



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

June 29, 2015

SUBMITTED VIA E-MAIL

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-ETA
Office of Management and Budget
Room 10235
725 17th Street NW
Washington, DC 20503

U.S. Department of Labor – OASAM
Office of the Chief Information Officer
Attn: Departmental Information Compliance Management Program
Room N1301
200 Constitution Ave NW
Washington, DC 20210

Re: Comment Request: DOL-ETA YouthBuild Reporting System [OMB Control No. 1205-0464]

To Whom It May Concern:

The U.S. Equal Employment Opportunity Commission (EEOC) submits this comment in response to the request for comments on the Department of Labor (DOL), Employment and Training Administration (ETA) sponsored information collection request, "YouthBuild Reporting System."¹

The EEOC enforces the federal laws that prohibit discrimination against job applicants and employees on the basis of race, color, religion, sex, national origin, age, disability, and genetic information.² The laws enforced by EEOC also prohibit retaliation for filing a charge or complaint of employment discrimination, participating in an employment discrimination

¹ Agency Information Collection Activities; Submission for OMB Review; Comment Request; YouthBuild Reporting System, 80 Fed. Reg. 30,493 (May 28, 2015).

² See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.; Section 501 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), 29 U.S.C. § 791; Titles I and V of the Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. § 12101 et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

proceeding, or otherwise opposing such discrimination.³ Further, the EEOC is charged with coordinating and leading the federal government's efforts to eradicate unlawful workplace discrimination.⁴

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) made a number of significant changes to the definition of "disability" under the Americans with Disabilities Act of 1990, as amended (ADA) and, correspondingly, the Rehabilitation Act of 1973, as amended (Rehabilitation Act).⁵ As described in greater detail below, we recommend that DOL review and revise the YouthBuild Data Elements chart and Workforce Investment Act of 1998 nondiscrimination and equal opportunity regulations as necessary to ensure consistency with the Rehabilitation Act, as amended by the ADAAA.⁶

Data Element No. 27: Individual with a Disability

We suggest that DOL review and revise the Data Element Definitions/Instructions (DED/I) for Data Element No. 27: Individual with a Disability, to ensure consistency with the ADAAA.

- "Individual with a disability" definition and citation

The DED/I for Data Element No. 27 defines a "disability" as "a physical or mental impairment that substantially limits one or more of [a] person's major life activities."⁷ This definition is accurate with respect to individuals who have an actual disability and individuals who have a record of a disability under the Rehabilitation Act.⁸ The definition is not accurate, however, with respect to individuals who are regarded as having a disability under the Rehabilitation Act. The ADAAA revised the "regarded as" definition to remove the requirement that an impairment substantially limit a major life activity, or be perceived to do so.⁹ In the event that DOL intends

³ 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 29 U.S.C. § 791(g) (incorporating, among other provisions, the anti-retaliation provision of the ADA into the Rehabilitation Act); 29 U.S.C. § 215(a)(3); 42 U.S.C. § 2000ff-6(f).

⁴ Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

⁵ Americans with Disabilities Act Amendments Act, Pub. L. No. 110-325, 122 Stat 3553; 29 U.S.C. § 705(20)(B) (incorporating the ADA's definition of "individual with a disability" into the Rehabilitation Act).

⁶ We note that the EEOC has submitted comments to DOL over the past few months that may be helpful when reviewing these regulations. In particular, the EEOC submitted comments to DOL's Civil Rights Center on 29 C.F.R. § 37 on October 31, 2014, and comments to DOL's Office of Policy Development and Research and Employment and Training Administration, Division of Youth Services on several related Workforce Investment and Opportunity Act NPRMs on June 15, 2015.

⁷ See DOL, *YouthBuild Data Elements* at 7.

⁸ 42 U.S.C. § 12102(1)(A)-(B) (defining "disability" as, among other things, "a physical or mental impairment that substantially limits one or more major life activities of such individual" or "a record of such an impairment"); 29 U.S.C. § 705(20)(B) (incorporating the ADA's definition of "individual with a disability" into the Rehabilitation Act).

⁹ Pub. L. No. 110-325, § 4(a), 122 Stat 3553 (stating that an individual has established coverage under the "regarded as" prong "if the individual establishes that he or she has been subjected to an action prohibited under this Act

this Data Element to refer to individuals covered under any prong of the definition of “disability” (actual disability, record of a disability, or regarded as having a disability), we suggest that DOL revise the definition of “disability” to reflect the new standard for coverage under the “regarded as” prong.

The DED/I for Data Element No. 27 cites to “Section 3(2)(a)” of the ADA for the definition of “disability.”¹⁰ We suggest that DOL revise this cite to “Section (3)” or “Section (3)(1)” of the ADA.

- “Physical or mental impairment” definition

The DED/I for Data Element No. 27 references the Workforce Investment Act of 1998 nondiscrimination and equal opportunity regulations (WIA regulations) for definitions and examples of “physical or mental impairment.”¹¹ These regulations limit a “physical or mental impairment” to a specified set of body systems.¹² Under the Rehabilitation Act, however, a “physical or mental impairment” may affect *any* body system.¹³ We suggest that DOL revise the WIA regulations to ensure that the definition of “physical or mental impairment” appropriately reflects the broad scope of this term. For example, DOL might consider deleting “of the following” prior to “body systems” and adding “, such as” (or words to that effect) after “body systems”: “. . . affecting one or more body systems, such as neurological, . . .”

