

**Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act, as Amended**

A Proposed Rule by the [Federal Contract Compliance Programs Office](#) on [07/23/2010](#)

**Department of Labor**

**Office of Federal Contract Compliance Programs**

1. 41 CFR Part 60-741
2. RIN 1250-AA02

**AGENCY:**

Office of Federal Contract Compliance Programs, Labor.

**ACTION:**

Advance notice of proposed rulemaking.

**SUMMARY:**

The Office of Federal Contract Compliance Programs (OFCCP) is issuing this Advance Notice of Proposed Rulemaking (ANPRM) in order to invite the public to provide input on how OFCCP can strengthen the affirmative action requirements of the regulations implementing section 503 of the Rehabilitation Act of 1973, as amended (Section 503). Strengthening affirmative action requirements will help increase the employment opportunities of people with disabilities in the Federal contractor sector.

**DATES:**

All comments must be received on or before September 21, 2010.

**ADDRESSES:**

You may submit comments, identified by RIN number 1250-AA02, by any of the following methods:

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

- *Mail and Hand Delivery/Courier:* Barbara J. Bingham, Acting Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room N3422, 200 Constitution Avenue, NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-0102 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available Online at <http://www.regulations.gov> and for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. People needing assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Advance Notice of Proposed Rulemaking will be made available in the following formats: Large print, Braille, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this Advance Notice of Proposed Rulemaking in an alternate format, contact OFCCP at the telephone numbers or address listed above.

#### **FOR FURTHER INFORMATION CONTACT:**

Barbara J. Bingham, Acting Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693-0102 (voice) or (202) 693-1337 (TTY).

#### **SUPPLEMENTARY INFORMATION:**

Federal contractors covered by section 503 of the Rehabilitation Act of 1973, as amended (Section 503) <sup>[1]</sup> are obligated to ensure equal employment opportunity for people with disabilities. In addition, Section 503 requires Federal contractors to take affirmative action to employ and advance in employment individuals with disabilities. The existing Section 503 regulations require that covered contractors:

- (1) Employ nondiscriminatory employment practices;
- (2) Provide reasonable accommodations to qualified job applicants and employees with disabilities;
- (3) After a job offer is extended but before employment begins, invite job applicants to voluntarily and confidentially self-identify as to whether or not they have a

disability in order to benefit from any affirmative action programs covered contractors may have;

(4) Maintain personnel and employment records; and

(5) For those contractors and subcontractors with 50 or more employees and a contract of \$50,000 or more, develop and maintain a written affirmative action program (AAP). Further information about the current Section 503 regulatory requirements may be found at [http://www.dol.gov/ofccp/regs/compliance/ca\\_503.htm](http://www.dol.gov/ofccp/regs/compliance/ca_503.htm).

Section 503 regulations promote equal employment opportunity for applicants and employees with disabilities, yet the percentage of people with disabilities *not* in the labor force as well as the unemployment rate of people with disabilities are high. According to recent data from the U.S. Department of Labor's Bureau of Labor Statistics, the percentage of people with disabilities in the labor force in March 2010 was 22.5 compared with 70.2 for persons with no disability. The unemployment rate for those with disabilities was 13.9 percent, compared with 10.1 percent for persons with no disability, not seasonally adjusted. Regulations implementing Section 503 have not undergone a comprehensive review and revision since May 1, 1996. It is time for OFCCP to reexamine its affirmative action provisions under Section 503 to make them more effective and to help ensure that more people with disabilities are employed and are given the opportunity to advance in employment in the Federal contracting labor force.

Determining how covered contractors can effectively increase employment opportunities for people with disabilities requires an understanding of the range of successful evidence-based practices employers use to recruit, hire, retain, and advance people with disabilities in employment. Among the key factors in measuring progress in this area is the existence of current and discrete statistical information that is valid and reliable. In an effort to enhance the affirmative action provisions under Section 503, OFCCP is considering adopting measures similar to those required under the [Executive Order 11246](#) program for supply and service contractors. Under that program, covered contractors are required, among other things, to compare the percentage of women and minorities in each job group at an establishment with the availability of women and minorities to work in the job group. Availability is a percentage estimate of those women and minorities who are qualified for employment in the job group within the relevant recruitment area. Contractors typically rely on Census Bureau data, state employment service data, and college graduation data in developing their availability factors.

Before publishing a proposed regulation, OFCCP seeks comments from members of the public on the issues under consideration to assist with making informed decisions regarding proposed regulatory changes. As a first step towards this goal, OFCCP conducted a Web based listening session and three Town Hall listening sessions in Chicago, San Francisco and New Orleans offering information on how interested stakeholders could participate in the official rulemaking process, and providing an opportunity for stakeholders to offer suggestions and recommendations for strengthening the equal employment opportunity and affirmative action requirements of Section 503. In developing a notice of proposed rulemaking to amend the Section 503 regulations, OFCCP will consider comments elicited in those listening sessions and information provided in response to this ANPRM.

