



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AA94

The Federal Sector's Obligation to Be a Model Employer of Individuals With Disabilities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is issuing an Advance Notice of Proposed Rulemaking to invite the public to comment on how it can amend its regulations to clarify the federal government’s obligation to be a model employer of individuals with disabilities.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3046-AA94, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Fax: (202) 663-4114. (There is no toll free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll free numbers).
- Mail: Bernadette Wilson, Acting Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission, 131 M Street, N.E., Washington, DC 20507.
- Hand Delivery / Courier: Bernadette Wilson, Acting Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission, 131 M Street, N.E., Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (“RIN”) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information you provide.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Copies of the received comments also will be available for review at the Commission’s library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5:00 p.m., from [INSERT

DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER] until the Commission publishes the rule in final form.

FOR FURTHER INFORMATION CONTACT: Christopher Kuczynski, Assistant Legal Counsel, or Aaron Konopasky, Senior Attorney-Advisor, at (202) 663-4637 (voice) or (202) 663-7026 (TTY). (These are not toll free numbers.) Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663-4191 (voice) or (202) 663-4494 (TTY).

SUPPLEMENTARY INFORMATION: Section 501 of the Rehabilitation Act of 1973, as amended (“section 501”),¹ requires both nondiscrimination and affirmative action with respect to federal employees and applicants for federal employment who are individuals with disabilities. It provides specifically that the standards used to determine whether a federal agency² has discriminated against an individual with a disability “shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 . . . as such sections relate to employment.”³ It also requires federal agencies to maintain, update annually, and submit to the Commission an “affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities.”⁴

¹ 29 U.S.C. 791.

² Section 501 applies to “each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution.” 29 U.S.C. 791(b). For convenience, this Notice uses the term “federal agency” or “agency” to mean any federal entity covered by Section 501.

³ 29 U.S.C. 791(g).

⁴ 29 U.S.C. 791(b).

Commission regulations implementing section 501 reiterate that federal agencies are prohibited from discriminating against individuals with disabilities under Americans with Disabilities Act (“ADA”) standards, and further clarify that 29 CFR part 1630 is intended to set forth those standards.⁵ Additionally, the section 501 regulations provide that the federal government “shall be a model employer of individuals with disabilities.”⁶ However, other than requiring federal agencies to “give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities,”⁷ the section 501 regulations do not explain what this obligation means or how it relates to agencies’ nondiscrimination or affirmative action obligations.

The Commission proposes to revise its regulations in 29 CFR part 1614 to include a more detailed explanation of the model employer obligation. Before it publishes a proposed regulation, the Commission seeks comments from members of the public on how further regulation by the Commission may assist the federal government in meeting this obligation.

Need for the Rule

Although Commission regulations already contain a detailed explanation of the standards for determining whether an agency has violated section 501’s nondiscrimination provisions,⁸ and of the process by which those provisions may be enforced,⁹ they do not explain what the model employer obligation entails. Instead, the

⁵ 29 CFR 1614.203(b).

⁶ 29 CFR 1614.203(a).

⁷ Id.

⁸ 29 CFR pt. 1630.

⁹ See 29 CFR pt. 1614.

Commission has, separate from the section 501 implementing regulations, required agencies to undertake actions related to employment of individuals with disabilities in addition to those required as a matter of nondiscrimination. For example, 29 CFR 1614.102 imposes certain minimum standards for federal equal employment opportunity programs, and Management Directive 715 (“MD-715”)¹⁰ and its accompanying materials¹¹ provide some guidance on how to uncover and eliminate barriers to employment faced by individuals with disabilities. However, 29 CFR 1614.102 does not address the specific obligation of federal agencies to be model employers of individuals with disabilities. The Commission is concerned that, without additional explanation about what it means to be a model employer of individuals with disabilities, federal agencies may not fulfill their obligations under section 501 of the Rehabilitation Act.

