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THE FEDERAL

IN BRIEF

Bill Targets White House Job Rules

House Republicans want the White House to be bound by the same employment and civil rights laws that businesses are.

Rep. John L. Mica (R-Fla.) introduced a bill Tuesday that would cancel exemptions the White House and Executive Office of the President have from such laws as the Americans with Disabilities Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act and the Occupational Safety and Health Act.

The bill also seeks to assert more congressional control over executive office finances by requiring appointment of a chief financial officer.

"This Congress really took an historic step during its first 100 days when it made itself live under laws that had been imposed on the private sector," Mica said during a news conference. "Now, we feel, it's time to close the loop by putting the White House under those same laws. I call this ending the last plantation."

Under the bill, White House employees who prove violations of equal employment opportunity laws would be eligible for punitive damages, just like their private counterparts, Mica said.

Mica said he proposed the bill partly in response to congressional hearings on the politically sensitive firings at the White House travel office in May 1993.

Those hearings revealed the White House's financial management needs to be tightened, he said.

The firings caused an uproar as Republican critics accused the White House of fabricating charges of incompetence against the employees so they could be replaced by President Clinton's allies.

"We observed that the White House financial operations lacked both accountability and structure," he said. "It is inconceivable that a [chief financial officer] would have permitted the unorthodox accounting practices that prevailed in the travel office, and which the White House used as justification for firing those longtime employees."

Clinton Removes War Zone Order on Vietnam

■ Three decades after it was signed, the executive order declaring Vietnam a war zone was revoked by Clinton this week.

The action, which Clinton signed Tuesday, takes effect June 30 and applies to Vietnam and the waters off its coast.

Clinton's decision to cancel the executive order ends one more lingering link to the war, which ended in 1975. The United States normalized diplomatic relations with Vietnam last year.

The 1965 order, signed by President Lyndon B. Johnson, made military personnel serving in Vietnam eligible for tax exempt hostile-fire pay.

"It was kept in effect after the war to preserve benefits for POW-MIA families," said a White House official who commented on the



"The bottom line is that federal employees should be administering programs passed by Congress—not campaigning with taxpayer dollars on behalf of their own special agency interests."

— Rep. William F. Clinger Jr. (R-Pa.)

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David,

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Michael
(legal intern)

May 15, 1996

MEMORANDUM FOR DAVID FEIN AND TREY SCHROEDER

FROM: MICHAEL YANG, Legal Intern

SUBJECT: DISABILITY DISCRIMINATION

You have asked me to determine whether the ADA applies to White House hiring; specifically, what impact it has on applicants with mental illnesses or records of illegal drug use.

Short Answer: Yes, it does. Current illegal drug users are not protected. In all other cases, it is difficult to predict the impact of the statute because of the complexity of the statute and its frequent use of balancing and multi-factor tests. The easiest way to avoid liability is to minimize or eliminate the impact the mental illness and/or drug use has on the hiring decision, except in cases where it is clear that the disability renders the individual unqualified.

FULL ANALYSIS

I. Does the ADA apply to EOP?

The ADA does not technically apply to the Executive Office of the President, but the Rehabilitation Act does.¹ The Rehabilitation Act prohibits discrimination by any federal executive agency or program which receives federal funds. In its application to employment discrimination, however, the Act is identical to the ADA.² The Executive Office of the President qualifies as an executive agency.³ Thus, any EOP hiring is subject to the Rehabilitation Act's ban on discrimination against "qualified individual[s] with handicap[s]." ⁴ A handicap is any physical or mental impairment which substantially limits one or

¹ While the ADA on its face applies to any employer who employs more than 15 employees, the United States government has been specifically exempted from this definition. 29 C.F.R. 1630.2(e)(2)(i).

² 29 U.S.C. 794(a) provides that in the area of employment discrimination, the standards to be applied are the same as those required by the ADA.

³ 3 C.F.R. 102 et. seq., which I have attached to this memo. Specifically, WHO, OVP, OMB, OPD, NSC, OSTP, USTR, CEQ, CEA, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the EOP.

⁴ 29 C.F.R. 794; 3 C.F.R. 102.140.

more major life activities.⁵ Thus, in determining whether an individual is covered you must consider 1) does he or she have an impairment?; 2) does that impairment substantially limit a major life activity? and 3) is that person qualified?

II. Does drug use qualify as an impairment?

A. Current drug use: No. The Rehabilitation Act explicitly states that an individual "who is currently engaging in the illegal use of drugs" does not qualify as an individual with a disability.⁶ The implementing regulations for EOP, however, state that "drug addiction" qualifies as a physical or mental impairment for the purposes of the Act.⁷ Thus, I believe the following statements are true:

- 1) An individual who is currently using any illegal substance is not covered by the Act.
- 2) An individual who is addicted to an illegal substance but is not using it is covered. (For example, a heroin addict using methadone, a legal substitute, would be potentially covered).
- 3) An individual who is addicted to a legal substance is covered.

