

FOIA MARKER

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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Michelle Aronowitz

Subseries:

OA/ID Number: 24519

FolderID:

Folder Title:

ADA [Americans with Disabilities Act] and OFCCP [Office of Federal Contract Compliance Programs] Rule

Stack:
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Row:
113

Section:
7

Shelf:
4

Position:
2

**Initiatives of the EEOC to Implement the Recommendation
of the President's Task Force on Adults with Disabilities that the
Departments of Justice and Labor and the EEOC Collaborate to Strengthen
Enforcement of the Americans with Disabilities Act and the Rehabilitation Act**

1. **EEOC, DOJ, and DOL** have initiated a coordinated enforcement project aimed at combating unnecessary qualification standards in state and local laws, ordinances, regulations, and professional certification requirements that bar individuals with disabilities from employment in violation of the ADA.

This project focuses on two areas: Requirements that apply across the board to all state employees; and teacher certification requirements. EEOC and DOJ are in the process of reviewing these types of state hiring requirements to identify those that violate the ADA.

Once EEOC and DOJ identify disqualifying qualification standards, they will educate state and local governing bodies about their current laws and ordinances that must be brought into line with the requirements of the ADA and the Rehabilitation Act. When voluntary compliance is not achieved, the EEOC, DOJ, and DOL will develop a coordinated enforcement approach to challenge such laws.

2. **EEOC, DOJ, and DOL** also have surveyed and catalogued their existing training materials and resources for agency investigators on disability discrimination laws for the purpose of making these training materials and resources more accessible to other enforcement agencies, such as OFCCP.

3. **EEOC and OFCCP** will engage in various coordinated enforcement-related activities, designed to foster cooperation between the agencies in their enforcement of the ADA and section 503 of the Rehabilitation Act, respectively. EEOC and OFCCP are discussing the sharing of information that each agency collects in the enforcement of the ADA and section 503. For the past several years, the agencies have worked cooperatively in the sharing of information concerning enforcement of Title VII and Executive Order 11246, which prohibit discrimination on the bases of race, color, national origin, religion, and sex. In this regard, OFCCP has sought information from EEOC's Case Data System and EEOC has sought information that OFCCP has developed during compliance reviews of federal contractors. Both agencies currently are discussing expanding these activities to include disability-related information, and a meeting is being scheduled between the agencies that will include information technology specialists from each agency, who will be able to discuss the feasibility of providing each agency with greater access to the information of the other agency.



McKinnon William <mckinnon-william@dol.gov>

06/07/2000 05:13:42 PM

Record Type: Record

To: Michelle M. Aronowitz/WHO/EOP
cc: Ogle Becky <ogle-becky@dol.gov>
Subject: FW: Recommendation #2

<<dir2>>

Michelle.....dir2 is the recommendation. Below is an email that was sent to Eric regarding the people/agencies that are participating in the discussions. Eric had planned on sending a memo to all participants prior to any meeting. Becky's points were intended to assist Eric when he wrote the memo.

We will let you know how this Friday's meeting goes....thanks

> -----

> From: McKinnon William
> Sent: Thursday, May 11, 2000 11:02 AM
> To: 'J._Eric_Gould@opd.eop.gov'; 'Eugenia_Chough@opd.eop.gov'
> Cc: McKinnon William
> Subject: RE: Recommendation #2

>

>

> Recommendation #2

>

> these are Becky's points concerning the reason for pursue this(see
> below)....the people that need to come to the meeting are the same ones
> invited to the last....see attached message thanks again, Bill
> <<CONFIRM: Implementation of Task Force Recommendation on
> Enforcement>>

>

> Becky writes:

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> As to date, the White House has not seen the proposed rule from OFCCP,
> apparently there have been no further conversations between OFCCP, EEOC or
> DOJ on this issue of collaboration. NO one, especially OFCCP and EEOC has
> brought any new ideas to light on how to capture the data in a systemic
> way. THis can not be lost. THis is important and they need to come to
> the table ready to discuss this very important issue. Before Eddie left
> we had discussed the long term plans of ending up with an Ex. Order, like
> the one for women and minorities, but we cannot do anything of this nature
> until we capture the data. This is probably the most important part of
> the directive and this needs to be the resounding point made in the memo
> from the White House.
> WE are looking to announce this at the July 25 or 26th event and need to
> move forward asap.

>

>
>

 - dir2.wpd

Date: Wed, 23 Feb 2000 17:36:21 -0400
From: Eugenia_Chough@opd.eop.gov
Subject: CONFIRM: Implementation of Task Force Recommendation on Enforcement
To: Edward_W._Correia@who.eop.gov, Lisa_M._Brown%OVP@oa.eop.gov,
Alison_Perkins-Cohen@omb.eop.gov, Debra_J._Bond@omb.eop.gov, Stuart_Shapiro@omb.eop.gov,
Daniel_I._Werfel@omb.eop.gov, John_E._Thompson@omb.eop.gov, ogle-becky@dol.gov,
Klein-cheryl@dol.gov, reed-gary@dol.gov, mckinnon-william@dol.gov, Solano-henry@dol.gov,
mccants-artenia@dol.gov, sjw@fenix2.dol-esa.gov, paxton-sally@dol.gov, stewart-marilyn@dol.gov,
benita.lucy@eeoc.gov, Ellen.vargyas@eeoc.gov, mark.l.gross@usdoj.gov, liz.savage@usdoj.gov, LLOP
EZ@EEOC.GOV, peggy.mastroianni@eeoc.gov, peter.gray@eeoc.gov, carol.miaskoff@eeoc.gov,
Susan_M._Carr@omb.eop.gov
Cc: Cynthia_A._Rice@opd.eop.gov, J._Eric_Gould@opd.eop.gov, EOP_Operations@oa.eop.gov,
Jeanne_Lambrew@opd.eop.gov, Devorah_R._Adler@opd.eop.gov, Anna_Richter@opd.eop.gov
Message-id: <8525688E.0050D314.00@Ingate3.eop.gov>
MIME-version: 1.0
X-Mailer: Internet Mail Service (5.5.2650.21)
Content-type: multipart/mixed; boundary="Boundary_(ID_sDrHoiH3zGWy27Np7LStlw)"

Monday, 2/28 at 3pm in room 211 OEOb, it is. Thank you.

----- Forwarded by Eugenia Chough/OPD/EOP on 02/23/2000
09:42 AM -----

(Embedded image moved to file: PIC02308.PCX) Eugenia Chough
02/22/2000 05:49:32 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: NEW TIME: Implementation of Task Force Recommendation on
Enforcement

It sounds like Friday at 1:30pm does not work for many of you. Let's try
Monday, 2/28 at 3pm in room 211 OEOb. Let me know if you absolutely cannot
make that time. Thanks.

----- Forwarded by Eugenia Chough/OPD/EOP on 02/22/2000
05:33 PM -----

(Embedded image moved to file: PIC31235.PCX) Eugenia Chough
02/22/2000 12:31:00 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: POSTPONE: Implementation of Task Force Recommendation on
Enforcement

Task Force folks had a last minute scheduling change so we're going to have
to reschedule this for Friday, 2/25 at 1:30pm in room 211 of OEOB. Please
let me know if you have a conflict, and I'll followup with a confirmation.
Thanks.

----- Forwarded by Eugenia Chough/OPD/EOP on 02/22/2000
12:28 PM -----

(Embedded image moved to file: PIC13284.PCX) Eugenia Chough
02/17/2000 06:03:46 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: CONFIRM: Implementation of Task Force Recommendation on
Enforcement

This note is to confirm that we will be meeting on Wednesday, February 23
at 2pm in room 211 of OEOB.

For those of you who haven't sent me your DOB and SSN, please do so by
Tuesday morning.

Thank you.

Genie

----- Forwarded by Eugenia Chough/OPD/EOP on 02/17/2000
05:59 PM -----

(Embedded image moved to file: PIC00404.PCX) Eugenia Chough
02/10/2000 06:03:04 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Cynthia A. Rice/OPD/EOP@EOP, J. Eric Gould/OPD/EOP@EOP, Jeanne Lambrew/OPD/EOP@EOP, Devorah R. Adler/OPD/EOP@EOP
Subject: MEETING: Implementation of Task Force Recommendation re: Enforcement

We would like to meet on Wednesday, February 23 at 2pm in room 211 of OEOPB to discuss next steps on the directive (described below) recommended by the President's Task Force on the Employment of Adults with Disabilities. Please let me know if that time absolutely can't work for you.

Justice, EEOC, DOL, OFCCP folks: Please send me your DOB and SSN info for entrance into the building.

I'll follow-up with a note to confirm.

