

COMMENTARIES

Funny You Should Mention It: New Disability EEO/AA Regulations Finalized for Federal Contractors

KRISTEN PRYOR, ERIC M. DUNLEAVY, AND DAVID COHEN

DCI Consulting Group

Santuzzi, Waltz, Finkelstein, and Rupp (2014) describe the many unique challenges faced by individuals with invisible disabilities, with particular emphasis on disclosure and accommodation concerns. The authors note that legislation, particularly regarding the ADA (1991) and ADAAA (2008), may not account for these unique challenges. One piece of legislation that was not discussed was the Rehabilitation Act of 1973, which, among other functions, is the precursor to the ADA and provides protection for federal employees and applicants. Section 503 of this act establishes equal employment opportunity and affirmative action requirements for federal contractors and is enforced by the Office of Federal Contract Compliance Programs (OFCCP). Importantly, in August 2013 Section 503 of the Rehab Act (as well as the Vietnam Era Veterans' Readjustment Assistance Act of 1974) was updated via a final rule.¹ That rule was published in the *Federal Register* on September 24 and becomes effective 180 days later in March 2014.

These updates have direct implications for some of the issues discussed by Santuzzi et al. However, these rules have not

received substantial attention in the SIOP community, and will have important implications for I-Os working for federal contractors or subcontractors or for consulting firms working for federal contractors. Toward that end, this response article is intended to educate the SIOP community on the new 503 regulations by describing relevant background and some of the more important aspects of the new rule.

Background

Patricia Shiu, who is the director of OFCCP under the Obama administration, made it clear early in her appointment to OFCCP that one of her major goals was to strengthen EEO and AA requirements related to both individuals with disabilities and protected veterans.² Her focus seemed to be on the lack of measurement in the affirmative action plans in the current regulations, and it became clear that potential revisions would involve new quantitative metrics. The rulemaking process regarding Section 503 started in 2010, with the announcement of proposed rulemaking.³ This was followed up by a more formal notice of proposed rulemaking (NPRM) in December

Correspondence concerning this article should be addressed to Kristen Pryor.

E-mail: kristenpryor06@gmail.com

Address: DCI Consulting Group, 1920 I Street NW, Washington, DC 20006

1. <http://www.dol.gov/opa/media/press/ofccp/OFCCP20131578.htm>

2. Protected veterans include newly separated veterans (3 years from date of discharge), disabled veterans, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran.

3. <http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0001>

2011, where OFCCP had more specific proposals for evaluation.⁴ This NPRM led to a substantial amount of public comment, some of it controversial.

In January 2012, Congressman John Kline, chairman of the Committee on Education and the Workforce, and Congressman Phil Roe, chairman of the Subcommittee on Health, Employment, Labor, and Pensions wrote a letter to then-Secretary of Labor Hilda Solis requesting a 90-day extension of the public comment period. Three major concerns were addressed in the letter:

- Federal contractors would be required to establish a 7% hiring goal for disabilities for the first time, which raised the question of “the legal authority under Section 503 permitting OFCCP to establish a numerical hiring standard,”
- Federal contractors would be required to “ask job applicants to self-identify as disabled” pre-offer, which, according to the letter, conflicted with ADA statutory language prohibiting employers “from asking disability-related questions before an offer of employment has been made.” In addition, the letter noted the need for accuracy in the self-identification and disclosure in the job application process “has the potential to create more problems than solutions.”
- The level of potential burden associated with the “NPRM’s myriad new paperwork and recordkeeping requirements,” noting that this contradicts President Obama’s call in January 2011 for reduced paperwork and also creates “a burden for employers with questionable benefits for individuals with disabilities.”

The public comment period was only extended for 14 days, and little was heard between January 2012 and August 2013,

when Vice President Biden and the U.S. Department of Labor announced the two final rules. Importantly, there were major changes made to proposed Section 503 revisions based on public feedback. That is another story for another time, but it was reassuring to know that the public comment process worked to some extent. In the next section we discuss what made it into the final version of the proposed 503 revisions.

Who Has to Do What?

