

Taking Disability Into Account: Proactive Recruitment & Hiring Practices

Introduction

Today, more and more businesses across the U.S. are recognizing the value of a workforce inclusive of people with disabilities and taking steps to bring them on board. Human Resources (HR) professionals, Equal Employment Opportunity (EEO) professionals, Diversity and Inclusion (D&I) professionals and others responsible for recruitment and hiring are using a variety of innovative and proactive practices to help in this regard, including adoption of affirmative action programs that are designed to benefit individuals with disabilities (known or voluntarily disclosed).

The purpose of this policy brief is to describe key elements of such an affirmative action program, examples of how employers have implemented them, and the legal context that permits them to do so. In this spirit, it may be useful to a variety of audiences, including HR, EEO and D&I professionals and companies' legal teams, so that all involved understand the different perspectives.

Making it Work

Creating an affirmative action program to proactively recruit and hire individuals with disabilities need not be complicated. Under Title I of the Americans with Disabilities Act (ADA) and other disability rights laws, pre-employment inquiries of disability status are generally prohibited. The purpose of this prohibition is to protect an applicant from discrimination based on misconceptions about an individual's abilities or limitations due to a disability.

However, this protection does not preclude employers from proactively recruiting and hiring individuals with disabilities. The ADA and other disability rights laws are meant to encourage and foster practices that benefit individuals with disabilities (whether those disabilities are obvious or voluntarily disclosed). In this spirit, the following are key elements to guide organizations as they build affirmative action programs that comply with disability nondiscrimination rules and regulations.

A company that implements an affirmative action program to proactively take disability into account during the hiring and recruitment process will:

- ➔ Inform applicants in writing that it is using affirmative action to target the hiring of qualified individuals with disabilities.

The Employer Assistance and Resource Network on Disability Inclusion (EARN) is a resource for employers seeking to recruit, hire, retain and advance qualified employees with disabilities. It is funded by the U.S. Department of Labor's Office of Disability Employment Policy under a cooperative agreement with The Viscardi Center. For more information, visit AskEARN.org.

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- ➔ Ask applicants to self-identify as having a disability on a form separate from the general application.
- ➔ State clearly that:
 - The affirmative action program is voluntary and intends to benefit individuals with disabilities.
 - The company collects disability-related information for affirmative action purposes only and such information will not adversely impact the applicant.
 - The disability-related information collected is the minimum amount necessary to determine eligibility for affirmative action.
 - The disability-related information may be used for purposes of hiring and will only be shared with those whose official duties require such access (for example managers, human resource personnel and others involved in the selection process, as well as those responsible for documenting compliance with the affirmative action program).
- ➔ Treat medical information or other disability-related documentation collected during the hiring process as confidential medical records, with access limited to those whose official duties require such access.
- ➔ Designate sufficient staff specifically trained to carry out responsibilities under the affirmative action program, including accepting applications for employment under it.

These criteria should not be construed in any way to modify existing policies related to federal contractors' requirements to invite applicants and employees to self-identify as people with disabilities under Section 503 of the Rehabilitation Act. In accordance with the Section 503 regulation, the Office of Federal Contract Compliance Programs (OFCCP) has prescribed a [Voluntary Self-Identification of Disability form](#). This OFCCP self-identification form may only be used for statistical and reporting purposes; it may not be used for hiring purposes (i.e., to invite individuals with disabilities to self-disclose as a way to create a candidate pool). Thus, the process used for self-disclosure of disability for hiring purposes should be separate and apart from the process used for self-identification of disability for statistical and reporting purposes.

Examples in Action

Below are examples of innovative strategies for proactively recruiting and hiring individuals with disabilities:

- ➔ **Advertising jobs as reserved or prioritized for applicants with disabilities (or particular disabilities) or customers of state vocational rehabilitation (VR) programs.** For example, a Midwest convenience store chain worked with state VR agencies to develop and implement a new position to meet a pressing workforce need. VR now serves as a single point of contact for recruiting and training for the position, which is only advertised and open to VR customers. VR also provides ongoing supports, such as job coaching, when appropriate.
- ➔ **Consideration of unpaid experiences for individuals with disabilities in lieu of paid experiences generally required for other applicants.** For example, an employer in Texas allows applicants who are blind or visually impaired to provide a record of unpaid work experiences when applying for entry-level positions, while applicants who are not blind or visually impaired are required to submit a record of paid employment.
- ➔ **Hiring preferences for applicants with disabilities, including customers of the state VR program.** For example, an organization that provides rehabilitation services for people with drug and alcohol addiction and prefers to hire counselors with histories of addiction asks applicants to voluntarily self-identify as having such a history. Similarly, an employer with employees who provide peer counseling to individuals with developmental or psychiatric disabilities can require those employees to have used mental health services themselves.
- ➔ **Hiring processes targeted at and for individuals with disabilities. For example, some technology companies have neurodiversity programs through which they proactively recruit individuals with autism who may possess traits that are a good match for IT jobs.** Such programs often feature a change in the way the company interviews, offering candidates an experience more akin to a "try out" period instead of one or more formal,