Thank you.
Genie

The Task Force recommends that:

The President direct the Departments of Justice and Labor and the Equal Employment Opportunity Commission to collaborate in exploring methods for strengthening enforcement of employment-related nondiscrimination provisions of the Americans with Disabilities Act and the Rehabilitation Act. All efforts shall provide a clear and unequivocal message that expanded employment opportunities for individuals with disabilities are a high priority of the Administration. The efforts of the Department of Labor and the Equal Employment Opportunity Commission should include providing increased technical assistance to employers, strengthening compliance evaluations, and enhancing data collection as appropriate

Message Sent

To: _____

Edward W. Correia/WHO/EOP@EOP
Lisa M. Brown/OVP@OVP
Alison Perkins-Cohen/OMB/EOP@EOP
Debra J. Bond/OMB/EOP@EOP
Stuart Shapiro/OMB/EOP@EOP
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To: _____

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EOP Operations
Jeanne Lambrew/OPD/EOP@EOP
Devorah R. Adler/OPD/EOP@EOP
Anna Richter/OPD/EOP@EOP

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- PIC02308.PCX



- PIC31235.PCX



- PIC13284.PCX



- PIC00404.PCX



J. Eric Gould

06/06/2000 03:07:23 PM

Record Type: Record

To: Michelle M. Aronowitz/WHO/EOP@EOP

cc:

Subject: RE: Recommendation #2

fyi

----- Forwarded by J. Eric Gould/OPD/EOP on 06/06/2000 03:07 PM -----



McKinnon William <mckinnon-william@dol.gov>

05/11/2000 11:02:16 AM

Record Type: Record

To: J. Eric Gould/OPD/EOP, Eugenia Chough/OPD/EOP

cc: McKinnon William <mckinnon-william@dol.gov>

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To: Edward_W._Correia@who.eop.gov, Lisa_M._Brown%OVP@oa.eop.gov,
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Susan_M._Carr@omb.eop.gov
Cc: Cynthia_A._Rice@opd.eop.gov, J._Eric_Gould@opd.eop.gov, EOP_Operations@oa.eop.gov,
Jeanne_Lambrew@opd.eop.gov, Devorah_R._Adler@opd.eop.gov, Anna_Richter@opd.eop.gov
Message-id: <8525688E.0050D314.00@Ingate3.eop.gov>
MIME-version: 1.0
X-Mailer: Internet Mail Service (5.5.2650.21)
Content-type: multipart/mixed; boundary="Boundary_(ID_n3PjLjml4tPkGcZwpJLvsg)"

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09:42 AM -----

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12:28 PM -----

(Embedded image moved to file: PIC13284.PCX) Eugenia Chough
02/17/2000 06:03:46 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

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05:59 PM -----

(Embedded image moved to file: PIC00404.PCX) Eugenia Chough
02/10/2000 06:03:04 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Cynthia A. Rice/OPD/EOP@EOP, J. Eric Gould/OPD/EOP@EOP, Jeanne Lambrew/OPD/EOP@EOP, Devorah R. Adler/OPD/EOP@EOP

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- PIC13284.PCX



- PIC00404.PCX

2. The President direct the Departments of Justice and Labor, and the Equal Employment Opportunity Commission to collaborate in exploring methods for strengthening enforcement of employment-related nondiscrimination provisions of the Americans with Disabilities Act and the Rehabilitation Act. All efforts shall provide a clear and unequivocal message that expanded employment opportunities for individuals with disabilities are a high priority of the Administration. The efforts of the Department of Labor and the Equal Employment Opportunity Commission should include providing increased technical assistance to employers, strengthening compliance evaluations, and enhancing data collection as appropriate.

Effective enforcement of employment-related, nondiscrimination requirements is crucial to increasing employment opportunities for individuals with disabilities. The agencies responsible for enforcement must continue to explore new and more effective approaches for increasing compliance with laws requiring equal opportunities for job applicants and employees with disabilities. The enforcement agencies should develop and disseminate technical assistance guides to assist employers in understanding and implementing nondiscrimination requirements. These agencies should also develop educational tools to inform individuals with disabilities of the full range of protections under the ADA and the Rehabilitation Act. The enforcement agencies also should explore methods to strengthen their investigation processes. For example, the Department of Labor, through the Office of Federal Contract Compliance Programs, should utilize compliance evaluation procedures that allow the agency to focus on systemic barriers to the employment of individuals with disabilities. The Equal Employment Opportunity Commission, in coordination with the Departments of Justice and Labor, should explore enhancing data collection efforts with respect to the employment and the availability of persons with disabilities in the workforce, possibly through new regulations. Consistent with their complementary responsibilities for enforcement, Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Program should explore joint enforcement strategies.

TASK FORCE/ DATA COLLECTION EFFORTS ON EMPLOYMENT

I. Efforts addressing the general population

In response to the Executive Order 13078, the Task Force established the Employment Rate Measurement Methodology (ERMM) Work Group or Statistics Committee. Executive Order 13078 requires Bureau of Labor Statistics, in conjunction with the Bureau of the Census and other agencies, to develop and implement an accurate and reliable methodology for determining the employment rate for adults with disabilities.

BLS currently maintains data on the employment status of other protected classes, such as women, blacks, and Hispanics, and it is necessary to have comparable data on adults with disability in order to track their involvement in the labor market. Also, employment data on adults with disabilities could be used by many federal departments and agencies to help evaluate their efforts towards improving the labor force status of persons with disabilities.

Bureau of Labor Statistics (BLS) and the Bureau of the Census have guidelines on questionnaire pretesting. Pretesting is important because it can determine if there is an understanding of the intent and meaning of the question that is shared by the questions' designers and respondents. In fulfilling the Executive Order, BLS is identifying surveys that might prove useful, and assessing the availability and quality of survey testing.

The Statistics Committee has proposed a plan to develop an employment rate of adults with disabilities. The following represent current Task Force and members research efforts in support of the proposed plan:

- An annotated bibliography was assembled that contains citations covering particular disability questions and entire disability surveys. The annotations contain relevant information on the questions and, particularly, any testing the questions or surveys have undergone. Relevant tests include those conducted by survey methodologists and others, including, but not limited to, cognitive interviews, behavior coding, and interviewer /respondent debriefings. Data from field tests (e.g., record check studies) as well as research studies (and methods) that provide data (and procedures) for evaluating the validity of disability measures discussed. This is completed.
- A concise but comprehensive overview of existing federal employment programs designed for adults with disabilities is underway. This information will provide input to the Committee regarding how to better operationalize what it means to be a person with a disability for purposes of measuring employment of adults with disabilities. To be completed by 1/25/00.
- More detailed materials regarding specific surveys that were identified in the annotated bibliography are currently being collected. This information will be used to specifically determine which set of questions identified in the annotated bibliography are candidates for subsequent cognitive and field testing as described in the Statistics Committee

proposed plan. To be completed by 12/21/99.

II. Efforts addressing the federal government/federal government contractors

A. Equal Employment Opportunity Commission (EEOC) has the responsibility for monitoring affirmative employment efforts of federal agencies and has prepared instructions for the agencies in "EEO-Management Directive- 713: Affirmative Action for Hiring, Placement, and Advancement of Individuals with Handicaps." EEOC now needs to update this goal for persons with targeted disabilities, as it is very dated. The Task Force and EEOC are conducting a research to derive a revised affirmative employment goal for federal civilian agencies for persons with targeted disabilities. To be completed by 3/15/00.

B. The Department of Labor, through its Office of Federal Contract Compliance (OFCCP), has the responsibility for enforcing Section 503 of the Rehabilitation Act of 1973, which requires Federal contractors to take pro-active measures to hire persons with disabilities that go beyond the nondiscrimination requirements of Section 503 and the Americans with Disabilities Act. The Task Force is taking steps needed to ensure that data on the availability of persons with disabilities in the workforce are included in the 2000 Census EEO Detailed File. This information will be available in 20003.



Cynthia A. Rice

03/10/2000 01:04:08 PM

Record Type: Record

To: J. Eric Gould/OPD/EOP@EOP

cc: Eugenia Chough/OPD/EOP@EOP, Edward W. Correia/WHO/EOP@EOP

Subject: Disability Management Directive

----- Forwarded by Cynthia A. Rice/OPD/EOP on 03/10/2000 01:04 PM -----

Edward W. Correia

03/10/2000 01:02:52 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP@EOP, Lisa M. Brown/OVP@OVP

cc:

Subject: Disability Management Directive

Are you interested in being a co-author of the attached?



Draft Memo to ME.d

To: Maria Echaveste
From: Eddie Correia, Lisa Brown, Cynthia Rice

Cynthia Rice

We have been working on a variety of initiatives to further the Administration's goal of increasing employment of adults with disabilities. One of our efforts has been working with EEOC to develop a "management directive" to all federal agencies, which gives agencies guidance about how to comply with the requirement in the Rehabilitation Act to develop affirmative action plans for disabled employees. We met with EEOC staff, DOJ, and others to reach consensus on a draft of the directive, which we believe will greatly improve agencies' efforts to increase hiring. Once EEOC issues it, the directive would be circulated for agency comment before it becomes final. Unfortunately, the issuance of the directive has been delayed because of disagreements among the EEOC Commissioners about how to proceed.