Federal contractors and subcontractors with at least \$10,000 in government contracts have had several obligations related to employment of individuals with disabilities since the inception of the Act. These have included obligations to not discriminate, engage in outreach and recruitment, and provide reasonable accommodations. Nondiscrimination obligations have specified that a test may not be used to screen out individuals with disabilities, unless the test is demonstrated to be job related and consistent with business necessity. In addition, contractors have been required to provide reasonable accommodations to qualified individuals with disabilities, unless that accommodation would pose an undue hardship or a direct threat to the individual or others.

Federal contractors and subcontractors with at least 50 employees and at least \$50,000 in government contracts have additional requirements, including a written affirmative action plan for each establishment, updated annually. This section of the regulation requires that contractors invite employees to inform the organization if they believe they are covered under the Act and wish to benefit under the affirmative action program (postoffer only). Employees should be informed that they may update their status with the employer at any time. In addition, organizations meeting the 50/\$50,000 threshold are required to conduct a periodic review of personnel processes and a periodic review of the physical and mental job qualification requirements of positions to ensure that they are not

4. http://www.dol.gov/ofccp/regs/compliance/faqs/Section503_NPRM_faq.htm

creating artificial barriers to employment of individuals with disabilities. The regulation also requires these organizations to train personnel on the organization's obligations under this Act. Several additional obligations surrounding policy statements, outreach and recruitment efforts, and audit and reporting systems are included as well but are outside the scope of this response. The full current regulations can be found in § 41 CFR 60-741.

Recent History

In practice, most federal contractors and subcontractors have been engaged in a paperwork exercise to record outreach and recruitment efforts and annually update a written narrative. The majority of citations for violations relating to the Act have been for recordkeeping (i.e., not having an affirmative action policy statement, not posting where/when the plan is available for employee review) or for outreach and recruitment (i.e., not having enough documentation of efforts to attract individuals with disabilities). Occasionally contractors have been cited for noncompliance with accessibility requirements (i.e., lack of accessible restrooms and/or entryways) even though that is not actually the jurisdiction of the OFCCP (this has increased in the past year). With the development of the new regulations has come some additional focus on the disability requirements, though in some cases the new focus is attempting to enforce the regulations that are not yet in effect (or were dropped from the final new regulations entirely).

A Primer on the New Regulations

The proposed regulations included several new requirements, a few of note include requiring contractors to annually solicit the disability status of all employees, requiring annual review of personnel processes, and requiring annual review of the physical and mental job qualifications of all positions. Other proposed aspects included requiring contractors to consider individuals with

disabilities for all positions for which they may have been qualified, requiring written agreements with outreach sources, and including a subgoal for employment of severely disabled individuals.

Beginning March 24, 2014 the new, final regulations will be effective. The proposed requirements listed previously were largely edited or removed. The updated regulations will still require that federal contractors and subcontractors who meet the 50/\$50,000 threshold begin to solicit pre-offer, post-offer, and employee disability status. The OFCCP has created a form that federal contractors will be required to use, verbatim, to request this information, and the information must be kept separate and confidential.⁵ Employee disability status will be solicited every 5 years thereafter, with a reminder in between instead of every year. Contractors are still required to "periodically" review mental and physical job qualifications and personnel processes, not annually. Additional new requirements include written assessments of outreach and recruitment efforts as well as a utilization analysis with a goal of 7% employment of individuals with disabilities. Contractors must assess whether they have a gap between the 7% goal and actual employment within each affirmative action job group. If there is a gap, they must strive to eliminate the gap with focused outreach and recruitment efforts, but the regulations specifically state that the goal is not a quota, so not meeting the goal does not automatically mean violating the regulations.

The immediate concern with the new regulations surrounds whether the pre-offer solicitation of disability status will violate the ADA/ADAAA. In 1996, the EEOC provided a letter stating that pre-offer solicitation would be a violation under general AA provisions.⁶ However, this year the EEOC provided a letter stating that when federal contractors are required to

5. http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary_Self-Identification_of_Disability_CC-305_SD_Edit1.24.14.pdf

6. <http://www.dciconsult.com/PDFs/ltrsdisabl.pdf>

solicit this information to comply with a federal regulation, it will not be violating the ADA/ADAAA. It remains to be seen whether this will provide a legal safe haven for contractors if they are challenged.