structured meetings. To implement the program, companies may partner with service providers, such as state VR agencies. As another example, the Federal Government has a noncompetitive hiring authority, commonly referred to as “Schedule A,” under which an individual who meets the eligibility status of the appointment and the minimum qualifications for a position may be hired without competing with the general public. People hired under Schedule A may then qualify for conversion to permanent status after two years, if service has been satisfactory. Several state governments have also adopted similar programs.

➔ **Mandatory interviews for applicants with disabilities who are at least minimally qualified for the job.**

For example, a public employer in New England has made it a policy to interview any “qualified individual with a disability” per the ADA definition, as amended by the ADA Amendments Act of 2008. To facilitate this, applicants may voluntarily choose to complete a short form (that is separate from the general application) indicating their impairment and provide documentation from a medical professional or VR counselor. Upon verification and approval, the individual is then granted mandatory interview status.

Legal Context

This section of the policy brief provides a more in-depth description of the legal context.

General Prohibitions Against Pre-Employment Inquiries About Disability

In the past, some employment applications and interviews requested information about an applicant’s disability. This information was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated. As a result, Title I of the Americans with Disabilities Act (ADA) establishes a process that isolates an employer’s consideration of an applicant’s non-medical qualifications from any consideration of the applicant’s medical condition.

Under the nondiscrimination provisions of the regulations implementing Title I of the ADA [29 CFR 1630.13], an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional offer to the applicant. This helps ensure that an applicant’s possible hidden disability (including prior history of disability) is not considered before the employer evaluates an applicant’s non-medical qualifications.

The regulations also specify circumstances under which medical exams and inquiries are permitted [29 CFR 1630.14]. The employers may ask:

- ➔ An applicant about their ability to perform specific job functions;
- ➔ An applicant about their non-medical qualifications and skills;
- ➔ All applicants if they will need accommodations for the application process, for example when scheduling interviews;
- ➔ An applicant—whose disability and need for a potential accommodation, if hired, are obvious—what accommodation might be needed; and
- ➔ Applicants to describe or demonstrate how they would perform job tasks.

Permitting Self-Identification of Disability Prior to an Employment Offer

The regulation [29 CFR 1630.15(e)] and sub-regulatory guidance issued by the Equal Employment Opportunity Commission (EEOC)¹ also includes the following policies permitting self-identification of disability prior to an employment offer:

(1) No employer is liable for a violation of Title I of the ADA for an action that it is required to take by another **federal statute or regulation**. For example, federal contractors and subcontractors may invite individuals with disabilities to

¹ Letter to Patricia A. Shiu, Director Office of Federal Contract Compliance Programs, Department of Labor from Peggy Mastroianni, Legal Counsel, Equal Employment Opportunity Commission (August 8, 2013).

voluntarily self-identify prior to an employment offer to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act.

(2) A pre-employment inquiry about a disability is permissible if it is required or necessitated by another **federal law or regulation that targets benefits to individuals with disabilities**.

(3) An employer may invite applicants to voluntarily self-identify for purposes of an employer's affirmative action program if the employer is undertaking affirmative action because of a **state or local law (including a veterans' preference law)** that requires affirmative action for individuals with disabilities i.e., the law requires some action to be taken on behalf of such individuals.

(4) Employers may comply with any **laws** that afford individuals with disabilities **equal or greater rights**.

(5) Any employer may invite applicants to voluntarily self-identify as individuals with disabilities for affirmative action purposes, whether pursuant to a federally mandated affirmative action requirement such as Section 503 or a **voluntarily adopted program** i.e., the employer is voluntarily using the information to benefit individuals with disabilities.

If the employer invites applicants to voluntarily self-identify in connection with providing affirmative action, the employer must do the following:

(1) State clearly on any written questionnaire or state clearly **orally** (if no written questionnaire is used) that the information requested is used solely in connection with its affirmative action obligations or efforts.

