



September 21<sup>st</sup>, 2010

On behalf of APSE, the *only* national organization with an *exclusive* focus on integrated employment and career advancement for citizens with disabilities, the following comments are being submitted on the Advanced Notice of Proposed Rulemaking issued by the Office of Federal Contract Compliance Programs (OFCCP). The ANPRM was published in the Federal Register on July 23rd, 2010.

**General Comments:** APSE would like to thank the OFCCP for issuing the ANPRM on Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act. We believe it is important that current regulations be reviewed periodically to ensure that Federal contractors and subcontractors are meeting their obligations to hire individuals with disabilities.

**Comments on Specific ANPRM Questions:**

***Question #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.*

**Response:** One factor that has significantly diminished the strength of the current affirmative action requirements of Section 503 is the lack of enforcement. Oftentimes Federal contractors may be aware of their obligations but the follow-up by the Office of Federal Contract Compliance Programs has failed to provide adequate enforcement measures. In other case, federal contractors may not even be aware of their obligations. The improved enforcement measures outlined in the FY 2011 Congressional Budget Justification highlight many of the much-needed measures to ensure that Federal contractors are taking steps to ensure employment of citizens with disabilities. Additionally, as noted in response to Question 8, significant strengthening of federal contractor requirements in terms of polices and procedures for provision of accommodations and supports for individuals with disabilities would potentially be effective, based on research that indicate this is a significant employer need.



***Question #3:*** *What barriers currently impede Federal contractors from hiring people with disabilities?*

**Response:** While it is impossible to say with complete certainty what barriers currently exist that limit Federal contractors from hiring citizens with disabilities, the challenges are most likely very similar to concerns that other employers share. In identifying these barriers, it is critical to avoid anecdotal speculative conjecture as much as possible, and instead base the response on research. Fortunately, significant research has been done in this arena, in particular by Virginia Commonwealth University (VCU). This includes summaries of previous research as well as new research findings. In a summary of previous research ([www.worksupport.com/documents/chapter121%2Epdf](http://www.worksupport.com/documents/chapter121%2Epdf) - Unger, 2002) found that:

- Employers have concerns surrounding the work potential of employees with disabilities that may derive from existing myths and misconceptions and not from their direct experiences with workers with disabilities.
- Employers have greater concern about hiring individuals with mental or emotional disabilities than individuals with physical disabilities – although employers expressing this concern have little or no experience in actually hiring individuals with disabilities.
- Those employers with previous experience with employing individuals with disabilities have more favorable perceptions of individuals with disabilities in the workforce and a willingness to hire them.

A survey of human resource professionals by VCU found the following:

(<http://www.worksupport.com/research/viewContent.cfm/164> - Unger, Wehman, Yasuda, Campbell, Green, 2002) found the following:

- The ADA is generally viewed positively, and is not perceived as a barrier. Additionally, cost of accommodation, additional supervision, and training are viewed as minimal barriers to employment for people with disabilities. However, lack of education, training, specific job skills, and related experience of people with disabilities were all viewed as potential obstacles – obstacles that are typical for anyone having trouble obtaining employment.
- Human resource professionals are very concerned “that they do not know effective recruitment strategies to entice individuals with disabilities to join their workforce. They indicate that they are unable to find qualified applicants, especially for skilled and professional positions.”
- Human resource professionals have very limited knowledge about the types of government funded human service programs that are available to assist people with disabilities. As noted, “it is clear that a disconnect exists between human service programs and the business community they serve.” Employers have also noted that



they would like to know more about reasonable accommodations and work supports, but do believe they are doing a good job in this area.

VCU ([www.worksupport.com/documents/chapter511%2Epdf](http://www.worksupport.com/documents/chapter511%2Epdf) - Unger, 2002) also found that while employers are willing and able to provide workplace accommodations, “they may not (a) be aware that the accommodation need exists, (b) know how to best assist individuals with disabilities in identifying and developing workplace accommodations, and (c) be able to formulate some type of workplace accommodation that might address the individual’s needs.”

This research is consistent with similar studies. In summary, the barriers can be identified as follows:

- A lack of effective recruitment strategies
- A lack of awareness and connectedness with the programs funded to assist and support individuals with disabilities with their employment needs
- A lack of education, training, and job skills, which limits the ability of individuals with disabilities to meet employment needs
- Myths and mis-perceptions by employers who lack experience in employment of people with disabilities
- A need for greater capacity in meeting employee accommodation needs.