The draft of the directive that was the subject of our discussions dealt with affirmative action plans for groups covered under Title VII (women and minorities) as well as disabled employees, which are covered under the Rehabilitation Act. We understand that there is general agreement among the EEOC Commissioners about how to deal with the Rehabilitation Act component of the directive. However, there is disagreement about how to deal with the Title VII component. In particular, some Commisisoners apparently want to press for requirements that may go beyond those that DOJ (and we) would recommend. In our judgment, reaching consensus on the Title VII component will take some time, and it is not realistic to expect EEOC to release it soon. However, if EEOC was willing to deal with the Rehabilitation Act component separately, it could be issued in the near future. That step would be enthusiastically applauded by the disability community and could spur private employers to take similar steps.

Ida Castro, the Chair of the EEOC is somewhat reluctant to press for issuance of the Rehabilitation. We understand her primary concern to be that the groups covered by Title VII will feel left behind if the directive is not comprehensive. While it would be preferable to have a comprehensive directive, we cannot realistically expect EEOC to issue one in the foreseeable future. Consequently, our judgment is that the EEOC should move ahead on the Rehabilitation Act component, and we recommend that you call Ida to make that point.

EEOC
Enforcement

**Initiatives of the EEOC to Implement the Recommendation
of the President's Task Force on Adults with Disabilities that the
Departments of Justice and Labor and the EEOC Collaborate to Strengthen
Enforcement of the Americans with Disabilities Act and the Rehabilitation Act**

1. **EEOC, DOJ, and DOL** have initiated a coordinated enforcement project aimed at combating unnecessary qualification standards in state and local laws, ordinances, regulations, and professional certification requirements that bar individuals with disabilities from employment in violation of the ADA.

This project focuses on two areas: Requirements that apply across the board to all state employees; and teacher certification requirements. EEOC and DOJ are in the process of reviewing these types of state hiring requirements to identify those that violate the ADA.

Once EEOC and DOJ identify disqualifying qualification standards, they will educate state and local governing bodies about their current laws and ordinances that must be brought into line with the requirements of the ADA and the Rehabilitation Act. When voluntary compliance is not achieved, the EEOC, DOJ, and DOL will develop a coordinated enforcement approach to challenge such laws.

2. **EEOC, DOJ, and DOL** also have surveyed and catalogued their existing training materials and resources for agency investigators on disability discrimination laws for the purpose of making these training materials and resources more accessible to other enforcement agencies, such as OFCCP.
3. **EEOC and OFCCP** will engage in various coordinated enforcement-related activities, designed to foster cooperation between the agencies in their enforcement of the ADA and section 503 of the Rehabilitation Act, respectively. EEOC and OFCCP are discussing the sharing of information that each agency collects in the enforcement of the ADA and section 503. For the past several years, the agencies have worked cooperatively in the sharing of information concerning enforcement of Title VII and Executive Order 11246, which prohibit discrimination on the bases of race, color, national origin, religion, and sex. In this regard, OFCCP has sought information from EEOC's Case Data System and EEOC has sought information that OFCCP has developed during compliance reviews of federal contractors. Both agencies currently are discussing expanding these activities to include disability-related information, and a meeting is being scheduled between the agencies that will include information technology specialists from each agency, who will be able to discuss the feasibility of providing each agency with greater access to the information of the other agency.

INITIATIVES TO IMPLEMENT THE RECOMMENDATIONS OF THE PRESIDENT'S TASK FORCE ON ADULTS WITH DISABILITIES

1. The OFCCP will develop a publication setting forth a list of best practices for the recruitment and retention of persons with disabilities. The document will address many ways outstanding federal contractors comply with the spirit and the letter of the nondiscrimination and affirmative action requirements of Section 503 of the Rehabilitation Act of 1973.
2. Conduct seminars with regional/local industry liaison groups to share information concerning best practices and to develop better linkages with organizations (e.g. rehabilitation services programs, association for the blind, Thresholds, disabled veterans organizations) that train and/or refer persons with disabilities who are qualified to work at federal contractor facilities.
3. Develop additional methods of selecting contractors for compliance evaluations where disability rights issues are involved. For example, OFCCP and EEOC could share information regarding multiple Americans with Disabilities Act (ADA) complaints filed against a single facility or contractor. With that and other evidence of noncompliance, OFCCP could institute a compliance evaluation or include that information for investigation during the course of regularly scheduled compliance reviews. Currently OFCCP selection procedures allow priority scheduling of contractor establishments for compliance evaluations. Specifically, the current selection guidelines provide that contractor establishments are to be given the highest priority in scheduling where: (1) a class action discrimination complaint filed with OFCCP against an establishment is pending resolution or other closure and (2) three or more individual discrimination complaints filed with OFCCP against an establishment are pending resolution or other closure. This provides an avenue for scheduling contractor establishments when disability issues are reported. Given the current regulatory provisions that allow "focused" reviews, OFCCP is able to determine compliance with Section 503 of the Rehabilitation Act of 1973 using this procedure. In addition, OFCCP routinely contacts the EEOC and State and local fair employment practice agencies for information concerning complaints filed against contractor establishments when it evaluates compliance with all three programs as a normal operating procedure. With this information, OFCCP will be able to do more compliance evaluations specifically targeted to issues related to disability.
4. Sign memoranda of understanding (MOUs) with state rehabilitation services agencies and assisted living organizations to promote more and better exchanges of information and to promote greater linkages between the federal contractors and the service providers.

exists with
to do focused
reviews for all
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② min 20
③ disabled
disreg. dom

5. Host a national conference on equal employment opportunity for persons with disabilities. Using the resources of local and national disability services and advocacy organizations, OFCCP may convene a conference to promote best practices and provide compliance assistance for contractors needing guidance. This conference could be co-sponsored with EEOC, the President's Task Force and/or the Department of Justice. Contractor organizations, including the National Industry Liaison Group, could also be asked to participate as organizers.
6. Provide more emphasis on disability related issues in press ^{1.5 site} announcements of OFCCP settlements with federal contractors.
7. Develop more fully the OFCCP interactive website (E-laws) to answer questions regarding the laws protecting persons with disabilities.
8. In FY 2000, consider Exemplary Voluntary Efforts Awards (EVE) for contractors with outstanding results in the employment of persons with disabilities.
9. Conduct informational visits to local disability agencies on the role of OFCCP. The OFCCP Ombudsperson will work with the regional offices to plan and implement these visits.

2/28/00



● J. Eric Gould

06/07/2000 03:29:40 PM

Record Type: Record

To: Michelle M. Aronowitz/WHO/EOP@EOP
cc:
bcc:
Subject: RE: Recommendation #2

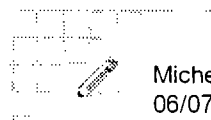
that is the recommendation

This is the draft memo from Becky:

As to date, the White House has not seen the proposed rule from OFCCP, apparently there have been no further conversations between OFCCP, EEOC or DOJ on this issue of collaboration. NO one, especially OFCCP and EEOC has brought any new ideas to light on how to capture the data in a systemic way. This can not be lost. This is important and they need to come to the table ready to discuss this very important issue. Before Eddie left we had discussed the long term plans of ending up with an Ex. Order, like the one for women and minorities, but we cannot do anything of this nature until we capture the data. This is probably the most important part of the directive and this needs to be the resounding point made in the memo from the White House.

WE are looking to announce this at the July 25 or 26th event and need to move forward asap.

Michelle M. Aronowitz



Michelle M. Aronowitz
06/07/2000 03:27:29 PM

Record Type: Record

To: J. Eric Gould/OPD/EOP@EOP
cc:
Subject: RE: Recommendation #2

is this it?

The Task Force recommends that:

The President direct the Departments of Justice and Labor and the Equal

Employment Opportunity Commission to collaborate in exploring methods for strengthening enforcement of employment-related nondiscrimination provisions of the Americans with Disabilities Act and the Rehabilitation Act. All efforts shall provide a clear and unequivocal message that expanded employment opportunities for individuals with disabilities are a high priority of the Administration. The efforts of the Department of Labor and the Equal Employment Opportunity Commission should include providing increased technical assistance to employers, strengthening compliance evaluations, and enhancing data collection as appropriate

