

October 24, 2013

VIA ELECTRONIC MAIL TO: OIRA_submission@omb.eop.gov

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Office of Management and Budget
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Re: **Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Proposed Voluntary Self-Identification of Disability Form CC-305 (OMB Control Number 1250-0005)**

Dear Ms. Aguilar:

The Equal Employment Advisory Council ("EEAC") is pleased to file these comments on the Office of Federal Contract Compliance Programs' ("OFCCP") proposed *Voluntary Self-Identification of Disability Form CC-305* (OMB Control Number 1250-0005). Our letter is submitted in response to the Department of Labor's ("DOL") September 24, 2013 *Federal Register* notice stating that Form CC-305, and the other information collection requirements ("ICR") established by the agency's final rule implementing the nondiscrimination and affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 ("Section 503"),¹ have been submitted to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act ("PRA"). 78 Fed. Reg. 58682.

When that new rule's provisions take full effect, covered federal contractors and subcontractors will be required to invite all job applicants, new hires, and incumbent employees to self-identify their disability status "using the language and manner prescribed" by OFCCP. Form CC-305 is the agency's proposed "language and manner" for these invitations – a single form federal contractors will be required to provide to: (1) all job applicants upon their application; (2) all applicants (again) who receive a job offer but before they start work; and (3) all incumbent employees at five year intervals.

OFCCP's *Federal Register* notice and supporting statement for this ICR indicate that Form CC-305 will be completed more than 110 million times in its first year of implementation,

¹ 29 U.S.C. § 793.

more than 90 million times each year in its second through fifth years of implementation, and more than 110 million times again in its sixth year. In its first six years of implementation, Form CC-305 is estimated to be completed more than half a *billion* times.

Given the obvious sensitivity surrounding the nature and volume of the information and data to be collected by this form, we respectfully urge OMB to give due consideration to EEAC's comments below. While EEAC supports *the concept* of a single disability self-identification form for all three invitations, our comments identify several practical and legal concerns with the form as proposed, and offer alternatives aimed at both accomplishing OFCCP's objectives and eliminating inconsistencies between the proposed form, OFCCP's Section 503 regulations, and the Americans with Disabilities Act, as amended ("ADA").²

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership includes approximately 300 of the nation's largest private-sector corporations, who collectively employ more than 19 million workers in the United States alone. The vast majority of EEAC's member companies are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. As major federal contractors and subcontractors, therefore, our members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements efficiently and effectively accomplish their underlying policy objectives, including those that seek to improve the employment situation for qualified persons with disabilities.

BACKGROUND

OFCCP's proposed Form CC-305 form is an instrument designed to implement portions of the agency's final rule revising the nondiscrimination and affirmative action obligations of federal contractors and subcontractors under Section 503 of the Rehabilitation Act. Specifically, OFCCP's final rule requires covered federal contractors and subcontractors to solicit disability information from applicants and employees at three different stages of the employment process: (1) pre-offer, whenever an applicant applies or is considered for employment; (2) post-offer (again), at any time after the offer of employment, but before the applicant begins his or her job duties; and (3) for current employees, within the first year the contractor becomes subject to the final rule and at five year intervals thereafter. These data must then be maintained by the contractor in what OFCCP refers to as a "data analysis file," and made available to the agency upon request. The final Section 503 rule mandates that all three collections be accomplished "using the language and manner prescribed by [OFCCP]."

² 42 U.S.C. §§ 12101, et seq.

As a threshold matter, it is important to note that EEAC and other interested stakeholders have not yet had an opportunity to comment to OFCCP on the proposed Form CC-305. Neither OFCCP's Section 503 Notice of Proposed Rulemaking ("NPRM"), 76 Fed. Reg. 77056, nor its accompanying ICR request to OMB (RIN 1250-AA02), contained any reference to the instant ICR or gave any indication that OFCCP would propose a single form for all three of these mandatory disability status invitations. Although the NPRM included what OFCCP referred to as an "example" of *pre-offer* invitation language, on which EEAC and other stakeholders offered comments, the instant ICR is the first opportunity for EEAC and other interested parties to comment on the proposed content and use of a single disability self-identification form that would be administered (1) pre-offer, (2) post-offer pre-employment, and (3) during employment.