B. History of drug use: Yes. The Act specifically provides that an individual who has successfully completed or is currently participating in a rehabilitation program who is not currently using the illegal substance is covered.⁸

II. Do mental illnesses qualify as impairments?

Yes. The definition of a handicap is a "physical or mental impairment which substantially limits one or more major life activities."⁹ Any mental illness qualifies as an impairment, with the exception of sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or any psychoactive use

⁵ 29 U.S. 706. **NOTE:** The definition also includes having a record of such an impairment or being regarded as having such an impairment.

⁶ 29 U.S.C. 706(8)(C)(i).

⁷ 3 C.F.R. 102.103. It is a general principle of administrative law that implementing regulations may not contradict their authorizing statutes, but every effort is made by the courts to devise interpretations which maintain consistency.

⁸ 29 U.S.C. 706(8)(C)(ii).

⁹ 29 U.S.C. 706(8)(A).

disorders stemming from illegal drug use.¹⁰

III. Does the impairment substantially limit a major life activity?

The next test is whether the impairment in question is serious enough to warrant protection. Although virtually any health condition qualifies as an impairment, only those which substantially limit a major life activity qualify an individual for protection. Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.¹¹ A substantial limitation is one which prevents or significantly restricts the condition, manner, or duration the individual's ability to perform the activity.¹² Thus, any mental illness or (legal) drug addiction which meets the requirements of both of these definitions qualifies an individual for protection. Likewise, any long-term effects of prior illegal drug use which met these requirements would qualify an individual for protection.

IV. Is the individual "qualified"?

Even if an individual has an impairment which substantially limits one of his or her major life activities, he or she is not necessarily covered by the Act. The Act only requires that employers not discriminate against "qualified" handicapped individuals. An individual is qualified if he or she can perform the essential functions of the job with or without "reasonable accommodation."¹³

What constitutes a "reasonable accommodation" is defined on a case-by-case basis. Accommodations to be considered include making existing facilities usable and accessible, job restructuring, part-time or modified work schedules, or providing devices or materials to help overcome the disability's impact on the individual's work. Factors to be considered in determining the reasonableness of an accommodation include its nature and cost and the size and financial resources of the employer.

While the federal government is certainly a large employer with considerable financial resources, the sensitive and high-stress nature of many EOP jobs can probably make for a strong argument that an individual may not be qualified for a particular job. Predicting whether a court will find an individual qualified in advance, however, is obviously difficult.

¹⁰ 29 U.S.C. 706(8)(E). Sexual behavior disorders include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders.

¹¹ 3 C.F.R. 102.103; 29 C.F.R. 1630.2.

¹² 29 C.F.R. 1630.2(j).

¹³ 42 U.S.C. 12111(8).

V. Summary of coverage requirements

The Rehabilitation Act applies to the EOP, but not to every individual. When considering whether a rejected applicant might be able to bring a lawsuit, the three-part test applies: 1) impairment, 2) substantially limiting, 3) qualified.

VI. If an individual is covered, what is prohibited by the Act?

Assuming an individual is covered, he or she may not be discriminated against. This means any of the following practices are prohibited:¹⁴

- 1) limiting, segregating, or classifying the applicant in a way that lowers his or her chances of being hired
- 2) using standards, criteria or methods of administration which "have the effect of discrimination" on the basis of the individual's disability, including qualifications or criteria which screen out such individuals
- 3) refusing to make reasonable accommodations for an otherwise qualified applicant
- 4) requiring applicants with disability to submit to a medical examination when non-disabled applicants are not also required to submit.

In short, if an individual qualifies for protection, the Act seeks to prevent his or her disability from being a factor in the hiring process. Any practices which make the disability a major factor are likely to generate liability. Obviously, refusing to hire the person because of the disability also generates liability.

VI. Conclusion

Mental illnesses and/or drug use are almost inevitably likely to reflect poorly on an individual's application. Denying an individual a position because of the disability, however, often may not generate liability because the disabilities render the individual unqualified. The nature of the position thus becomes a crucial factor.

Also, in a highly political environment, it is difficult to prove that the disability played a role in the rejection. Many other factors, such as connections, past experience, etc., can be cited as a defense.

Thus, applying the Act to EOP hiring is difficult. Liability is best avoided by downplaying the role the mental illness or history of drug use plays in the hiring decision, to the extent practicable.

¹⁴ 42 U.S.C. 12112(b)(3).