INITIATIVES TO IMPLEMENT THE RECOMMENDATIONS OF THE PRESIDENT'S TASK FORCE ON ADULTS WITH DISABILITIES

1. The OFCCP will develop a publication setting forth a list of best practices for the recruitment and retention of persons with disabilities. The document will address many ways outstanding federal contractors comply with the spirit and the letter of the nondiscrimination and affirmative action requirements of Section 503 of the Rehabilitation Act of 1973. *not in draft draft - way*
2. Conduct seminars with regional/local industry liaison groups to share information concerning best practices and to develop better linkages with organizations (e.g. rehabilitation services programs, association for the blind, Thresholds, disabled veterans organizations) that train and/or refer persons with disabilities who are qualified to work at federal contractor facilities. *- on line*
3. Develop additional methods of selecting contractors for compliance evaluations where disability rights issues are involved. For example, OFCCP and EEOC could share information regarding multiple Americans with Disabilities Act (ADA) complaints filed against a single facility or contractor. With that and other evidence of noncompliance, OFCCP could institute a compliance evaluation or include that information for investigation during the course of regularly scheduled compliance reviews. Currently OFCCP selection procedures allow priority scheduling of contractor establishments for compliance evaluations. Specifically, the current selection guidelines provide that contractor establishments are to be given the highest priority in scheduling where: (1) a class action discrimination complaint filed with OFCCP against an establishment is pending resolution or other closure and (2) three or more individual discrimination complaints filed with OFCCP against an establishment are pending resolution or other closure. This provides an avenue for scheduling contractor establishments when disability issues are reported. Given the current regulatory provisions that allow "focused" reviews, OFCCP is able to determine compliance with Section 503 of the Rehabilitation Act of 1973 using this procedure. In addition, OFCCP routinely contacts the EEOC and State and local fair employment practice agencies for information concerning complaints filed against contractor establishments when it evaluates compliance with all three programs as a normal operating procedure. With this information, OFCCP will be able to do more compliance evaluations specifically targeted to issues related to disability. *develop statement*
need a tag change
King
announcement
- long term strategy
4. Sign memoranda of understanding (MOUs) with state rehabilitation services agencies and assisted living organizations to promote more and better exchanges of information and to promote greater linkages between the federal contractors and the service providers. —

regional conference

5. Host a national conference on equal employment opportunity for persons with disabilities. Using the resources of local and national disability services and advocacy organizations, OFCCP may convene a conference to promote best practices and provide compliance assistance for contractors needing guidance. This conference could be co-sponsored with EEOC, the President's Task Force and/or the Department of Justice. Contractor organizations, including the National Industry Liaison Group, could also be asked to participate as organizers. *roll out*
6. Provide more emphasis on disability related issues in press announcements of OFCCP settlements with federal contractors. *— look at DOD*
7. Develop more fully the OFCCP interactive website (E-laws) to answer questions regarding the laws protecting persons with disabilities. *>*
8. In FY 2000, consider Exemplary Voluntary Efforts Awards (EVE) for contractors with outstanding results in the employment of persons with disabilities.
9. Conduct informational visits to local disability agencies on the role of OFCCP. The OFCCP Ombudsperson will work with the regional offices to plan and implement these visits.

2/28/00

**Initiatives of the EEOC to Implement the Recommendation
of the President's Task Force on Adults with Disabilities that the
Departments of Justice and Labor and the EEOC Collaborate to Strengthen
Enforcement of the Americans with Disabilities Act and the Rehabilitation Act**

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This project focuses on two areas: Requirements that apply across the board to all state employees; and teacher certification requirements. EEOC and DOJ are in the process of reviewing these types of state hiring requirements to identify those that violate the ADA.

Once EEOC and DOJ identify disqualifying qualification standards, they will educate state and local governing bodies about their current laws and ordinances that must be brought into line with the requirements of the ADA and the Rehabilitation Act. When voluntary compliance is not achieved, the EEOC, DOJ, and DOL will develop a coordinated enforcement approach to challenge such laws.

2. **EEOC, DOJ, and DOL** also have surveyed and catalogued their existing training materials and resources for agency investigators on disability discrimination laws for the purpose of making these training materials and resources more accessible to other enforcement agencies, such as OFCCP.
3. **EEOC and OFCCP** will engage in various coordinated enforcement-related activities, designed to foster cooperation between the agencies in their enforcement of the ADA and section 503 of the Rehabilitation Act, respectively. EEOC and OFCCP are discussing the sharing of information that each agency collects in the enforcement of the ADA and section 503. For the past several years, the agencies have worked cooperatively in the sharing of information concerning enforcement of Title VII and Executive Order 11246, which prohibit discrimination on the bases of race, color, national origin, religion, and sex. In this regard, OFCCP has sought information from EEOC's Case Data System and EEOC has sought information that OFCCP has developed during compliance reviews of federal contractors. Both agencies currently are discussing expanding these activities to include disability-related information, and a meeting is being scheduled between the agencies that will include information technology specialists from each agency, who will be able to discuss the feasibility of providing each agency with greater access to the information of the other agency.



Ogle Becky <ogle-becky@dol.gov>

03/20/2000 10:23:59 AM

Record Type: Record

To: Edward W. Correia/WHO/EOP

cc: McKinnon William <mckinnon-william@dol.gov>

Subject: RE: a couple of things

I don't know where we're at with the OFCCP deal and it seems that some of those folks, DOJ, EEOC and OFCCP should be brought back together to see what if anything they are doing in response to the last meeting. I was also wondering if there would be a way to bring in to the mix OCR at HHS and HUD folks on their anti-discrimination activities. I asked Judy Heumann how OCR at Education does post-secondary enforcement of 504 and ADA and she says it is complaint driven. We are inundated with people telling us how inaccessible post-secondary higher education is for them and was just wondering if there isn't something we can do to beef this part up. Same goes for HUD. OCR at HHS needs the collaborative efforts from everyone else on post-Olmstead.

All of these entities could bring about a nice set of deliverables for the President/VP and others around the 10th anniversary of the ADA.....

From:

Edward_W._Correia@who.eop.gov[SMTP:Edward_W._Correia@who.eop.gov]

Sent: Monday, March 20, 2000 10:10 AM

To: Ogle Becky

Subject: Re: a couple of things

I'll try to set something up. Who all needs to come?

Memorandum

TO: Edward Correia
Shirley Wilcher
Edward Montgomery
Dr. Bernard Anderson
Henry Solano
Sally Paxton

FROM: Becky Ogle

RE: OFCCP Proposed Activities

DATE: February 7, 2000

As we are all aware, the intent and spirit of the proposed directive for the DOL Office of Federal Contract and Compliance Programs, Department of Justice and the Equal Employment Opportunity Commission is to strengthen enforcement by: (1) developing new and more effective compliance efforts by the responsible agencies; (2) shifting the focus toward increased technical assistance to employers in understanding and implementing non-discrimination requirements; (3) undertaking expanded efforts to educate persons with disabilities about the full range of protections under the ADA and the Rehab Act; and (4) enhancing data collection efforts with respect to the employment and the availability of persons with disabilities in the workforce, possibly through new regulations.

If history serves me correctly, the premise for the initial discussions for this directive were to ultimately establish an executive order, similar to the E.O. for women and minorities that sets goals and timetables. Further, this directive if done properly, signals that the enforcement of Section 503 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act is a high priority of both the Department of Labor and the Administration.

A lot of work toward consensus building had gone into the final directive, and it is somewhat dismaying that the initial proposed activities do not begin to illuminate any of these fruitful discussions. Allow me to point out the glaring omissions of the initial findings:

1. First and foremost, the intention behind the directive was not to do work in isolation, but rather collaborate with federal partners on how best to achieve the desirable

outcomes. This has not been done through either the EEOC or DOJ.

2. Essentially all listed proposed activities are requirements that OFCCP is mandated to do currently under the Rehabilitation Act of 1973 and the current MOU with EEOC.

3. There is no mention of activities toward strengthening current enforcement of Section 503, such as requiring some significant subset of OFCCP program plan to include focused reviews of disability employment.

4. The lack of an initiative on data collection on the workforce availability of persons with disabilities was completely left out of the proposed activities. This data is critical to the overarching intent behind this directive.

Finally, it is critical that we proceed from this point on with our federal partners that are outlined in the directive. This will enhance cooperation, collaboration and innovation. It is crucial that a meeting be convened immediately with all principle parties to discuss ways of achieving the outcomes outlined in the recommendation.

Thank you.

CHAPTER 1

1999 Recommendations to the President from the Presidential Task Force on Employment of Adults with Disabilities

The Task Force wishes to recognize the outstanding work by the Clinton-Gore Administration in acting on the recommendations made to the President in last year's report - Re-charting the Course: First Report of the Presidential Task Force on Employment of Adults with Disabilities. Prompt action and strong support by the Administration on these recommendations has resulted in significant achievements that are leading to increased employment opportunities for people with disabilities. See Chapter two for a complete review of the status of last years' recommendations.

The Task Force also wishes to acknowledge the efforts of the Task Force Committee members, particularly those who chaired the various committees established this past spring to guide and focus the work of the Task Force. The Task Force has received a report from each committee on their activities in 1999, which largely have focused on putting in place plans for more specific activity in 2000 and beyond. The Task Force will be reviewing and using these reports as the basis for future activities as appropriate. We have included highlights of these reports in Chapter Four.

The Task Force respectfully submits the following recommendations to the President of the United States of America for immediate consideration; The Task Force recommends that:

1. The President direct the Department of Labor to develop a proposal for consideration in the FY 2001 budget process for an Office of Disability Policy, Evaluation and Technical Assistance (ODPET) to be headed by an Assistant Secretary of Labor. ODPET functions could include:
 - Ensuring ongoing efforts to integrate people with disabilities into the Department of Labor's mainstream employment and training programs.
 - Establishing the National Disability Business Development Board to be comprised of the membership of the President's Committee on Employment of People with Disabilities and to serve as the advisory body to ODPET.
 - Maintaining the principle functions of the President's Committee on Employment of People with Disabilities.
 - Assisting the Presidential Task Force on Employment of Adults with Disabilities in implementing a coordinated and aggressive national employment strategy for people with disabilities.