That being said, EEAC supports *the concept* of a single disability self-identification form for all three invitations, as long as it is: (1) consistent with the final rule under which it is administered; (2) does not conflict with any provision of the ADA, as amended; (3) allows recipients to make a *voluntary and informed* decision as to whether to self-identify as a person with a disability; and (4) is implemented in a practical and efficient manner that reflects the ways in which federal contractors currently recruit, hire, and employ qualified individuals with disabilities.

While Form CC-305 as drafted does not accomplish these goals, we respectfully submit that a modified Form CC-305 reflecting the recommendations we offer below would.

RECOMMENDATIONS FOR REVISIONS TO FORM CC-305

OFCCP's proposed Form CC-305 is a one-page document containing three sections: (1) a section that explains why the recipient is receiving the form; (2) a section that defines "disability" and invites the recipient to self-identify in one of two disability status categories; and (3) a section informing the recipient about reasonable accommodations and inviting the recipient to inform the employer if such an accommodation is required. As addressed in the comments that follow, each section presents unique practical and legal concerns that we respectfully urge OMB to carefully examine and resolve before approving Form CC-305 for implementation.

Why Am I Receiving This Form?

In view of the fact that Form CC-305 will be administered more than half a billion times in its first six years of implementation, the question asked in the first section of the form is an appropriate one indeed.³

³ OFCCP estimates that there are 211,287 covered federal contractor establishments in the United States, each of which the agency expects to have an average of only 15 job vacancies per year. The agency further estimates that there will be a total of only 24 job applicants per vacancy, resulting in approximately 76 million Forms CC-305 being administered to job applicants in the United States every year. These figures exclude the separate

EEAC agrees that all recipients of Form CC-305 should be presented with a simple, straightforward explanation as to why the employer administering the form is seeking highly sensitive information about the individual's status as a person with a disability, and we support OFCCP's efforts to provide this explanation. To be sure, lengthy citations to statutes, amendments, and regulations could make the form difficult to understand. To the agency's credit, the proposed form's simple statement that the employer is a federal contractor subject to federal law requiring the invitation is straightforward, and sets the appropriate tone by immediately and directly answering the question posed, "Why Am I Receiving This Form?"

We understand that the "short answer" to this question is simply "federal law requires it." As discussed in more detail below, however, this short answer is unlikely to satisfy the prevailing concerns we expect that most recipients of the form will have. Based on discussions with our member companies, we believe the presumptive concerns of recipients can be expressed in the following questions:

1. Do I have to provide any information at all, and will providing (or not providing) this information harm me in any way?
2. How will this employer use the information I provide, and who will have access to my information?

Although partial answers to these questions can be found in the proposed form, we believe they can be addressed more directly, clearly, and thoroughly with a few modifications.

Do I have to provide any information at all, and will providing (or not providing) this information harm me in any way?

The proposed form contains a clear and concise statement, at the beginning of its second paragraph, that "submission of information is voluntary." This statement, however, conflicts with the form's two "yes or no" options for responding, which we discuss in greater detail below. Further, the very next statement addresses the issue of whether the information the individual provides will subject them to adverse treatment, but it does not make clear that the recipient may elect not to respond to the invitation at all, and that such a decision also will not result in adverse treatment. This is important for two reasons.

First, although EEAC agrees that individuals should be encouraged to self-identify, it is important to avoid any perceived pressure to do so. Indeed, one of the laudable goals of OFCCP's affirmative action program for individuals with disabilities is to change how the public thinks about the role of individuals with disabilities in the workplace and to remove the stigma

and fear often associated with self-identification and requests for reasonable accommodation. Given the inherently private and confidential nature of a person's disability, no one should ever feel that they are being required to disclose their disability status. The form therefore should clearly state that no unfavorable consequences will follow a person's choice not to respond.

Second, recipients of Form CC-305 must clearly understand that there are no penalties for "changing their answer" over time. The proposed form addresses the scenario in which someone becomes disabled at a later time, but it does not address the ancillary situation in which an individual's disability is successfully treated. While such an individual may still meet the definition of disability under the "history or record of" prong (and thus retain legal protection under the ADA and Section 503), it is important that the form provide such individuals with the option to state that they do not have a disability. Without this change, the form runs the risk of fostering the notion that, once a person identifies as an individual with a disability, he or she will forever be considered disabled for whatever employment-related purposes the form and its data are used.

How will this employer use the information I provide, and who will have access to my information?