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***Question #4:*** *Are there changes that could be made to the existing language on permissible qualifications standards that would better ensure equal employment opportunities for individuals with disabilities?*

***Response:*** In reviewing the current language, a primary omission appears to be a discussion about the hiring processes, and in particular the use of on-line and automated screening processes that can often be a barrier and end up screening out qualified individuals with disabilities. It is suggested that language be inserted that requires employers to demonstrate that the current hiring practices, and specifically on-line and automated screening processes, are inclusive of individuals with disabilities, and do not result in unintended discrimination.

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***Question #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?*

Response: The challenge in identifying an appropriate data source for an availability pool, is the wide variations in definition of disability, and reliability of disability status that is self-reported. The most reliable source of data in terms of efficacy is likely to be SSI/SSDI beneficiary data, as the disability status of such individuals has been verified independently. It is recommended that this data would be useful as a basis for establishment of hiring goals. The US Census ACS data may also serve as a useful basis, although such data may be challenging as disability status is self-reported. The Bureau of Labor statistics newly implemented reporting of disability unemployment data may also serve as a useful data source, although breaking such data down to a regional and local level may be problematic. It is suggested that a combination of these sources be utilized, (with SSI/SSDI as a basis), to develop a formula that as accurately as possible, reflects the size of the disability population and employment needs of that population. Consistent definitions and measures of disability should be utilized to ensure uniformity in analyzing and establishing hiring goals for individuals with disabilities.

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**Question #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.*

Response: In theory, one may assume that the establishment of placement goals for individuals with disabilities would increase employment opportunities in the Federal contractor sector given that the establishment of a “quota” would result in a specific number of persons being hired. However, it is the concern of APSE that in doing so, there is potential backlash. Federal contractors who successfully meet specific placement goals, may intentionally or unintentionally hire individuals with disabilities in jobs that are not necessarily a good match to an individual’s strengths and talents, and may create a perception (whether real or otherwise) that the individual was hired “just because they have a disability”. Furthermore, such placements may be done in a manner that excludes individuals with disabilities from career advancement and higher-level positions. A Federal contractor may also assume that if they meet their “placement goals”, then they are relieved of any further affirmative action requirements. Additionally, there is the potential that the establishment of placement goals may unintentionally result in a patronizing attitude towards people with disabilities. Finally, employers may use strategies that are counter to full inclusion and integration of people with disabilities into society, as well as best practices in employment supports, through



hiring of individuals through enclaves, groups, and subcontracting arrangements with service providers, in order to meet placement goals, and avoid some type of sanctions. This will result in not only a lack of full inclusion and integration, but reinforcement of stereotypes and mis-perceptions regarding people with disabilities. In summary, it is APSE's position that the establishment of placement goals should be done cautiously, carefully, and with full consideration of the unintended consequences.

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***Question #8:*** *What specific employment practices have been verifiably effective in recruiting, hiring, advancing, and retaining individuals with disabilities?*

**Response:** The overall attitude and culture of a workplace can significantly impact the effectiveness in recruiting, hiring, advancing and retaining individuals with disabilities. It is important that from the management level all the way down to the staff level, employees display a sense of community and acceptance of workplace diversity. Research has clearly shown that an organization commitment to hiring people with disabilities is critical. The underlying message of such efforts must be that hiring of people with disabilities is not something "extra" but an integral part of overall efforts of embracing diversity, and supporting individuals with a wide variety of needs. Ingraining such a message within the organization culture is critical. Beyond an organizational commitment, the following specific strategies have also been shown to be verifiably effective:

- The work of David Mank at the University of Oregon and others has clearly demonstrated that full integration of individuals within the workplace is critical, with an emphasis on natural supports. The existence of natural supports at a workplace can positively impact the feeling of all employees, regardless of disability. While deviation from typical hiring and employee support processes may be necessary at times due to the nature of an individual's disability, every effort should be made to avoid deviating from such typical processes in terms of interventions, as this can have a negative impact on an individual's integration within the work place, as well as wages and benefits. In particular, the concept of "special" programs for people with disabilities should be avoided if at all possible.
- As noted by Unger (2002), supervisors and coworkers are "the primary providers of support for individuals with disabilities in a number of areas, including learning how to do the job, completing regular job duties, being able to perform infrequent duties associated with the position, learning how to do something new at work, and taking lunch and other breaks." Therefore it is critical that supervisors and coworkers be comfortable in supporting individuals with disabilities, and have access to necessary assistance in order to meet their support needs.