The second step towards publishing a notice of proposed rulemaking is to request comments and data from the public on the following issues.

### **Request for Comments**

OFCCP is seeking public comment on the following inquiries:

1. How can the affirmative action requirements of Section 503 be strengthened to measurably increase employment opportunities of covered contractors for individuals with disabilities? If available, include examples or information illustrating the effectiveness of the suggested new requirements.
2. What measures have contractors and subcontractors taken to fulfill the current affirmative action requirements of Section 503? How much did these measures cost?
3. What barriers currently impede Federal contractors from hiring people with disabilities?
4. Are there changes that could be made to the existing language on permissible qualifications standards <sup>2</sup> that would better ensure equal employment opportunities for individuals with disabilities?
5. If OFCCP were to require Federal contractors to conduct utilization analyses and to establish hiring goals for individuals with disabilities, comparable to the analyses and establishment of goals required under the regulations implementing [Executive Order 11246](#), what data should be examined in order to identify the appropriate availability pool of such individuals for employment?

6. Would the establishment of placement goals for individuals with disabilities measurably increase their employment opportunities in the Federal contractor sector? Explain why or why not.
7. What experience have Federal contractors had with respect to disability employment goals programs voluntarily undertaken or required by state, local or foreign governments?
8. What specific employment practices have been verifiably effective in recruiting, hiring, advancing, and retaining individuals with disabilities?
9. To what extent does workplace flexibility, including flexibility in work schedules, as well as job-protected leave, impact recruitment and retention of individuals with disabilities?
10. Has training of employees and/or managers been effective in increasing advancement and/or retention of individuals with disabilities? If so, how?
11. Federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer. The collection of this information allows contractors to monitor the impact of their employment practices by race and gender and to assess progress in meeting their affirmative action goals. Existing Section 503 regulations require contractors to invite applicants to voluntarily and confidentially self-identify as a person with a disability after making an offer of employment but before the applicant begins employment. ([See 41 CFR 60-741.42\(a\)](#).) Would amending the Section 503 regulations to require contractors to invite all applicants to voluntarily and confidentially self-identify if they have a disability prior to an offer of employment enhance a federal contractor's ability to more effectively monitor their hiring practices with respect to applicants with disabilities? Note that a Section 503 regulation requiring contractors to invite voluntary and confidential self-identification as an applicant with a disability pre-offer for affirmative action purposes would not violate the Americans with Disabilities Act. [29 CFR 1630.15\(e\)](#); Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC Notice Number 915.002, October 10, 1995).
12. How can linkage agreements between Federal contractors and organizations that focus on the employment of individuals with disabilities be strengthened to increase effectiveness? Do linkage agreements have better outcomes when higher level company officials are responsible for their implementation/execution? Include examples of cooperative agreements between employers and disability or

community recruitment organizations that have been helpful in hiring persons with disabilities.

13. What impact would result from requiring that Federal contractors and subcontractors make information and communication technology used by job applicants in the job application process, and by employees in connection with their employment fully accessible and usable by individuals with disabilities? <sup>3</sup> What are the specific costs and/or benefits that might result from this requirement?

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

15. *Regulatory Flexibility Act*—Consistent with the Regulatory Flexibility Act, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations and small governmental jurisdictions with populations under 50,000. In response to this ANPRM, the Department encourages small entities to provide data on how additional requirements under Section 503 may impact them.

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

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

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

OFCCP encourages any interested party to comment on these questions.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

#### **Footnotes**

1. Covered contracts or subcontracts include those that exceed \$10,000, and contracts or subcontracts for indefinite quantities, unless the purchaser has reason to believe that the cost in any one year will not exceed \$10,000.

[Back to Citation](#)

2. [41 CFR 60-741.44b & c](#)—Required contents of affirmative action programs. To view, go to [http://www.dol.gov/dol/allcfr/Title 41/Part 60-741/41CFR60-741.44.htm](http://www.dol.gov/dol/allcfr/Title%2041/Part%2060-741/41CFR60-741.44.htm).

[Back to Citation](#)

3. For example, requiring that contractors ensure that application and testing kiosks are fully accessible and usable by individuals with disabilities, and that contractors strive to ensure that their Internet and Intranet Web sites satisfy the United States Access Board's accessibility standards for technology used by the Federal Government and subject to section 508 of the Rehabilitation Act.

[Back to Citation](#)

[[FR Doc. 2010-18104](#) Filed 7-22-10; 8:45 am]

BILLING CODE 4510-CM-P