In addition to clearly informing each recipient that his or her response is voluntary and that responses will not be used against them, Form CC-305 also must clearly explain *how* the information will be used once it has been provided to the employer, and also *who* will have access to the data the form collects.

Regarding the question of how the information will be used, the proposed form states that employers will "use this information to measure the effectiveness of [their] outreach, recruitment, and other employment practices." In fact, federal contractors will use the information collected by the form to measure the effectiveness of their equal employment and affirmative action programs, and government officials will use the information to evaluate federal contractors' compliance with federal law.

Regarding the question of who will have access to the form's information, OFCCP's proposal states that the information will be kept "confidential." The form does not, however, identify *to whom* the person's disability status may be disclosed. Under OFCCP's regulations, disability status may be disclosed only to certain individuals under certain conditions. This should be clearly explained in Form CC-305.

To address these concerns, EEAC recommends that Form CC-305 incorporate the language below, portions of which have been taken directly from OFCCP's existing sample disability self-identification form⁴ and which also mirror the language found in the ADA.⁵

⁴ 41 C.F.R. § 60-741 app. B.

⁵ 42 U.S.C. § 12112(d)(2).

This employer is a federal contractor or subcontractor. The federal government requires federal contractors and subcontractors to invite job applicants, new hires, and employees to tell us whether they have a disability (as defined below).

Your submission of disability information is completely voluntary. The information you provide will be used only to measure the effectiveness of our equal employment and affirmative action programs, and by government officials to evaluate our compliance with federal law.

Information you submit about your disability will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of individuals with disabilities, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment; and (iii) government officials engaged in enforcing laws administered by OFCCP or the Americans with Disabilities Act may be informed.

Your response to this form will not be held against you in any way, including whether or not you have responded differently on a previous form.

Finally, there is a factual inaccuracy in OFCCP's proposed Form CC-305 that needs to be corrected. The proposed form states, "Because a person who does not now have a disability may become disabled at a later time, *we are required to invite our employees to self-identify each year.*" (emphasis added) This statement is inconsistent with the provision of OFCCP's final rule requiring federal contractors to administer the self-identification form to incumbent employees at least once every five years. 41 C.F.R. § 60-741.42(c). We submit that the statement is not necessary to the form, but if OFCCP believes it should be included, the frequency must be consistent with OFCCP's regulations.

Self-Identification of Disability

The second section of Form CC-305 poses significant legal and practical issues based on the fact that the form's definition of "disability" is different from the ADA's definition of the term, and recipients' response options do not accurately portray the supposed voluntary nature of the form.

Form CC-305's Definition of "Disability" Does Not Match the ADA

Title I of the ADA prohibits discrimination in employment against a qualified individual on the basis of disability.⁶ The ADA defines "disability" as follows:

⁶ 42 U.S.C. §§ 12111-12117.

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment...⁷

The 2008 ADA Amendments Act (ADAAA), P.L. 110-325 (September 25, 2008), among other things added to the ADA’s definition of “disability” two illustrative lists — one of “major life activities,” and one of “major bodily functions” that also are considered to be major life activities:

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.⁸

Notably, the ADAAA also contained a “conforming amendment” to the Rehabilitation Act of 1973, incorporating by reference the ADAAA’s definition of “disability.” The Rehabilitation Act’s definitions provision now states that:

The term “disability” means—

- (A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or

⁷ 42 U.S.C. § 12102(1).

⁸ 42 U.S.C. § 12102(2).

(B) for purposes of sections 701, 711, and 712 of this title, and subchapters II, IV, V, and VII of this chapter, the meaning given it in section 12102 of title 42.⁹

Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, under which OFCCP obtains its authority, is in subchapter V. Therefore, Section 503 itself also uses the ADA definition of disability.

In contrast, OFCCP's proposed form CC-305 lists "major life activities" and "major bodily functions" as follows:

Major life activities include, but are not limited to: seeing, hearing, eating, walking, standing, sitting, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and performing manual tasks. Major life activities also include the operation of major bodily functions such as: the immune system, skin, normal cell growth, bowel, bladder, neurological, circulatory, cardiovascular, endocrine, hemic (blood), lymphatic, and reproductive functions.