- Research done by Unger and Kregal at VCU (<http://www.worksupport.com/documents/chapter411%2Epdf> - 2002) shows that “human resource professionals play a pivotal role in integrating and retaining people with disabilities in the workforce”. Many organizations rely heavily on human resource professionals “as the primary source of information and assistance in identifying and developing accommodations for employees.” The need for human resource professionals to have strong knowledge base regarding accommodations and supports for employees with disabilities is clear.
- Unger and Kregal (2002) also noted the critical role that direct supervisors play, and the ability of supervisors to address the support of employees with disabilities “when they are able to readily address employees’ need for accommodations or have direct interaction or control in arranging and implementing the accommodations. In contrast, supervisors may be less sure of their ability to address functional limitations of employees with disabilities when it necessitates structural changes to the work environment, providing non-job function related assistance, and altering aspect of jobs or positions resulting in deviations from typical organizational descriptions, standards, or norms.” An understanding of the supervisor’s authority to grant accommodations is also an issue. It is clear from these findings that employers must have clearly stated and specific policies and procedures in regards to accommodating individuals with disabilities, that go beyond pro-forma language requiring compliance with reasonable accommodation requirements.
- As noted by Unger (2002), staff from agencies supporting individuals with disabilities can play a critical role in the success of individuals with disabilities in the workplace. Staff who are highly skilled in the area of workplace supports and accommodations, both in direct dealings with employers, and counseling individuals with disabilities, are critical. As noted earlier however, a lack of awareness of such assistance is an issue for many human resource professionals. Additionally, the quality of direct support staff available to work with employers and assist individuals with disabilities is inconsistent and a significant issue. It is clear that some different models of provision of supports from external entities need to be examined.
- Utilization of universal design approaches ([http://www.ncsu.edu/www/ncsu/design/sod5/cud/about\\_ud/udprinciples.htm](http://www.ncsu.edu/www/ncsu/design/sod5/cud/about_ud/udprinciples.htm)) and universal design for learning (<http://www.cast.org/research/udl/index.html>), can be effective strategies in terms of making meeting the needs of employees with disabilities, as part of an overall strategy of a universal approach to meeting employee needs. One of the major benefits of such an approach is that it moves away from the concept of employment of people with disabilities as something “special”.



**Question #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?*

**Response:** Workplace flexibility can, in general, help any employee. Parents with children, expectant mothers, employees with ill family members, etc. can benefit from having flexibility in their work schedules. For individuals with disabilities, it is no different. Within this context, it is important to recognize that not all individuals with disabilities require such flexibility, but that for certain individuals, as with the general population, such flexibility is important.

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**Question #10:** *Has training of employees and/or managers been effective in increasing advancement and/or retention of individuals with disabilities? If so, how?*

**Response:** Research indicates that the effectiveness of such program is not clear (VCU, 2002). Training of employees and/or managers however can be effective if done as part of a larger diversity strategy. Adequate training alone is not enough to ensure that individuals with disabilities will be hired, promoted and retained. It is important that employees and managers have a basic understanding on some of the “dos” and “don’ts” when working alongside individuals with disabilities, and it is particularly important for managers to have an understanding of the various employment laws as they relate to individuals with disabilities. At the same time, such training needs to move beyond basic awareness, particularly given the critical importance of understanding how to provide accommodations and work support. It is suggested therefore, that such training programs need to focus on specific strategies of supporting individuals with disabilities in the workplace.