MEMORANDUM TO DAVID FEIN AND TREY SCHROEDER

FROM: MICHAEL YANG, Legal Intern

RE: DISABILITY DISCRIMINATION

The attached article appeared in the Washington Post yesterday (May 16). It does not affect my previous memo concerning the applicability of anti-discrimination laws to the EOP.

As best I can determine without contacting anyone on the Hill, this bill would repeal EOP's exemption from punitive damages. Under 28 U.S.C. 2674, the Federal government cannot be held liable for punitive damages. Rep. Mica's bill only appears to strip EOP of this exemption. If the Post article is accurate, this bill will not apply to the rest of the executive branch.

If you would like more information, please let me know.

PART 102—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE EXECUTIVE OFFICE OF THE PRESIDENT

Sec.

- 102.101 Purpose.
- 102.102 Application.
- 102.103 Definitions.
- 102.104–102.109 [Reserved]
- 102.110 Self-evaluation.
- 102.111 Notice.
- 102.112–102.129 [Reserved]
- 102.130 General prohibitions against discrimination.
- 102.131–102.139 [Reserved]
- 102.140 Employment.
- 102.141–102.148 [Reserved]
- 102.149 Program accessibility: Discrimination prohibited.
- 102.150 Program accessibility: Existing facilities.
- 102.151 Program accessibility: New construction and alterations.
- 102.152–102.159 [Reserved]
- 102.160 Communications.
- 102.161–102.169 [Reserved]
- 102.170 Compliance procedures.
- 102.171–102.999 [Reserved]

Authority: 29 U.S.C. 794.

Source: The provisions of this part 102 appear at 53 FR 25879, July 8, 1988, and 55 FR 46037, November 1, 1990, unless otherwise noted.

§ 102.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 102.102 Application.

This regulation (§§ 102.101–102.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 102.103 Definitions.

For purposes of this regulation, the term—

“Agency” means, for purposes of this regulation only, the following entities in the Executive Office of the President: the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

“Agency head” or “head of the agency”; as used in §§ 102.150(a)(3), 102.160(d) and 102.170 (i) and (j), shall be a three-member board which will include the Director, Office of Administration, the head of the Executive Office of the President, agency in which the issue needing resolution or decision arises and one other agency head selected by the two other

board members. If an issue arises within the agency, it shall be the Director of the Executive Office of the President, the Assistant Attorney General, the Director of the Civil Rights Division, the Director of the Office of the Inspector General, the Director of the Office of Management and Budget, the Director of the Office of Policy Development, the Director of the Office of Science and Technology Policy, the Director of the Office of the United States Trade Representative, the Director of the Council on Environmental Quality, the Director of the Council of Economic Advisers, the Director of the Office of Administration, the Director of the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

“Complete compliance” means the complainant’s name and address, a copy of the complaint, a copy of the alleged violation, and a copy of the alleged violator or by someone on behalf of the complainant, if possible) to the agency.

“Facility” means any building, roads, walks, parking areas, or personal property.

“Historic preservation” means any agency that have preserved historic property.

“Historic property” means any listing in the National Register of Historic Places as historic under the Act.

“Individual with a mental impairment” means an individual who has a mental impairment.

As used in this definition:

(1) “Physical or mental impairment” means:

(i) Any physiological or anatomical loss affecting the normal functioning of the sensory organs; card

and lymphatic; skin diseases; and any mental organic brain syndrome.

(ii) Any mental organic brain syndrome. The term is limited to, such disabilities as hearing impairment, multiple sclerosis, cardiac disease, and emotional illness, and

(2) “Major life activities” means performing manual tasks, learning, and working.

(3) “Has a record of being misclassified” means having been misclassified in a way that limits one or

CRIMINATION ON THE S OR ACTIVITIES E OF THE PRESIDENT

board members. In the event that an issue needing resolution or decision arises within the Office of Administration, one of the board members shall be the Director of the Office of Management and Budget.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Historic preservation programs" means programs conducted by the agency that have preservation of historic properties as a primary purpose.

"Historic properties" means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 102.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

"Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 102.104—102.109 [Reserved]

§ 102.110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

§ 102.111 Notice.

The agency shall make the provisions of this regulation known to the beneficiaries, and other persons who are affected by the provisions of this regulation, in such manner as the agency determines to be appropriate. The agency shall also make the provisions of this regulation known to the persons of the protected class in such manner as the agency determines to be appropriate. 504 and this regulation.

§§ 102.112—102.129 [Reserved]

§ 102.130 General prohibitions.

(a) No qualified individual with handicaps, be excluded from any program or activity, nor otherwise be subjected to discrimination, solely on the basis of handicap, conducted by the agency.