Thus, the form's lists of "major life activities" and "major bodily functions" are not entirely consistent with the same lists found in the ADA, as amended. Rather, the proposed form inexplicably includes some items that are not on the ADA lists (*e.g.*, sitting), and omits some that are (*e.g.*, digestive and respiratory functions). While some of these additions and omissions reflect the revised contents of OFCCP's final Section 503 rule, which incidentally also departs from the corresponding sections of the ADA and Section 503, others do not. To avoid unnecessary confusion, we respectfully submit that Form CC-305 be corrected to include the lists that actually appear in the ADA, and which by reference apply to Section 503.

Internally Inconsistent Definition of Disability

Apart from our concerns regarding the "main" definition section of Form CC-305, the proposed form also contains *internally* inconsistent definitions of "disability."

For example, the third sentence includes a partial definition of disability stating that: "The Federal Government requires contractors and subcontractors to invite job applicants, new hires, and employees to tell us whether they have, or have previously had, a disability." The term is similarly defined again in the check box description, "Yes, I have a disability (or have previously had a disability)." These partial definitions differ slightly from the full definition appropriately provided under the header, "What is a Disability," and could lead to confusion.

Under the header, "What is a Disability," Form CC-305 adds the term "history" to the "record of" prong. Neither the ADA definition nor the OFCCP definition includes the term

⁹ 29 U.S.C. § 705(9).

“history.” Having “previously had” a disability is not precisely the same as having a “history or record of” a disability, but our concerns on this point involve far more than mere semantics. The “history or record of” prong of the definition is meant to protect both individuals who “previously had” a disability and individuals with an erroneous “record of” a disability. EEAC does not believe it is OFCCP’s intent to disenfranchise the latter group. Regardless, defining a critical term differently on the same form, even slightly, is likely to introduce uncertainty when the goal is to be as clear and concise as possible.

EEAC recommends that the form provide one, comprehensive definition of the term disability, mirroring the ADA:

What is a Disability?

A person has a disability if he or she has a physical or mental impairment or medical condition that substantially limits a major life activity, or has a record of such an impairment or medical condition.

Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Major life activities also include the operation of major bodily functions such as: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Pre-Offer Invitations to Self-Identify Continue to Raise ADA Concerns

Despite OFCCP’s assurances, EEAC members remain very concerned about the potential for liability under the ADA for inviting job applicants to self-identify as individuals with disabilities prior to extending them a *bona fide* offer of employment. Under the ADA, it is an act of unlawful discrimination for an employer to inquire, at the pre-offer stage, whether an applicant is an individual with a disability.

The ADA states, as a general rule, that “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment,”¹⁰ and goes on to state that “The prohibition against

¹⁰ 42 U.S.C. § 12112(a).

discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.”¹¹

The ADA expressly forbids an employer from asking whether an applicant is an individual with a disability prior to making a job offer, although the employer may ask if the applicant can perform job-related functions:

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.¹²

Furthermore, section 12112(d)(3) of the ADA provides that the employer lawfully may inquire about disability status *only* after extending an offer.

Prior to the ADA’s enactment, OFCCP required federal contractors under Section 503 to extend *pre-offer* invitations to self-identify disability status in the same manner as race/ethnicity and gender invitations to self-identify under Executive Order 11246. When the ADA was enacted, however, both the Equal Employment Opportunity Commission (“EEOC”), which administers Title I of the ADA, and OFCCP viewed pre-offer invitations to self-identify disability status as unlawful pre-employment medical inquiries unless the contractor: (1) was undertaking affirmative action because of a federal, state, or local law that requires affirmative action for individuals with disabilities, or (2) was using the information voluntarily to benefit specific individuals with disabilities (such as a sheltered workshop). Neither OFCCP nor the EEOC considered coverage under Section 503 to be sufficient to meet the first prong of this exception. Accordingly, OFCCP amended its Section 503 regulations in 1996 to require that federal contractors extend the invitation to self-identify disability status *only after* they had made an offer of employment, in conformance with the ADA. 61 Fed. Reg. 19,336 (May 1, 1996).

With the adoption of the newly revised Section 503 regulations, however, OFCCP has added a requirement that contractors return to the pre-ADA practice of inviting applicants to self-identify as individuals with disabilities prior to extending them an offer of employment. By

¹¹ 42 U.S.C. § 12112(d)(1).

¹² 42 U.S.C. § 12112(d)(2).

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letter of August 8, 2013,¹³ the EEOC's Legal Counsel assured OFCCP that, based on the EEOC's interpretation of the statute, federal contractors can comply with the invitation requirement without violating the ADA.