Authority

All responsibility for the administration and enforcement of equal opportunity in federal employment is vested in the Commission.¹² The Commission is authorized under 29 U.S.C. 794a(a)(1) to issue rules, regulations, orders, and instructions pursuant to section 501.¹³

¹⁰ Management Directive 715, U.S. Equal Emp’t Opportunity Comm’n (Oct. 1, 2003), <http://www.eeoc.gov/federal/directives/md715.cfm>.

¹¹ See, e.g., Instructions to Federal Agencies for Equal Employment Opportunity Management Directive 715 (EEO MD-715), U.S. Equal Emp’t Opportunity Comm’n, <http://www.eeoc.gov/federal/directives/md715instruct.cfm> (last modified Dec. 12, 2008); Frequently Asked Questions About Management Directive MD-715, U.S. Equal Emp’t Opportunity Comm’n, http://www.eeoc.gov/federal/directives/qanda_md715.cfm (last visited Dec. 16, 2013).

¹² See E.O. 11478, 34 FR 12985 (1969); Reorg. Plan No. 1 of 1978, 43 FR 19807 (1978); E.O. 12144, 44 FR 37193 (1979); E.O. 12106, 44 FR 1053 (1979).

¹³ 29 U.S.C. 794a(a)(1) (incorporating the remedies, procedures, and rights set forth in 42 U.S.C. 2000e-16, including the EEOC’s right to “issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilit[y]” to enforce the law, codified at 42 U.S.C. 2000e-16(b)).

Request for Comments

EEOC is seeking public comment on the following:

1. What barriers do individuals with disabilities face in the federal recruitment and hiring process? For example, are there specific job qualifications that frequently exclude individuals with disabilities from federal jobs they can perform? What kinds of regulatory requirements, other than the existing requirement not to discriminate based on disability, might effectively address these barriers?

2. Would requiring federal agencies to adopt employment goals for individuals with disabilities help them to become model employers of individuals with disabilities? What are the advantages and disadvantages of requiring federal agencies to adopt employment goals? How and what information should be used to analyze the benefits and costs of such a requirement?
3. If goals are adopted—
 - a. How should the goals be set? For example:
 - i. Should an agency's goal be to have a workforce that reflects the availability of individuals with disabilities in the national labor pool, to increase the number of individuals with disabilities it employs by a certain amount each year, or to have its new hires reflect the availability of qualified individuals with disabilities in the applicant pool? How should the goal(s) account for people with disabilities who are not participating in the labor force, or the extent to which people with disabilities in the labor pool are qualified for agency positions?
 - ii. Should the regulations give federal agencies the option of either meeting a uniform goal(s) set by EEOC or meeting a goal(s) which they set after considering factors enumerated in the regulations? What are the advantages and disadvantages of this approach, and what factors are most relevant for establishing goals?

- iii. Would information about the number of federal employees who have self-identified as individuals with disabilities on the Standard Form 256 (SF 256)¹⁴ and in the most recent Federal Employee Viewpoint Survey¹⁵ be helpful in establishing goals for the employment of people with disabilities? The Commission has recently added questions about disability to the form used by federal agencies to collect demographic information on job applicants.¹⁶ Could data collected using that form, as revised, be used to set goals? What are the advantages and disadvantages of relying on these data? What other data are available?
- iv. Should the goal(s) be applied to specified job categories, GS, or SES levels, or applied across federal agencies' workforces?
- b. Which types of disabilities should count toward fulfillment of the goal(s), and why? For example, should there be separate goals for individuals with disabilities as defined by the Rehabilitation Act and individuals with the most significant disabilities (known in federal employment as "targeted disabilities")?

¹⁴ SF 256 is a form used by federal agencies to invite employees to identify themselves as individuals with disabilities. See Standard Form 256, U.S. Office of Pers. Mgmt. (July, 2010), http://www.opm.gov/forms/pdf_fill/sf256.pdf.

¹⁵ The survey, which measures federal employees' perceptions of their employers, invites respondents to indicate whether they have disabilities. See Data, Analysis & Documentation, U.S. Office of Pers. Mgmt. (July, 2010), <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/employee-surveys/#url=Governmentwide-Results> (explaining the history and purpose of the survey, and providing a link to reports summarizing survey results).