(2) State clearly that the information is being requested on a **voluntary basis**, that it will be **kept confidential** in accordance with the ADA, that refusal to provide it will **not subject the applicant to any adverse treatment**, and that it will be **used only** in accordance with the ADA.

(3) In order to ensure that the self-identification information is kept confidential, the information must be on a **form that is kept separate from the application**.

The EEOC's Office of Legal Counsel has reaffirmed the application of these criteria to proactive recruitment and hiring practices that take disability into account:

- ➔ "Preferences for applicants with disabilities or customers of VR programs," and "advertising jobs as reserved or prioritized for applicants with disabilities or VR customers" are all permissible forms of affirmative action.
https://www.eeoc.gov/eeoc/foia/letters/2018/ada_amendments_act%207_10.html
- ➔ An employer may ask for information necessary to determine eligibility for an affirmative action program offering mandatory interviews to all applicants who meet the ADA's definition of an "individual with a disability" as amended by the ADA Amendments Act of 2008, provided that the information is offered voluntarily. Also, if the eligibility determination is made by an individual other than the interviewing supervisor or manager, the supervisor or manager is entitled to know only that the applicant has a qualifying disability.
https://www.eeoc.gov/eeoc/foia/letters/2005/ada_inquiries_examinations_preoffer.html
- ➔ An employer may invite applicants who are blind or visually impaired to submit a record of non-paid experience pursuant to an affirmative action policy that allows such individuals to substitute non-paid experience for paid work experience, provided that the information is provided in accordance with established criteria. Applicants who are not blind or visually impaired are required to submit a record of paid employment experience.
https://www.eeoc.gov/eeoc/foia/letters/2000/ada_inquiries_examinations_4.html
- ➔ An employer who provides rehabilitative services for people with drug, alcohol and other addictions and prefers to hire counselors with histories of drug or alcohol addiction may ask applicants to voluntarily self-identify as individuals with specific disabilities (individuals with histories of drug or alcohol addiction) for purposes of an employer's voluntary affirmative action program in accordance with established criteria.
https://www.eeoc.gov/eeoc/foia/letters/2000/ada_inquiries_examinations_5.html

- ➔ It is permissible for an employer to adopt a requirement that employees acting as advocates in a peer self-advocacy program that provides peer counseling to individuals with developmental or psychiatric disabilities must have experience as consumers of mental health services as a qualification standard. Such a requirement is permissible because it arguably does not screen out individuals based on disability; rather it excludes individuals with all different types of disabilities, including some individuals with psychiatric disabilities who may never have been consumers of mental health services, based on disability-related experience that they lack.

Moreover, even if the standard screens out individuals on the basis of disability, it arguably is job-related and consistent with business necessity because it manifestly relates to the job's essential function of providing peer counseling. Finally, although questions about an applicant's experience as a consumer of mental health services are considered "disability-related inquiries" under the ADA, "in the narrow and unique instance of a peer self-advocate program," they could be permissible because they relate to the ability of the applicant to perform the job. https://www.eeoc.gov/eeoc/foia/letters/2007/ada_disability_1.html

Section 503 of the Rehabilitation Act (nondiscrimination and affirmative action by federal contractors) incorporates by reference the nondiscrimination provisions of Title I of the ADA.² In addition, [regulations implementing Section 503](#) include specific affirmative action provisions [requiring self-identification](#) of disability:

- ➔ The contractor shall invite the applicant to self-identify as an individual with a disability. Information obtained regarding medical condition or history of an applicant shall be collected and maintained on separate forms and in separate medical records and treated as a confidential medical record, subject to specified exceptions. [41 CFR 60-741.23(c), (d)]
- ➔ This invitation shall be provided to each applicant when the applicant applies or is considered for employment. The invitation may be included with the application materials for a position, but must be separate from the application. [41 CFR 60-741.42(a)(1)]
- ➔ The contractor shall invite an applicant to self-identify using the language and manner prescribed by the Director of the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and published on the [OFCCP website](#). [41 CFR 60-741.42(a)(2)] The form explains why an individual is being asked to complete the form. "Because we do business with the government, we must reach out to, hire, and provide equal opportunity to qualified people with disabilities. To help measure how well we are doing, we are asking you to tell us if you have a disability or if you ever had a disability. Completing this form is voluntary, but we hope that you will choose to fill it out. If you are applying for a job, any answer you give will be kept private and will not be used against you in any way." Individuals are provided three choices: "Yes, I have a disability (or previously had a disability)"; "No, I don't have a disability"; and "I don't wish to answer."
- ➔ Generally, self-identification information will be obtained by, and reside with, Human Resources offices and will not be provided to interviewing, testing or hiring officials as it is confidential information that must be kept separate from regular personnel records. This will help ensure that these officials do not, in fact, have knowledge of which applicants have chosen to self-identify as having a disability. [78 FR 58691(September 24, 2013)]
- ➔ Pursuant to the Section 503 regulation, **disability demographic information** must be kept confidential and maintained in a **data analysis file**. Such information may not be included in an individual's personnel file. [41 CFR 60-741.42((e); 78 FR 58692 (September 24, 2013)]