With all due respect to both agencies, EEAC is concerned that our federal contractor members who comply with OFCCP's pre-offer invitation requirement will now become subject to private lawsuits under the ADA for precisely the same reasons that caused OFCCP to amend its regulations in 1996 in conformance with the ADA. The ADA's express language continues to prohibit pre-offer inquiries, and the EEOC's assurances are based entirely on the agency's regulatory and sub-regulatory interpretations. Moreover, several federal courts of appeals have ruled that a plaintiff need not meet the ADA's definition of "disability" as a prerequisite to filing a suit challenging an unlawful pre-offer inquiry. *See Harrison v. Benchmark Electronics*, 593 F.3d 1206 (11th Cir. 2010), and cases cited. While a federal court might defer to the EEOC's interpretation that the ADA allows federal contractors to extend invitations to self-identify in compliance with the OFCCP's regulations, it is certainly possible that no such deference would be accorded.

Further complicating this issue are the countless situations that will occur every year in which an employer's status as a federal contractor "sunset" or expires. More specifically, many federal contractors will invest hundreds of thousands of dollars designing and implementing systems to administer the pre-offer disability self-identification forms required by this ICR. And for as long as these employers remain covered by OFCCP's rule, such invitations will not, at least according to the EEOC, violate the ADA's clear prohibition against pre-offer medical inquiries.

In reality, however, some companies acquire, lose, and re-acquire federal contractor status on a regular basis. Thus, while the EEOC's August 8, 2013 letter might provide some help to an employer defending itself against a claim alleging that the pre-offer administration of Form CC-305 violates the ADA, the letter will be of little if any help to that employer when it continues to administer the form after its contract has been completed. Few if any federal contractors so closely watch the timing and duration of the performance of their federal contracts that they would be able to quickly turn off (or on) the systems that administer Form CC-305 at the pre-offer stage.

As a practical matter, common sense would suggest that a pre-offer "invitation," one that makes it clear that any response is entirely voluntary, is not an "inquiry" at all, since it does not require an answer. The fact that the OFCCP and EEOC have agonized over this issue for twenty years, however, implies that reasonable people can differ over whether the invitation is in fact a prohibited pre-employment inquiry under the ADA.

¹³ Available on the OFCCP website at http://www.dol.gov/ofccp/regs/compliance/sec503/OLC_letter_to_OFCCP_8-8-2013_508c.pdf.

We acknowledge, however, that OFCCP's revised Section 503 regulations requiring pre-offer invitations to self-identify disability status are now final. Accordingly, we submit that the very real liability potential for making the pre-offer inquiry serves as an additional reason to ensure that OFCCP's disability self-identification form tracks as closely as possible to the ADA and does not add additional risks.

Response Options

The ADA concerns just expressed also reinforce the need to make clear that a recipient's response to the form is *voluntary*. As drafted, however, the form's responses do not permit an individual to either not identify as an individual with a disability, or not respond at all.

Form CC-305 as proposed provides respondents with two options. They may either check the box that states "Yes, I have a disability (or have previously had a disability)," or they may check the box that states "No, I don't wish to identify as having a disability." We respectfully recommend that the response options for Form CC-305 be changed to make the form consistent with OFCCP's underlying regulations, and to enhance the accuracy and utility of the data it is designed to collect.

First, it is both unnecessary and confusing to append the "history or record of" prong to the "Yes" option. This "Yes" option should simply state either "Yes, I have a disability," or "Yes, I have a disability (as defined above)."

Second, our members have told us that OFCCP's phrasing of the "No" option is confusing even to well informed and experienced human resources professionals, expressing the following concerns:

- Individuals might check the "No" option understanding it to mean the opposite of the first "Yes" option, intending to indicate that they do not have a disability.
- Individuals might correctly interpret the "No" option and leave the form blank to indicate they do not have a disability.
- Individuals who have a disability but do not wish to self-identify might misinterpret the "No" option as the opposite of "Yes" and decline to respond by leaving the form blank.
- Individuals might feel pressured to respond when they see only two options, "Yes" and "No," contradicting the statement that providing information is voluntary.