¹⁶ See Demographic Information on Applicants, OMB No. 3046-0046, U.S. Equal Emp't Opportunity Comm'n (approved Feb. 10, 2014), http://www.eeoc.gov/federal/upload/Applicant_Tracking_Form_2-19-2014-2.pdf.

- c. What should an agency do to determine whether the goals have been met?

For example, should it rely solely on voluntary self-disclosure through SF 256 and the form used by federal agencies to collect demographic information on job applicants? Or should it also, for example, consider individuals who have requested reasonable accommodation or entered the workforce through the Schedule A excepted hiring authority for “persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities”?¹⁷

- d. Should there be consequences for federal agencies that fail to meet the goals?

If so, what should they be?

4. Are there specific hiring policies and practices other than, or in addition to, establishing goals that should be part of the regulation for being a model employer of individuals with disabilities? For example, should the proposed model employer regulation require agencies to work with entities specializing in the placement of individuals with disabilities, such as state vocational rehabilitation agencies or the Department of Labor’s Office of Workers’ Compensation Programs; to interview all qualified job applicants with disabilities; to assign additional “points” to qualified applicants with disabilities; to subject their qualification standards (including safety requirements) to internal or external review to identify unnecessary barriers to people with disabilities; to include certain information about affirmative action for individuals with disabilities in their job advertisements; to observe certain guidelines for determining the essential functions of the job; or to engage in additional, targeted

¹⁷ See 5 CFR 213.3102(u); see also [Schedule A Hiring Authority, U.S. Office of Pers. Mgmt., https://www.opm.gov/policy-data-oversight/disability-employment/hiring/#url=Schedule-A-Hiring-Authority](https://www.opm.gov/policy-data-oversight/disability-employment/hiring/#url=Schedule-A-Hiring-Authority).

outreach? Commenters suggesting that specific policies or practices be included in the proposed regulation are encouraged to include information about the benefits and costs of the suggested policy or practice.

5. Are there any policies or practices related to retention, inclusion, and advancement of federal employees with disabilities, other than policies and practices that are already required by EEOC regulations, that a federal agency should be required to adopt to become a model employer of individuals with disabilities? For example, should the proposed model employer regulation require agencies to have reasonable accommodation procedures meeting certain standards, or to take certain remedial actions if they fail to achieve roughly equal average levels of compensation for employees with and without disabilities? Are there particular policies related to travel, technology, or security measures that could eliminate systemic barriers to federal employment of people with disabilities? Should agencies be required to gather feedback regarding their efforts to retain, include, and advance employees with disabilities on an ongoing basis, for example by convening roundtables with managers or conducting exit interviews with individuals with disabilities when they leave the agency? Please be as specific as possible about what the proposed new regulation should require. You are encouraged to provide information about the benefits and costs of the suggested policy or practice.
6. Are there any policies or practices related to reasonable accommodation, other than policies and practices that are already required by EEOC regulations, that federal agencies should be required to adopt to become model employers of individuals with disabilities? For example, should the proposed model employer regulation require

agencies to establish certain time limits for the provision of accommodations; observe certain limitations on the collection of medical information during the interactive process; or adopt certain methods of funding, or budgeting for, reasonable accommodations, such as a centralized funding mechanism that would avoid charging individual program budgets for the cost of accommodations, or a centralized contracting vehicle or contract authority to streamline the accommodation process? Again, please be as specific as possible about what sorts of policies or practices the proposed new regulation should require. You are encouraged to provide information about the benefits and costs of the suggested policy or practice.

7. What requirements, other than those discussed above and the existing requirement not to discriminate based on disability, should be included in the proposed regulation to better clarify what it means to be a model employer of individuals with disabilities?

The Commission encourages any interested party to comment on one or more of these questions, and to provide any other relevant information, including information about the benefits and costs of suggested policies, practices, or general approaches.

Dated: May 12, 2014

For the Commission

Jacqueline A. Berrien,

Chair

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