The Office of Disability Policy, Evaluation and Technical Assistance could provide a long-term, permanent force to continue the work needed to ensure that persons with disabilities are integrated into mainstream employment and training programs within the Labor Department. The Presidential Task Force would continue to be responsible in the short-term for developing, refining, and monitoring the implementation of an aggressive, national employment strategy for persons with disabilities.

2. The President direct the Departments of Justice and Labor, and the Equal Employment

Opportunity Commission to collaborate in exploring methods for strengthening enforcement of employment-related nondiscrimination provisions of the Americans with Disabilities Act and the Rehabilitation Act. All efforts shall provide a clear and unequivocal message that expanded employment opportunities for individuals with disabilities are a high priority of the Administration. The efforts of the Department of Labor and the Equal Employment Opportunity Commission should include providing increased technical assistance to employers, strengthening compliance evaluations, and enhancing data collection as appropriate.

Effective enforcement of employment-related, nondiscrimination requirements is crucial to increasing employment opportunities for individuals with disabilities. The agencies responsible for enforcement must continue to explore new and more effective approaches for increasing compliance with laws requiring equal opportunities for job applicants and employees with disabilities. The enforcement agencies should develop and disseminate technical assistance guides to assist employers in understanding and implementing nondiscrimination requirements. These agencies should also develop educational tools to inform individuals with disabilities of the full range of protections under the ADA and the Rehabilitation Act. The enforcement agencies also should explore methods to strengthen their investigation processes. For example, the Department of Labor, through the Office of Federal Contract Compliance Programs, should utilize compliance evaluation procedures that allow the agency to focus on systemic barriers to the employment of individuals with disabilities. The Equal Employment Opportunity Commission, in coordination with the Departments of Justice and Labor, should explore enhancing data collection efforts with respect to the employment and the availability of persons with disabilities in the workforce, possibly through new regulations. Consistent with their complementary responsibilities for enforcement, Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Program should explore joint enforcement strategies.

3. The President direct the Departments of Labor, Education, and Health and Human Services, the Social Security Administration, the Office of Personnel Management, and other appropriate Federal agencies to construct and coordinate, under the leadership of the Presidential Task Force on Employment of Adults with Disabilities, a Youth-to-Work Initiative.

Barriers to employment for youth with disabilities include: low educational attainment; low educational and employment expectations; and confusing governmental programs with conflicting eligibility criteria and goals. As a result, many youth with disabilities transition from youth welfare to adult welfare without access to the education and training opportunities needed to make a transition to work and achieve independence. This Youth-to-Work Initiative would test alternative approaches to helping youth with disabilities gain access needed to education and training opportunities and overcome barriers to employment.

Each year, about 40,000 eighteen-year-olds are subject to a continuing disability review for Supplemental Security Income (SSI) benefits, but only 25,000 are determined eligible for such assistance. On average, the young adults determined to still be eligible will remain on SSI for 27 years, while those found ineligible are likely to live in poverty. Many youth with disabilities spend a significant portion of their lives living in poverty, dependent upon public assistance

programs, and relegated to the margins of society. In addition, compared to students without disabilities, students with disabilities drop out of school much more frequently and enroll in post-secondary education less frequently.

4. The President direct the Department of Health and Human Services to develop a proposal to allow the Maternal and Child Health Programs for Children with Special Needs to provide Healthy and Ready to Work services to youth with disabilities who are under the age of 16.

The Maternal and Child Health Programs for Children with Special Needs (Title V of the Social Security Act) provides Healthy and Ready to Work services to youth with disabilities that are essential to preparing them for continued education and training, but are restricted to serving only youth 16 years and older. As a result, many youth with disabilities are ready to drop out of the education stream just at a time when they become eligible to receive services that would enable them to benefit from continued education.

There is a clear need to provide these services to youth with disabilities at an earlier age.

5. The President direct the Department of Housing and Urban Development to explore steps needed to establish an earned income disregard for tenants with disabilities living in other-than-Public Housing Authority housing who return to work, and to exempt any disability-related expenses incurred when a tenant goes to work from the "countable" income used to determine rents.

The Department of Housing and Urban Development has promulgated rules under recently enacted legislation aimed at providing additional incentives for low-income individuals in public housing to go to work, or work additional hours. Current rules, however, do not provide sufficient incentives for employment of people with disabilities who are assisted by the Department of Housing and Urban Development subsidies, but do not live in Public Housing Authority housing. The Department should explore ways to extend similar incentives to all HUD-subsidized tenants with disabilities.

6. The President continue to work with Congress to secure adequate funding, proposed in the Administration's FY 2000 budget, for their program to accelerate the development and adoption of information and communication technologies that can be used by the 54 million Americans with disabilities.

The President should continue to push for this initiative that would: (1) help make the Federal Government a "model user" of accessible electronic and information technology through the implementation of Section 508 of the Rehabilitation Act; (2) support new and expanded State loan programs making assistive technology more affordable for adults with disabilities; and (3) invest in research, development, and technology transfer in areas such as "text to speech," speech recognition, and eye tracking for people who cannot use a keyboard.

7. The President continue to work with Congress to pass the tax credit proposed in the Administration's FY 2000 budget, in order to assist adults with disabilities with expenses related to work.

Working-age adults with disabilities are often discouraged from working because of the high cost of personal attendant services and other services or technologies required for employment. Similarly, the cost to employers of hiring an individual requiring personal attendant services can sometimes be prohibitive. Tax credits provide a flexible way to assist people with disabilities in defraying these expenses.

8. The President continue to work with Congress to pass a strong, enforceable Patients' Bill of Rights.

It is critically important to people with disabilities that we enact a strong, enforceable Patients' Bill of Rights. This legislation must include the following: guaranteed access to needed health care specialists; access to emergency room services when and where the need arises; continuity of care protections so that patients will not have an abrupt transition in care if their providers are dropped; access to a fair, unbiased, and timely internal and independent external appeals process, to address health plan grievances and to help govern decisions about medically necessary treatments; an enforcement mechanism that ensures recourse for patients who have been harmed as a result of a health plan's actions.

9. The President convene a White House Conference on Employment of Adults with Disabilities that will include representatives from the Administration, Congress, elected officials from State and local governments, small and large businesses, the disability community and other stakeholders.

A White House Conference would provide heightened visibility to the issue of employing persons with disabilities and help build partnerships between public and private sectors. It would also provide the opportunity to showcase "best practices" and innovative strategies for employment of people with disabilities, and highlight actions taken by Task Force member agencies, departments, and other Federal agencies. Finally, it could commemorate the 10th anniversary of the Americans with Disabilities Act, the 25th anniversary of Individuals with Disabilities Education Act, and the 35th anniversary of the Equal Employment Opportunity Commission.

10. The President direct the Task Force members' departments and agencies to collaborate on the development and implementation of a multimedia, interagency public awareness campaign to eliminate the negative and erroneous stereotypes about employment of people with disabilities.

This campaign would focus on the benefits of employing people with disabilities. There is an immediate need for leadership to address negative attitudes and prejudices against people with disabilities. An aggressive public awareness campaign, conducted in partnership with the disability community, businesses, and other influential entities would help to eliminate erroneous and prejudicial thinking about disability that results in limiting employment opportunities.

11. The President direct the Social Security Administration and the Department of Labor to create an "Access America for People with Disabilities" Web site that targets individuals with disabilities.

In February, Vice President Gore announced "Access America for Seniors," a Web site providing a wide range of services to older Americans - an example of his vision of "one-stop" Web access to government services. A new Web site, "Access America for People with Disabilities," would likewise provide information and services offered by virtually every major Federal Government agency, by linking to an abundance of helpful Federal agency sites, information, programs, and services.

12. The President direct the Department of Transportation to work with the Departments of Labor, Education, and Health and Human Services, the Social Security Administration, and other relevant Task Force members to develop a comprehensive plan of action to address the lack of transportation services and systems for persons with disabilities.

The lack of available public transportation is a major employment barrier for persons with disabilities. This factor is cited by many individuals with disabilities, at recent Town Hall meetings held by the Task Force and at other events, as being the major impediment to finding and keeping jobs. The Department of Transportation has been vigorous in addressing public and private accessibility issues for people with disabilities. This directive would be to concentrate Federal efforts on developing an interagency action plan that addresses the lack of available transportation.

13. The President direct all Federal agencies with customer service call centers and other appropriate services to explore ways to encourage hiring people with disabilities.

Cutting-edge telecommunications technology has recently made it possible for customer service centers to send voice and data to home-based customer service representatives who work just as if they were in a call center. Many agencies in the Federal Government operate significant customer service call center activities. This cutting-edge technology needs to be widely available in the Federal Government, and used to increase the employment rate of individuals with disabilities as much as possible.

