 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 the data used for these comparisons is likely to be unreliable given the currently available Federal data sources, the inherent individualized and changing nature of any particular individual’s disability status, and the significant difficulties involved in obtaining full and accurate self-identification of disability status. In essence, the agency’s proposed requirements for collection and analysis of disability status information puts the proverbial “cart before the horse.” Federal contractors should not be required to engage in qualitative analyses of their progress towards employing individuals with disabilities until the Federal government develops reliable data upon which to base those analyses.

We are particularly concerned by the onerous administrative and recordkeeping burdens and “one size fits all” approach taken by the agency with respect to affirmative action obligations for individuals with disabilities. This is a departure from the agency’s traditional view that affirmative action plans should be a useful management tool. Replacing that flexibility with a checklist of very specific “gotcha” items is not likely to encourage employment of individuals with disabilities and instead only will serve to undermine the underlying premise of Section 503 – 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 also question the wisdom of creating a multitude of “special” requirements that are only applicable to federal contractors’ affirmative action obligations to individuals with disabilities, without any empirical basis for creating such legally dubious distinctions among protected groups.
We appreciate the opportunity to submit these comments and look forward to working with the OFCCP to develop a compliance system that better balances the agency’s laudable goals of improving employment opportunities for individuals with disabilities with the burdens of imposing onerous paperwork requirements on federal contractors. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,

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