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**Question #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?*

Response: Inviting all applicants to voluntarily and confidentially self-identify might in theory, be an effective method for improving the tracking capabilities of Federal contractors of the number of applicants with a disability. However, given the fact that Title I of the ADA prohibits an employer from asking an applicant to disclose his or her disability, it may cause significant confusion with employers and applicants as to what their obligations are with regard to self-identifying a disability. Furthermore, there is the potential for information on a person's disability, disclosed before an offer of employment, may be abused. The information would have to be safely guarded and kept private from the employer and/or hiring manager as such information could not be used in determining an applicant's suitability for a job. At the same time, it is recognized that there is a greater need to track the number of individuals with disabilities who are applying for positions with federal contractors. Therefore as an alternative to such an approach of voluntary disclosure prior to an offer of employment, the following is suggested as an indicator of federal contractor efforts:

- Tracking the number of candidate referrals and applications from disability organizations (vocational rehabilitation, other public disability agencies, community rehabilitation providers, etc.)
- The number of individuals referred from these organizations that are interviewed for positions.
- The number of individuals referred by these organizations who are hired.

Such data would also have the secondary benefit of getting a greater sense of the effectiveness of the referring disability organizations in terms of responding to employer needs.

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**Question #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.*

Response: The potential for positive linkage agreements between Federal contractors and disability organizations is significant if done properly. It is important for linkage agreements to move beyond assuring that disability organizations have job listings from



federal contractors. Examples of elements of such agreements that could increase their effectiveness include:

- Assurances that a specific number of individuals with disabilities will be interviewed for positions.
- Working in partnership with disability organizations to enable individuals with disabilities to receive training (with accommodations as necessary) that will provide them the skills to qualify for positions with employers.
- Working in partnership with disability organizations to conduct analysis of positions and determine various accommodations and modifications that could be undertaken that would enhance potential opportunities for individuals with disabilities.
- Developing agreements that allow staff from disability organizations to be on-site and integrated within the employer's workplace, so that they can fully understand the employer's work culture and needs, and work in partnership to facilitate the hiring of individuals with disabilities.
- Assisting employers to become Employment Networks under Social Security's Ticket to Work program, in partnership with a disability organization.

Any sort of linkage agreement must be done in a manner that ensures individual, integrated, employment for individuals with disabilities, where the business directly pays the individual. While the examples above can have a positive impact, at the same time, linkage agreements have the potential for being problematic, and reinforcing stereotypes of individuals with disabilities, through the development of "special programs", etc. For example, mobile work crews and enclaves should not be considered a linkage agreement outcome. In this regard, APSE strongly urges prohibition against the following types of linkage agreements:

- Subcontracts with disability service providers, where individuals work for the service provider and not directly for the employer.
- Linkage agreements that result in a group placement/enclaves for individuals with disabilities working for a federal contractor, including such arrangements that occur through AbilityOne and other programs authorized under the Javits Wagner O'Day Act (JWOD).

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**Question #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? What are the specific costs and/or benefits that might result from this requirement?*



Response: The impact of requiring the use of accessible information and communication technology by Federal contractors and subcontractors would be immensely positive. There are many barriers faced by individuals with disabilities in accessing a variety of technologies utilized by employers. For individuals who are blind, deaf or deaf/blind, it is imperative that they have equal access to job applications and the application process. As technology advances, more and more employers have begun using online applications versus paper applications. Online applications can be challenging for individuals with intellectual disabilities – often times applications “time out” and are overall not very user-friendly. For individuals with limited mobility, the use of application kiosks can be difficult as well. This is a major issue in terms of access to employment. It has been particularly noted that managers for larger retail chains, and large employers, lack the knowledge base or ability to accommodate needs in this regard, often maintaining that these requirements are absolute and not flexible, despite obvious violations of the ADA in terms of unwillingness to accommodate.. Additionally, it should be noted that application processes should be universally accessible – i.e., while making reasonable accommodations is certainly a strategy in responding to the needs of individuals with disabilities, this puts applicants with disabilities in the position of having to disclose their disability, and also requires advocacy that they may not be comfortable with. APSE would applaud OFCCP for taking the lead in addressing this issue.

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Once again, we appreciate OFCCP’s efforts at revisiting the regulations pursuant to Section 503 of the Rehabilitation Act. We look forward to reviewing the final regulations as soon as they are published in the Federal Register. Thank you and if you have any questions on the above comments, please feel free to contact either David Hoff ([david.hoff@umb.edu](mailto:david.hoff@umb.edu)) or Stephanie Birmingham ([Stephanie@apse.org](mailto:Stephanie@apse.org)).

Respectfully submitted,

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