We submit that all of these interpretations are reasonable and likely to generate questions. Equally important, the options as presented could result in an unnecessary number of blank forms with no way to assign meaning to anything but a "Yes" response. Contractors would have

no way of knowing whether an individual left the form blank because he or she forgot to fill it out, or because the respondent intended the “blank” to be their affirmative response. From an enforcement perspective, blank forms would make it difficult for contractors to demonstrate, or for OFCCP to verify, that individuals are receiving the invitations at all.

When we asked our members about how they understood the options presented on OFCCP’s proposed form, many of them stated that they interpreted the “No” option as an “opt-out” reply. But for reasons largely related to their ability to demonstrate compliance with OFCCP-enforced requirements, many of them also told us that they would like the form to be structured in a way that permits them to require individuals to complete it. Adding an “opt-out” option would allow them to do so and enable contractors to demonstrate that individuals are receiving the invitations as required. We are concerned that the “opt-out” option OFCCP has provided is not clear enough for this purpose.

Further, we believe it is important to provide individuals with the option to affirmatively state that they do not have a disability. Such an option can help alleviate any fear that identifying as an individual with a disability is a permanent choice. Accordingly, EEAC recommends that the form include the following three options:

- Yes, I have a disability (as defined above)
- No, I do not have a disability
- I do not wish to respond

These three options are self-explanatory and thorough. They clearly convey the understanding that a disability is not necessarily a permanent state of being, that an individual’s answer can change over time, and that the individual is not required to affirm his or her disability status one way or the other. These three options also enable contractors to require that individuals complete the form without coercing or compelling an individual to self-identify, thus enhancing the utility of the data collection for both the contractor and OFCCP.

Reasonable Accommodation

As proposed, Form CC-305 includes a paragraph under the heading “Reasonable Accommodation” stating:

Federal law requires us to provide reasonable accommodation to qualified individuals with disabilities to ensure equal employment opportunity for all. If, because of your disability, you require a reasonable accommodation such as a change to application *or work procedures*, documents in an alternate format, sign language interpreter, or specialized equipment, please let us know.

(emphasis added). As noted above, the ADA strictly limits what an employer can ask an applicant before making a job offer. In particular, according to the EEOC, while the ADA

permits an employer to ask an applicant whether he or she needs an accommodation for the hiring process itself, it strictly forbids an employer from asking whether an applicant will need a reasonable accommodation to perform the job. *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (EEOC, October 10, 1995).¹⁴ The EEOC's Guidance provides this specific example:

Example: An applicant with no known disability is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need reasonable accommodation to perform this job?"

Rather, the Guidance explains, if (and only if) the employer reasonably believes that the applicant will need reasonable accommodation to perform the functions of the job, the employer may ask certain limited questions, *i.e.* whether the applicant "needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job." The Guidance states that such questions are lawful if (and only if):

- the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability;
- the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
- an applicant has voluntarily disclosed to the employer that s/he needs reasonable accommodation to perform the job.

None of these circumstances is present when a contractor extends to applicants the invitation to self-identify as an individual with a disability for purposes of compliance with Section 503. The contractor will not know if any particular applicant has a disability, and thus cannot reasonably believe that any particular applicant will need a reasonable accommodation. Accordingly, we believe that asking every applicant the additional question of whether he or she needs an accommodation "such as a change to . . . work procedures," as does OFCCP's proposed form, likely would violate the ADA. Moreover, it is very unlikely that the EEOC would, or could, provide an opinion letter stating otherwise.

Indeed, under OFCCP's former Section 503 regulations, the sample invitation to self-identify (Appendix B) stated explicitly that the "reasonable accommodation" language should *never* be used pre-offer. That sample form began with this unmistakable warning:

¹⁴ Available at <http://www.eeoc.gov/policy/docs/preemp.html>.

NOTE: When the invitation to self-identify is being extended prior to an offer of employment, as is permitted in limited circumstances under § 60-741.42(a), paragraph 2(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

41 C.F.R. Pt. 60-741, App. B (2012).

Nothing in the ADA has changed that allows contractors to ask pre-offer whether applicants would need an accommodation to do the job. Accordingly, if OFCCP is going to require that contractors use the same form for extending pre-offer invitations to self-identify as they use for extending post-offer invitations, then the "reasonable accommodation" language must be removed from the form.