(b)(1) The agency, directly or through contractors, shall not discriminate on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from any program or activity that is funded in whole or in part by the agency;

(ii) Afford a qualified individual with handicaps the opportunity to participate in or benefit from any program or activity that is funded in whole or in part by the agency that is not afforded others;

(iii) Provide a qualified individual with handicaps a separate program or service that is not the same result, to the same extent, as that provided to others;

(iv) Provide different standards for individuals with handicaps or to individuals with handicaps than those provided to others unless the standards are necessary for the individual with handicaps to be able to participate in or benefit from the program or activity as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of the program or activity;

(vi) Otherwise limit the participation of any individual with handicaps in the receipt of the aid, benefit, or service.

(2) The agency may not deny an individual with handicaps the opportunity to participate in or benefit from any program or activity, different, despite the individual's handicap, from the program or activity.

(3) The agency may not deny an individual with handicaps the opportunity to participate in or benefit from any program or activity, different, despite the individual's handicap, from the program or activity.

(i) Subject qualified individuals to different standards on the basis of handicap; or

(ii) Defeat or substantially impair the participation of any individual with handicaps in any program or activity.

(4) The agency may not deny an individual with handicaps the opportunity to participate in or benefit from any program or activity, different, despite the individual's handicap, from the program or activity.

(i) Exclude individuals with handicaps from any program or activity, or otherwise subject them to discrimination, solely on the basis of handicap, conducted by the agency.

§ 102.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 102.112—102.129 [Reserved]**§ 102.130 General prohibitions against discrimination.**

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 102.131—102.139 [Reserved]

§ 102.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§ 102.141—102.148 [Reserved]

§ 102.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 102.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 102.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compli-

ance with § 102.150(a) decision that compliance made by the agency h resources available fo program or activity, a the reasons for reachi an alteration or such would not result in su less ensure that indiv ices of the program or

(b) *Methods*—(1) *Ge* of this section throug of services to accessi home visits, delivery existing facilities and ing stock, or any other ties readily accessible agency is not require where other methods tion. The agency, in m cessibility requirement riers Act of 1968, as a implementing it. In ch requirements of this sec that offer programs an in the most integrated

(2) *Historic preserv* § 102.150(a) in historic ity to methods that pro In cases where a physi because of § 102.150(a) accessibility include—

(i) Using audio-visua an historic property tha

(ii) Assigning perso through portions of hi cessible; or

(iii) Adopting other i

(c) *Time period for c* tions established unde where structural chang made by September 6,

(d) *Transition plan.* be undertaken to achie by March 6, 1989, a tra plete such changes. Th persons, including ind ing individuals with h transition plan by subm the transition plan sha shall, at a minimum—

(1) Identify physical cessibility of its program

ance with § 102.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General*. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs*. In meeting the requirements of § 102.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 102.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance*. The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

§ 102.151

Title 3—The President

(2) Describe in detail the methods that will be used to make the facilities accessible:

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 102.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 102.152—102.159 [Reserved]

§ 102.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 102.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or

such burdens, the age in such an alteration to the maximum extent benefits and services

§§ 102.161—102.169 [

§ 102.170 Compliance

(a) Except as provided in this section, this chapter applies to all allegations of sexual harassment, sexual assault, and activities of sexual violence.

(b) The agency shall comply with respect to employment with the Equal Employment Opportunity Commission to section 501 of the

(c) The Director, Executive Office of the President, for the implementation of this section, at the following address: Room 5638, 1700 Pennsylvania Ave. NW., Washington, D.C. 20503.

(d) The agency shall determine whether the employee is a person in which it has jurisdiction, and if so, the employee shall be removed from the days of the alleged act, and the employee shall be removed from the period for good cause.

(e) If the agency receives information from a source under its jurisdiction, it shall promptly make such information available to the FBI and shall make every effort to refer the case to the FBI.

(f) The agency shall

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individuals with hand

(g) Within 180 days of the date that the Commission has jurisdiction, the Commission shall conduct the investigation in a

(1) Findings of fact a

(2) A description of

(3) A notice of the ri

(h) Appeals of the

must be filed by the court
of the letter required by
good cause.

(i) Timely appeals to the agency.

(j) The head of the appeal within 60

agency determines that complainant, he or she shall

Additional information to m

(k) The time limits of the contract shall be extended with the permission of the Commission.

(l) The agency may c

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final determination made

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§ 102.171-102.999 [Re

such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 102.161—102.169 [Reserved]

§ 102.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director, Facilities Management, Office of Administration, Executive Office of the President, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Director at the following address: Room 486, Old Executive Office Building, 17th and Pennsylvania Ave. NW., Washington, DC 20500.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151—4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

- (1) Findings of fact and conclusions of law;
- (2) A description of a remedy for each violation found; and
- (3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 102.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 102.171—102.999 [Reserved]