Research has shown that the percentage of individuals with significant disabilities who are employed is the lowest of disadvantaged groups in the nation. It is critical that we seek out as many strategies as possible to change this picture.

14. The President direct the Social Security Administration to explore options for raising the Earned Income Exclusion in the Supplemental Security Income program, for both adults and students, in order to encourage work efforts.

Supplemental Security Income (SSI) is a means-tested program, but beneficiaries are able to have limited earnings without impact on their benefit amounts. Allowing such earnings not only increases overall income security, but also provides an incentive to work. The earned income exclusions for both adults and students, however, have not been raised since the early 1970's, even though the SSI Federal Benefit Rate is indexed annually for inflation. The Earned Income Exclusion remains at \$65 per month for adults and up to \$400 per month for students for a limited time period. As a result, SSI beneficiaries with non-SSI income do not receive full

indexing of their benefits, and work effort is less rewarded than it was previously.

The Plan *for* Employment of People With Disabilities in the Federal Government

Accessing Opportunity

United States Office of Personnel Management	Employment Service	Theodore Roosevelt Building 1900 E Street, NW Washington, DC 20415-9800	202-606-1059 www.opm.gov
			ES DO-04 October 1999

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Copies of this document may be obtained from OPM's website, www.opm.gov. Persons with disabilities may request copies in alternate formats, including large print, Braille, audio cassette, and computer disk by calling (202) 606-1059 (voice) or (202) 606-0023 (TTY).

- INTRODUCTION -

As the 21st century approaches, scientific and technological advances are giving rise to new industries and occupations unheard of only a decade ago. As these advances occur, new employment opportunities are becoming plentiful. However, the majority of working-age individuals with severe disabilities have not shared in this employment prosperity.

The Federal government has a statutory obligation to engage in affirmative action with respect to the hiring, placement and advancement of individuals with disabilities. In undertaking this statutory obligation, departments and agencies must consult Management Directives issued by the Equal Employment Opportunity Commission (EEOC). Copies of the Management Directives can be obtained by calling (202) 663-4599. The Federal government is committed to taking the lead in charting a public policy that provides clear direction to both the public and private sectors.

To this end, the President signed Executive Order 13078 on March 13, 1998, establishing the Presidential Task Force on Employment of Adults with Disabilities. The Task Force's mission is to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate as close as possible to that of the general adult population. On November 15, 1998, the Task Force issued its first report, "Recharting the Course." On December 14, 1998, Vice President Gore accepted the report on behalf of the Administration, and directed the U.S. Office of Personnel Management (OPM) to develop a plan to increase the representation of adults with disabilities in the Federal workforce. This Plan will help ensure that departments and agencies:

- Recruit widely for positions at all levels;
- Provide opportunities for students with disabilities;
- Give full consideration to employees with disabilities for inclusion in developmental opportunities;
- Collect and maintain data to monitor success; and
- Provide reasonable accommodations for qualified applicants and employees with disabilities, consistent with guidance from the Equal Employment Opportunity Commission.

OPM provides this Plan for government-wide use as part of its ongoing support of and commitment to the President's and Vice-President's goal of making the Federal government a model employer of people with disabilities. Experience has shown that government-wide programs and initiatives require the dedicated and sustained commitment of department and agency leadership. This Plan will assist Federal employers in fulfilling their commitment to become model employers of people with disabilities.

THE PLAN FOR EMPLOYMENT OF PEOPLE WITH DISABILITIES IN THE FEDERAL GOVERNMENT

- RECRUITMENT AND PLACEMENT -

Recruit widely for positions at all levels of the Federal workforce, including GS-13 to 15 and senior executive service levels.

Recruitment Strategies

- In developing targeted recruitment strategies for people with disabilities, Federal employers will recruit widely and develop collaborative efforts with community outreach groups. By working together, the use of resources would be maximized while attracting highly-qualified persons with disabilities at all levels.

OPM will develop a collection of “best practices” in the public and private sectors of successful recruitment efforts of people with disabilities. Information will be shared with Federal departments and agencies, other public entities, and interested parties.

OPM will also share information through OPM Service Center “messengers.” These messengers will serve as liaisons between the Plan and the community and Federal departments and agencies. They will also work closely with Federal Executive Boards, Federal Executive Associations, and Personnel (or Human Resources) Councils to disseminate information about planned efforts and best practices.

- Federal employers will review internal human resource policies to ensure that every flexibility is considered in areas such as alternative work schedules and job sharing. They will also disseminate employment and other information in alternate formats such as large print, audio cassette, Braille, computer disk, or accessible Internet sites.
- Federal employers should review their programs to determine if part-time employment opportunities could be created to accommodate employees with disabilities.
- Departments and agencies should explore ways to recruit from all sources when filling positions, including those in the Senior Executive Service and managerial and supervisory positions at grades GS-13 to 15, in order to attract candidates with disabilities from inside and outside the Federal government.

- Departments and agencies should use a variety of resources and networks available to them to remove barriers to employment and assist them in actively recruiting people with disabilities. These resources include but are not limited to the following:
 - The Job Accommodation Network (JAN) will help Federal employers receive expert accommodation information easily before, during, and after the recruitment process. JAN is a confidential service which allows any manager or employee to receive individualized information on his or her accommodation issue. It is run by the President's Committee on Employment of People with Disabilities (PCEPD), and may be reached at (800) 526-7234.
 - The Workforce Recruitment Program for College Students with Disabilities (WRP) is one source Federal employers may tap for potential employees. The WRP is managed by the President's Committee on Employment of People with Disabilities (PCEPD) and the Department of Defense. It is a resource used to connect public or private sector employers nationwide with highly-motivated post-secondary students and recent graduates with disabilities. The WRP has two long-term goals: (1) to provide college students with disabilities the opportunity to obtain summer employment which may lead to permanent employment in the Federal or private sector; and (2) to break down attitudinal barriers held by employers and co-workers by demonstrating that people with disabilities can work successfully in a variety of jobs. Employers may access the candidate database by contacting their agency's WRP representative.
 - Project ABLE (Able Beneficiaries' Link to Employers) is a national resume bank which provides any employer an easily-accessible applicant pool of qualified job-ready individuals. These individuals receive Social Security or Supplemental Security Income disability benefits and are prepared to work. Employers may request resumes--
 - By telephone: (757) 441-3362;
 - By fax: (757) 441-3374; or
 - By Email: projable@opm.gov.

Federal employers may also access Project ABLE by dialing OPM's Automated Applicant Referral System at (912) 757-3150. A valid agency identification code is needed to access the system; it may be obtained by calling (912) 744-2085. For more information on Project ABLE, please contact the Social Security Administration at (410) 965-9040, TTY (410) 966-6210, or through Internet at: www.ssa.gov/odhome/odderp/P_Able.htm.

- State Vocational Rehabilitation Agencies (SVRAs) and the U.S. Department of Veterans Affairs (VA) are also potential recruitment sources. They provide counseling, evaluation, training and other services to individuals with disabilities, including disabled veterans.

For more information and to locate the nearest SVRA, please access the agency's website at: www.nchrtm.okstate.edu/nchrtm_links/state_VR.html.

For more information and to locate the nearest VA facility, please access the department's website at: <http://www.va.gov/stations97/guide/home.asp?DIVISION=ALL>. Also, telephone numbers may be found in the government blue pages section of the local telephone directory.

- Department or agency-wide memoranda to increase the number of people with disabilities in the Federal workforce will be distributed within their respective agencies. Employees will also appreciate knowing what efforts are currently underway to increase the number of people with disabilities in their own departments or agencies. To support department and agency efforts, **OPM** is available to provide government-wide or agency-specific data.
- **OPM** will help educate Federal employers on various recruiting and hiring options available to employ people with disabilities. The first step is issuing *People with Disabilities in the Federal Government: An Employment Guide* as a companion piece to this plan. Copies of the guide may be obtained from OPM's website, www.opm.gov. Persons with disabilities may request copies in alternate formats by calling (202) 606-1059 (voice) or (202) 606-0023 (TTY).
- Federal employers will educate and train managers and supervisors on various hiring programs and resources available to them in recruiting, promoting, and retaining employees with disabilities. An initial survey regarding familiarity with these programs may help identify specific training needs.

Vacancy Announcements

- Federal employers will include language in vacancy announcements that states that reasonable accommodations will be made for qualified applicants or employees with disabilities, except when doing so would pose an undue hardship on the employing agency.¹ **OPM** will assist departments and agencies with developing appropriate language.

Special Appointing Authorities

¹An undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as the agency's size, financial resources, and the nature and structure of the operation. See EEOC's Enforcement Guidance on Reasonable Accommodation, dated March 1, 1999. The Job Accommodation Network (JAN) operated by the President's Committee on Employment of People with Disabilities (PCEPD) is an excellent technical assistance resource in the area of reasonable accommodation.

- **OPM** will continue to work with departments and agencies on the use of the special appointing authorities available to them when employing people with disabilities. These special appointing authorities include:

Schedule A, 5 CFR 213.3102(l) for hiring readers, interpreters, and personal assistants.