If OFCCP has included the "reasonable accommodation" language in the proposed form out of a concern that contractors otherwise would neglect to inform applicants and employees of the availability of reasonable accommodations, EEAC respectfully submits that this concern is misplaced. First, after more than 20 years of experience under the ADA and nearly 40 under the Rehabilitation Act, contractors know that information about reasonable accommodations, and the processes by which such accommodations can be requested, should be clearly communicated to applicants (with respect to the application process) and to employees. Second, OFCCP already has mechanisms in place to audit and enforce its own requirements for accessibility. Third, any such concern simply cannot override the fact that asking OFCCP's proposed accommodation question at the pre-offer stage appears to violate the ADA.

Moreover, the reasonable accommodation language in the form, ending with the generic request to "let us know," will cause substantial confusion at all three stages of the process. Since contractors will be required to use the "language and manner prescribed" by OFCCP, they presumably will not be permitted to change the form to make it more useful, for example, by adding instructions as to how an applicant or employee should go about making an accommodation request. Particularly for large employers, who likely will be incorporating OFCCP's invitation language into the online application process, "let us know" gives the individual no information whatsoever as to what to do should he or she wish to request an accommodation.

For all of these reasons, EEAC strongly recommends that OFCCP drop the reasonable accommodation language from the form entirely, and allow contractors to handle communications around reasonable accommodation in ways that are effective, practical, and consistent with their existing human resources policies and procedures.

Recordkeeping and Implementation Considerations

Finally, as OFCCP itself notes in the preamble to its final Section 503 rule, some identifying information is needed in order for contractors to assess their utilization of individuals with disabilities by job group, as will be required under 41 C.F.R. § 60-741.46. However, OFCCP's proposed Form CC-305 contains no space for identifying information, thereby frustrating contractors' ability to perform any meaningful analysis of the effectiveness of their outreach and recruitment efforts.

In addition, because the proposed form is to be used for all three invitations required by OFCCP's Section 503 regulations (pre-offer, post-offer, and the employee survey), and because an individual's disability status can change over time, contractors must be able to ascertain each individual's most current self-identification status when performing the reviews and analyses required by OFCCP's rule. In addition, it is reasonable to expect that many contractors will, as a matter of consistent recordkeeping, also use the form whenever employees wish to self-identify on their own, outside of the employer's specific invitation. For these reasons, in addition to identifying information, the form should include a field containing the date on which it was completed.

It is our understanding that OFCCP does not intend to allow contractors to modify the self-identification form other than to integrate it into electronic or online systems, which makes the inclusion of identifying information and date potentially problematic. To the extent that the form is used electronically, identifying information and date can, and likely will, be tracked by the electronic system itself. If so, requiring the input of these fields would be superfluous and unduly costly for federal contractors. However, to the extent that a paper form is used, we believe there must be dedicated fields for name (or other identifying information) and date.

Simply allowing a contractor's human resources staff to record these data on paper forms when received is inefficient and unduly burdensome. Accordingly, we recommend that name (or identifying information) and date fields be added to the form, and that OFCCP provide explicit guidance that allows contractors to remove these fields when integrating the form into an electronic or online system, provided that the information is being captured by some other means.

Last but not least, it is unclear from OFCCP's Section 503 regulations whether contractors will be required to maintain the physical forms (or an electronic representation of the form) pursuant to OFCCP's recordkeeping requirements, or whether it will be acceptable to maintain the data collected from the form. As a practical matter, if contractors will be required to produce the forms themselves, this poses a tremendous burden well beyond what OFCCP has estimated. EEAC members have expressed concern over the feasibility, logistics, and cost of not only capturing the data from the forms (each individual's response), but also creating and storing an electronic version or image of the form itself. We respectfully request that OFCCP provide

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explicit guidance allowing contractors to meet recordkeeping requirements with the data collected by the form, rather than maintaining millions of copies of the form itself.

CONCLUSION

As stated at the outset, the concept of a single form implementing the new disability self-identification requirements of OFCCP's final Section 503 regulations is one that we and our members can support. That form, however, must: (1) be consistent with the regulations under which it is administered; (2) not conflict with any provision of the ADA; (3) allow recipients to make a *voluntary and informed* decision as to whether to self-identify as a person with a disability; and (4) be implemented in a practical and efficient manner that reflects the ways in which federal contractors currently recruit, hire, and employ qualified individuals with disabilities. Our comments and recommendations set forth above are offered in that spirit.

We appreciate the opportunity to make our views known to OMB, and welcome any questions you might have.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph S. Lakis, Jr.", written in a cursive style.

Joseph S. Lakis, Jr.
President