Santuzzi et al. won't be surprised by additional concerns about the new regulations regarding potential employee skepticism surrounding the requirement to solicit employee disability status, confusion for applicants who will be solicited for disability status multiple times in the application and employment process, and concerns around how to keep this information confidential within existing HRIS (human resources information) and ATS (applicant tracking) systems. Over time, it is likely that employees will become desensitized to the request for this information. Also, those applicants who regularly apply for federal contractor positions will likely begin to expect these additional requests during the application process. An important question remains in whether this additional exposure will serve to reduce or enhance the stigma sometimes associated with self-identifying with a disability and/or receiving an accommodation, as King noted in the CCE public comment.⁷

The 7% utilization goal for contractors is another area that will need to be monitored. Affirmative action programs have a stigma of their own, and requiring contractors to set a goal, even though it is not a quota, may have the effect of discouraging individuals with disabilities from self-identifying (Colella, 2001; Colella, Paetzold, & Belliveau, 2004; Gordon & Rosenblum, 2001; Kravitz et al., 1997; Stone & Colella, 1996). In the same way that some individuals may not self-identify based on a belief that race or gender will be used to select, some individuals with disabilities may not self-identify at the pre-offer stage for this reason. In addition, this goal may increase stigma associated with individuals who have self-identified or are perceived as disabled in the workplace,

if coworkers perceive that the individual was hired solely for disability status not on merit. Training programs for employees as well as management will be absolutely essential to informing the workforce about the organization's policy.

Finally, the new regulations are open to interpretation in what may be considered reasonable for many obligations. The regulations require periodic review of mental and physical job qualifications, but how will "periodic" be interpreted when a contractor is audited, and what will be considered an acceptable review? It is understood that the OFCCP is concerned that individuals with disabilities are being screened out by basic qualifications that do not take into consideration appropriate and reasonable accommodations, but it remains to be seen how this will be audited and/or enforced.

Conclusion

Santuzzi et al. identified a number of important areas for future research related to disability solicitation and accommodation. From a legal perspective, we are in the midst of a major change in disability EEO/AA that has somehow remained under the radar for many. Federal contractors will be moving from a present day context where it is generally illegal to solicit disability status pre-offer to one where it will be required to solicit disability status pre-offer. These and other data will be used to formally develop disability percentiles by job group that will be compared to a general goal, and the consequences of not meeting those goals are unclear. Clearly the times are changing, and the unique challenges for employees and organizations that Santuzzi et al. discuss will have immediate EEO/AA compliance implications in 2014. These areas of research will only become more important as the contemporary reality of EEO/AA disability enforcement matures both in scope and stakes. Stay tuned.

References

7. http://www.whitehouse.gov/sites/default/files/omb/assets/oira_1250/1250_08092013-1_0.pdf

ADA Amendments Act of 2008. (2008). Pub. L. No. 110-325, 122 Stat. 3553.

- Americans With Disabilities Act of 1990. (1991). Pub. L. No. 101-336, 104 Stat. 328.
- Colella, A. (2001). Coworker distributive fairness judgments of the workplace accommodation of employees with disabilities. *Academy of Management Review*, *26*, 100–116.
- Colella, A., Paetzold, R., & Belliveau, M. A. (2004). Factors affecting coworkers' procedural justice inferences of workplace accommodations of employees with disabilities. *Personnel Psychology*, *57*, 1–23.
- Gordon, B. O., & Rosenblum, K. E. (2001). Bringing disability into the sociological frame: A comparison of disability with race, sex, and sexual orientation statuses. *Disability & Society*, *16*, 5–19.
- Kravitz, D. A., Harrison, D. A., Turner, M. E., Levine, E. L., Chaves, W., Brannick, M. T., ... Conard, M. A. (1997). A review of psychological and behavioral research on affirmative action. *The Industrial-Organizational Psychologist*, *34*(3), 141–149.
- Santuzzi, A. M., Waltz, P. R., Finkelstein, L. M., & Rupp, D. E. (2014). Invisible disabilities: Unique challenges for employees and organizations. *Industrial and Organizational Psychology: Perspectives on Science and Practice*, *7*(2), 204–219.
- Stone, D. L., & Colella, A. (1996). A model of factors affecting the treatment of disabled individuals in organizations. *Academy of Management Review*, *21*, 352–401.