This excepted authority is used to appoint readers, interpreters, and personal assistants for employees with severe disabilities. After one year of satisfactory service, they may qualify for conversion to permanent status.

Schedule A, 5 CFR 213.3102(t) for hiring people with mental retardation. This excepted authority is used to appoint persons with cognitive disabilities (mental retardation). They may qualify for conversion to permanent status after two years of satisfactory service.

Schedule A, 5 CFR 213.3102(u) for hiring people with severe physical disabilities. This excepted authority is used to appoint persons with severe physical disabilities who have demonstrated satisfactory performance through a temporary appointment, or have been certified as likely to succeed in performing the duties of the job. After two years of satisfactory service, they may qualify for conversion to permanent status.

Schedule B, 5 CFR 213.3202(k) for hiring people who have recovered from mental illness. This excepted authority is used to appoint persons who are certified that they are at a severe disadvantage in obtaining employment because of disrupted employment due to hospitalization or outpatient treatment for psychiatric disabilities. Certification also ensures that they are capable of functioning in the positions for which they will be appointed, and that any residual disabilities are not job-related.

Note: OPM will issue regulations implementing Executive Order, No. 13124, dated June 4, 1999, providing persons with psychiatric disabilities the same employment opportunities as persons with mental retardation or severe physical disabilities. Until the regulations are final, agencies may continue to use 5 CFR 213.3202(k) and any other appropriate excepted service appointing authorities to appoint persons with psychiatric disabilities.

5 CFR 315.604 for hiring disabled veterans enrolled in a VA training program. This authority is used to hire veterans with disabilities who are eligible for training under the Department of Veterans Affairs (VA) vocational rehabilitation program (38 U.S.C. chapter 31). The veterans may enroll for training or work experience at an agency under the terms of an agreement between the agency and VA. While enrolled in the VA program the veterans are not Federal employees for most purposes, but are beneficiaries of the VA. Upon successful completion, the host agency and VA give the veterans Certificates of Training showing the occupational series and grade levels of the positions for which trained. The Certificates of Training allows any agency to appoint the veterans noncompetitively under a status quo appointment which may be converted to permanent status at any time. (The

Rehabilitation Act of 1973, as amended, provides that Federal departments and agencies should initiate efforts with State vocational rehabilitation agencies to develop and enter into work experience agreements similar to those available for disabled veterans under 5 CFR 315.604.)

5 CFR 316.201(b) for hiring worker-trainees for programs such as the Welfare to Work program. In his memorandum, dated March 8, 1997, the President directed Federal agencies to expand the use of the worker-trainee authority, under TAPER (temporary appointment pending establishment of a register) and other excepted service hiring authorities to appoint welfare recipients to entry-level positions. Accordingly, Federal agencies may utilize the worker-trainee authority as a vehicle to further its Welfare to Work programs.

5 CFR 316.302(b)(5) and 5 CFR 316.402(b)(5) for hiring 30 percent or more disabled veterans. These authorities are used to hire veterans who are 30 percent or more disabled under temporary appointments of more than 60 days, or term appointments. The veterans must have retired from active military service with a 30 percent or more disability rating, or be rated by the Department of Veterans Affairs within the preceding year as having a compensable service-connected disability of 30 percent or more. The department or agency may convert these individuals to permanent status at any time during the appointment.

- EMPLOYMENT OPPORTUNITIES FOR STUDENTS -

- In addition to the other appointing authorities listed on pages 5-6 of this Plan, Federal

Provide opportunities for students with disabilities to participate in internship and student employment programs.

employers are encouraged to develop agency-specific programs to employ students with disabilities (such as programs developed by the Department of Labor and the General Services Administration).

- An outstanding program that is currently in place in the Federal government is the Student Educational Employment Program. The program has two components: Student Temporary Employment and Student Career Experience (5 CFR 213.3202(a) and (b)). Both programs offer valuable, paid work experience to all students--high school, vocational and technical, associate degree, undergraduate, and graduate. Students may be employed year-round and receive a flexible schedule of work assignments. Federal employers should tailor the Student Educational Employment Program to attract students with disabilities to Federal employment.

OPM will continue promoting the Student Educational Employment Program to students, colleges and universities, and Federal managers and supervisors to attract students with disabilities to the Federal workforce.

OPM will serve as a clearinghouse for all students interested in Student Educational Employment Program opportunities.

OPM will work with appropriate organizations to identify information on accredited schools and programs with a high concentration of students with disabilities, and provide the information to departments and agencies.

OPM will establish master cooperative education agreements with schools in order for Federal employers to tailor them for specific uses.

- Another source of potential employees with disabilities is the Presidential Management Intern (PMI) Program. The PMI Program is a two-year, entry-level career development and training program designed to attract to Federal service masters and doctoral students in a variety of academic disciplines. Students are nominated by their schools, and are invited to participate in an OPM-developed structured assessment process. Finalists are not guaranteed placement; they take an active role in finding a position in the Federal government. Upon successful completion of the two-year internship, PMI's are eligible for permanent status. In its

information letters to colleges and universities concerning the PMI Program, **OPM** will reinforce its commitment to diversity, including the recruitment of persons with disabilities.

OPM will also continue outreach efforts through campus visits and targeting of professional organizations and publications serving the interests of people with disabilities.

- Colleges and universities will be encouraged to identify students with disabilities who meet the criteria of the programs listed above.
- Federal employers are encouraged to use the Workforce Recruitment Program for College Students with Disabilities (WRP) described previously (see Recruitment and Placement) as an excellent source for potential employees. Employers can access the candidate database by contacting their agency's WRP representative.

- CAREER DEVELOPMENT -

Give full consideration to employees with disabilities for inclusion in developmental opportunities designed to enhance their leadership skills and to advance their careers.

- Federal employers will ensure that persons with disabilities are made aware of, and have an equal opportunity to compete for, managerial and executive training or other career development opportunities. Self-nominations should be invited and encouraged, as well as nominations made by managers and supervisors.
- Departments and agencies will review career development and related programs to make sure that no barriers exist for people with disabilities. If targeted recruitment is used to broaden the pool of candidates for these programs, include as part of that effort employees with disabilities and organizations that represent their interests.
- Federal employers should establish formal mentoring programs, especially for participants of career development programs. Mentors serve as role models and act as personal advisors and confidants. They help build self-confidence; expand individual awareness, insight, and perspective about the organization; talk about performance expectations; and discuss developmental needs and how to obtain them.
- Departments and agencies will develop training and other courses related to disability employment issues. These courses are helpful to all levels of agency management--from first-line supervisors to the Senior Executive Service. Issues that may be covered include disability culture awareness, eliminating attitudinal barriers, communication between disability and non-disability communities, and transforming organizations to accommodate cultural differences.
- **OPM**, through the Federal Executive Institute and Management Development Centers, will conduct diversity training initiatives for senior management. This will improve understanding of the issues related to the employment of people with disabilities.

- MONITORING AND EVALUATING PROGRESS -

Collects and maintains data to monitor the success in achieving a higher percentage of adults with disabilities in the federal workforce.

- **OPM** will widely disseminate information on the Federal employment of people with disabilities, such as its *People with Disabilities in the Federal Government--A Statistical Profile* report, to all departments and agencies.
- Departments and agencies are expected to regularly monitor their own workforce data, especially elements concerning workforce composition, as set out in EEOC Management Directives. Periodic surveying of the workforce, and evaluating the resulting data, will determine progress and successes. In turn, the data may be used to develop internal recruiting strategies and workforce planning initiatives.
- In their performance management programs, Federal employers should review efforts and successes of their managers in diversity hiring. During performance reviews, efforts by the manager or supervisor to achieve diversity in his or her organization are evaluated--including efforts to hire people with disabilities. Open discussions of how to eliminate employment barriers are encouraged.
- Federal employers are encouraged to recognize managers and supervisors whose recruiting, hiring, and promoting efforts of those with disabilities are commendable.
- **OPM**, in its oversight role, and the EEOC, as the agency responsible for enforcing the Federal government's affirmative action and non-discrimination programs related to disability, will monitor Federal employer efforts in recruiting and employing people with disabilities.

- REASONABLE ACCOMMODATION -

Provide reasonable accommodations for qualified applicants and employees with disabilities, consistent with guidance from the Equal Employment Opportunity Commission.