In addition to permitting self-identification of disability for data analysis purposes, the Section 503 regulation requires and/or permits contractors to undertake outreach, positive recruitment and hiring initiatives that are premised on the disclosure (directly or indirectly through arrangements with disability agencies or organizations) of disability:

² It should be noted that federal contractors with 15 or more employees are covered by both the nondiscrimination provisions of Title I of the ADA and Section 503.

- ➔ The contractor shall undertake appropriate **outreach and positive recruitment** activities that are reasonably designed to **effectively recruit qualified individuals with disabilities**. Examples include enlisting support from state VR agencies, local SSA Employment Networks (ENs), local disability groups and placement or career offices of educational institutions that specialize in the placement of individuals with disabilities. [41 CFR 60-741.44(f)]
- ➔ The contractor's recruitment efforts at all educational institutions should incorporate **special efforts to reach students who are individuals with disabilities**. [41 CFR 60-741.44(f)]
- ➔ An effort should be made to participate in **work-study programs for students, trainees or interns with disabilities**. [41 CFR 60-741.44(f)]
- ➔ The contractor should **take any other positive steps it deems necessary to attract individuals with disabilities** not currently in the workforce who have requisite skills and can be recruited through affirmative action measures. These individuals may be located through state VR agencies and ENs. [41 CFR 60-741.44(f)]
- ➔ The contractor, in making hiring decisions, **should consider applicants who are known to have disabilities** for all available positions for which they may be qualified when the position applied for is unavailable. [41 CFR 60-741.44(f)]

Use of Hiring Authorities that Take Disability Into Account (e.g., Schedule A Excepted Service Hiring Authority)

[Section 501](#) of the Rehabilitation Act (nondiscrimination and affirmative action by federal agencies) incorporates by reference the nondiscrimination provisions of Title I of the ADA. The regulations implementing Section 501 include the following additional affirmative action policies regarding recruitment (29 CFR 1614.203(d)(1)(i)) and hiring (29 CFR 1614.203(d)(1)(ii)) relating specifically to hiring authorities such as Schedule A³ that take disability into account:

The affirmative action plan shall require the agency to take specific steps to ensure a broad range of individuals with disabilities, including individuals with targeted disabilities as listed on the [Standard Form 256](#) will be aware of and be encouraged to apply for job vacancies using programs and processes **such as hiring authorities that take disability into account (e.g., Schedule A)**. Exactly which steps an agency takes will depend on the circumstances.

- ➔ The regulations require each federal agency to adopt the goal of having 12 percent of its workforce be people with disabilities, and 2 percent of its workforce be people with targeted disabilities. These goals apply at both higher and lower salary levels.
- ➔ The regulations also require federal agencies:
 - To have sufficient opportunities for employees with disabilities to advance within the agency;
 - To strengthen their programs for reasonable accommodations and ensure accessibility; and
 - As an aspect of affirmative action, to provide personal assistance services to employees who need them because of a targeted disability, unless doing so would impose an undue hardship on the agency.
- ➔ The regulations also require federal agencies to designate sufficient staff and training, support and other resources to carry out their responsibilities including:
 - Accepting applications for appointment under hiring authorities that take disability into account e.g., Schedule A; and
 - Forwarding the individual's application to the relevant **hiring officials** with an explanation of how and when the individual may be appointed, consistent with all applicable laws.

³ *Schedule A is used by federal agencies to tap into a diverse and vibrant talent pool of individuals with disabilities without going through the often-lengthy traditional hiring process. Schedule A allows individuals with specified disabilities to apply for federal appointments through a noncompetitive hiring process. This means that if an individual meets the eligibility status of the appointment and the minimum qualifications for a position, he or she may be hired for the position without competing with the general public.*