- “Major life activities” definition

The DED/I for Data Element No. 27 references the WIA regulations for definitions and examples of “major life activities.”¹⁴ These regulations define “major life activities” as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁵ The ADAAA expanded the definition of “major life activities” to include, among other things, major bodily functions.¹⁶ We suggest that DOL

because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”) (emphasis added); 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(g)(1)(iii); 29 C.F.R. § 1630(l)(1).

¹⁰ See DOL, *YouthBuild Data Elements* at 7.

¹¹ *Id.*

¹² 29 C.F.R. § 37.4 (defining “physical or mental impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss *affecting one or more of the following body systems . . . [or] [a]ny mental or psychological disorder . . .*”) (emphasis added).

¹³ See 29 C.F.R. § 1630.2(h)(1) (defining “physical or mental impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss *affecting one or more body systems, . . .*”) (emphasis added).

¹⁴ See DOL, *YouthBuild Data Elements* at 7.

¹⁵ 29 C.F.R. § 37.4.

¹⁶ Pub. L. No. 110-325, § 4(a), 122 Stat 3553 (clarifying that “major life activity” includes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel,

revise the WIA regulations to reflect the new, broader definition of “major life activities.” In addition, to provide further clarification regarding the new “major life activities” definition, we suggest that DOL consider specifying that: (1) the operation of a major bodily function includes the operation of an individual organ within a body system; (2) the term “major” shall not be interpreted strictly to create a demanding standard for disability; and (3) whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”¹⁷

In the event that DOL needs to finalize the YouthBuild Reporting System forms, including the YouthBuild Data Elements chart, prior to any review and revision of the WIA regulations, we suggest that DOL remove the reference to 29 CFR 37.4 from the DED/I for Data Element No. 27 and any other Data Elements in which it appears. As an alternative, until the WIA regulations are revised, DOL might consider citing to relevant provisions in the EEOC’s ADA regulations.¹⁸

Data Elements No. 28, 123 – 139, 144 – 147

Data Elements No. 28, 123 through 139, and 144 through 147 request information about participants’ health or medical conditions, including significant health issues, substance abuse treatment, mental health treatment, emergency medical care, non-emergency medical care, and receipt of other health services.¹⁹ In at least one instance, it appears that participants have the option to decline to respond.²⁰ In most instances, however, responses do not appear optional.

The Rehabilitation Act limits an employer’s ability to make disability-related inquiries of employees.²¹ In general, after employees begin work, an employer may make such inquiries only if they are job-related and consistent with business necessity. The employer must have a reasonable belief based on objective evidence that the employee will be unable to perform the essential functions of his or her job because of a medical condition, or that the employee will

bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”); 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(i).

¹⁷ See 29 C.F.R. § 1630.2(i) (referencing Congressional intent to invalidate the “demanding standard for qualifying as disabled” established in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002)).

¹⁸ See 29 C.F.R. § 1630.2(h)(1) (defining “physical or mental impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss *affecting one or more body systems*, . . .”) (emphasis added); 29 C.F.R. § 1630.2(i) (providing examples of “major life activities,” including “[t]he operation of a major bodily function,” and clarifying that “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability.”).

¹⁹ See DOL, *YouthBuild Data Elements* at 7, 31 – 34.

²⁰ See *id.* at 7 (indicating that individuals may choose not to report (“self-identify”) that they have significant health issues).

²¹ See generally EEOC, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>; EEOC, QUESTIONS AND ANSWERS: ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000), <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.

pose a direct threat to him or herself or others because of a medical condition. There are a few exceptions to the general prohibition on requesting disability-related information.²² For example, an employer may obtain medical information from employees if it is required to do so by a federal law or regulation.²³

In the event that DOL requires YouthBuild participants to provide the information requested in these data elements, we suggest that DOL ensure that such inquiries are job-related and consistent with business necessity, or fall within one of the exceptions to the general prohibition on requesting disability-related information.

Thank you for the opportunity to comment on the YouthBuild Reporting System. Should you wish to discuss these comments, please contact Assistant Legal Counsel Corbett Anderson at (202) 663-4579 or Senior Attorney Advisor Lisa Schnall at (202) 663-4845.

Sincerely,

/s/

Peggy R. Mastroianni
Legal Counsel

²² 29 C.F.R. § 1630.14 (describing the circumstances in which employers may lawfully conduct medical examinations and make disability-related inquiries). In certain circumstances, employers may also request that individuals voluntarily self-identify as individuals with disabilities for affirmative action purposes. *See, e.g.*, EEOC, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995), <http://www.eeoc.gov/policy/docs/preemp.html> (explaining employers' responsibilities when asking applicants to voluntarily self-identify in such circumstances).

²³ 29 C.F.R. § 1630.15(e) (stating that covered entities may be able to defend themselves against a charge of discrimination by asserting that an otherwise prohibited action is "required or necessitated by another Federal law or regulation").