- A reasonable accommodation is an adjustment or alteration that enables a qualified person with a disability to apply for a job, perform job duties, or enjoy equal benefits and privileges of employment. Federal departments and agencies will make reasonable accommodations for qualified persons with disabilities unless doing so would impose an undue hardship on the agency.
- The concept of reasonable accommodation applies to all aspects of employment, including recruitment, training, promotion, reassignment, and developmental assignments. Departments and agencies are expected to ensure that their personnel are familiar with Federal and agency-specific policies and procedures related to the availability of reasonable accommodations for persons with disabilities. Departments and agencies should also consult the new enforcement guidance on reasonable accommodation issued by the Equal Employment Opportunity Commission (EEOC) on March 1, 1999. Copies can be obtained by calling (800) 669-3362. They can also be reviewed at EEOC's website, www.eeoc.gov.
- Reasonable accommodations vary with the needs of the individuals involved, the type of position in question, and the ingenuity of the agency. Accommodations are determined on a case-by-case basis, taking into consideration the applicant or employee, the specific disability and existing limitations, the essential functions of the particular job, the work environment, and the effectiveness of the proposed accommodation. The cost of a job or work environment accommodation can often be minimal. The applicant or employee should always be consulted before an accommodation is made. Please consult the appropriate section in OPM's *People with Disabilities in the Federal Government: An Employment Guide*, for additional information on types of reasonable accommodation.
- Departments and agencies should widely disseminate their reasonable accommodation policies and should integrate the topic of reasonable accommodation into existing training for management and supervisory employees, as well as for those connected with agency hiring processes.

Date: 10/15/1999 05:29 pm (Friday)
Subject: Follow-up to 503 Enforcement Discussion

Eddie, Lisa, Becky --

Instead of, or in addition to, OFFCP's emphasis on increasing investigation of individual complaints we have another idea to propose:

1) Distill the OPM Model Plan guidance into a technical assistance document that will be useful to private sector employers. (We (CRT/DOJ) would be willing to take a cut at this).



*accom
def defined*

2) Have OFFCP send this distilled document to all of its federal contractors (with an appropriate cover letter stating that :

a) it is a technical assistance document (that avoids any PRA problem);

b) it provides a good framework for addressing the employment of people w/disabilities;

c) OFFCP will be conducting compliance reviews over the next ____ years.

] ?

3) OFFCP should do compliance reviews to look at :

a) outreach efforts on disability; -

b) whether the employer has an appropriate policy on providing reasonable accommodation;

c) how many disabled employees they have (if they know)

These reviews could be either part of their current reviews or could be a separate initiative (i.e. 500-1000 reviews limited to disability issues). It seems that site visits would not be required for most reviews --

therefore the cost should be limited.

(FYI - we used a similar process for our
ADA compliance reviews of 9-1-1
emergency centers)

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PRESIDENT CLINTON AND VICE PRESIDENT GORE:
Working on Behalf of Americans with Disabilities

"If we want to keep our economy growing with continued low inflation and low unemployment, we must draw on the untapped potential of our people.... Americans with disabilities who want to work shouldn't have to wait one more day."

-- President Clinton
October 16, 1999

EXPANDING ECONOMIC OPPORTUNITY:

I. 2000 Legislative Priorities and FY2001 Budget Initiatives

Disability Office in the Department of Labor. President Clinton and Vice President Gore support a proposal to establish an Office of Disability Policy, Evaluation and Technical Assistance (ODPET) within the Labor Department, and improving access for adults with disabilities to employment services offered through the one-stop system. The FY 2001 budget includes \$20.556 million and 47 FTE for ODPET, which was recommended by the Presidential Task Force on Employment of Adults with Disabilities. Under the leadership of an Assistant Secretary, ODPET's mission will be to implement a sustained, coordinated and aggressive strategy to eliminate barriers to employment for people with disabilities that result in meaningful employment opportunities and a dramatically increased employment rate. This office will initially subsume the President's Committee on Employment of People with Disabilities in an effort to reduce duplication and enhance coordination of Federal employment programs for people with disabilities. The office will work within the Department to ensure that all programs address the need to increase participation of people with disabilities in DOL training programs, with a targeted emphasis on those serving youth during FY 2001.

National Disability Business Development Board. Through the creation of ODPET, there will be established a federally chartered corporation known as the National Disability Business Development Board. The National Disability Business Development Board membership will be comprised of America's business leaders, organized labor, rehabilitation and service providers, and disability-related organizations currently advising the President's Committee on Employment of People with Disabilities. Specific functions will include improving the access of individuals with disabilities to financial institutions, commercial and business enterprises; providing incentives to, and collaborating with, both public and private sectors to ensure the necessary levels of resources/investments in employment initiatives for individuals with disabilities; and leveraging funds for public awareness about disability and employment.

\$1,000 Tax Credit for Work-Related Expenses. In his FY2001 budget, President Clinton renews his proposal a \$1,000 Tax Credit for work-related expenses for people with disabilities, which was included in last year's budget but not supported by Congress. This would allow workers with significant disabilities to receive an annual \$1,000 tax credit to help cover the formal and informal costs that are associated with employment, such as special transportation and technology. Like the Ticket to Work and Work Incentives Improvement Act, it will help ensure that people with disabilities have the tools they need to return to work by recognizing the extra costs associated with working.

Extending Medicare Access for People with Disabilities who Work. The President's FY01 budget builds on achievements enacted in the Ticket to Work and Work Incentives Improvement Act of 1999 to ensure that individuals with disabilities have full opportunity to participate in and contribute to our growing economy. The President is proposing to remove an arbitrary four-and-a-half-year limit on Medicare coverage for people with disabilities who return to work. This would mean individuals would have lifetime access to Medicare.

II. Record of Accomplishments

Fighting to Enact the Ticket to Work and Work Incentives Improvement Act (TWWIA) of 1999. The Ticket to Work and Work Incentives Improvement Act of 1999 is an historic bill produced through the bipartisan efforts of Senators Jeffords, Kennedy, Roth, and Moynihan, leaders in the House of Representatives, the disability community, and staff throughout the Administration. On December 17, 1999, the President signed this historic bill into law at a ceremony held at the FDR Memorial. This legislation, which the President advocated since 1998, will help provide better health care options for people with disabilities who work.

TWWIA will improve employment opportunities by: creating new options and incentives for states to offer a Medicaid buy-in for workers with disabilities; extending Medicare coverage for an additional 4 ½ years for people on disability insurance who return to work; creating a \$250 million Medicaid buy-in demonstration to help people whose disability is not yet so severe that they cannot work; and enhancing employment-related services for people with disabilities through the new "Ticket to Work" Program. TWWIA also creates a Work Incentive Grant program to provide benefits planning and assistance, facilitating access to information about work incentives, and better integrate services to people with disabilities working or returning to work.

Increasing the Substantial Gainful Activity Amount. Beginning July 1999, the Social Security Administration increased the monthly earnings guidelines used to determine whether the work activities of a person with impairments, other than blindness, demonstrate that he or she is able to perform substantial gainful activity (SGA). The monthly SGA guidelines were increased from \$500 to \$700 per month, enabling disabled beneficiaries to earn more without affecting their benefits.

Directing Federal Agencies to Implement Plan for Hiring People with Disabilities. Since the beginning of the Clinton-Gore Administration, the American economy has added more than 19 million new jobs, and unemployment is at a 29-year low. Yet over 75 percent of individuals with severe disabilities are unemployed. Last year, Vice President Gore asked the Office of Personnel Management to develop a model plan to bring more adults with disabilities into the Federal workforce. On October 16, 1999, President Clinton released that action plan and directed the Federal government to implement it immediately. The plan, "Accessing Opportunity: The Plan for Employment of People with Disabilities in the Federal Government," along with a companion Employment Guide, provides detailed resources for federal employees as they recruit, hire, train and promote people with disabilities. Under this plan, the Federal government -- the nation's largest employer with almost 1.8 million workers -- will do more to: Recruit people with disabilities for positions at all levels of government; Provide opportunities

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for students with disabilities; Ensure career opportunities for people with disabilities; Collect and maintain data to monitor success of people with disabilities in the federal workforce; and Provide reasonable accommodations for applicants and employees with disabilities.

"Disability Mentoring Day: Career Development for the 21st Century." On October 27, 1999, the White House sponsored the first-ever mentoring day for people with disabilities. This program, which included the participation of numerous federal agencies, was modeled after other "shadow" days. It also coincided with a reception hosted by OPM to celebrate the release of the *Plan and Employment Guide*. The reception was attended by agency officials and disability advocates from across the country who participated in the mentoring day. This year, the mentoring day will take place on Wednesday, October 25; the White House encourages people from all across the country to participate in their local communities.

Expanding Hiring Opportunities for People with Psychiatric Disabilities. In January 1999, Tipper Gore announced that the Office of Personnel Management would explore measures to eliminate the stricter standards that are currently applied to job applicants with psychiatric disabilities. On June 4, 1999, President Clinton responded to this issue by signing an executive order ensuring that the federal government's hiring and promotion standards are the same for people with psychiatric disabilities as they are for people with other disabilities. The executive order ensures that individuals with psychiatric disabilities are given the same hiring opportunities as persons with severe physical disabilities or mental retardation. The civil service rules will be changed to ensure that people with psychiatric disabilities are covered by the same hiring rules and authority used for individuals with other disabilities. The executive order also permits people with psychiatric disabilities the same opportunity to acquire competitive civil service status after two years of successful service. This authority will allow adults with psychiatric disabilities the same opportunity for conversion into the competitive civil service as employees with other disabilities.

Mental Health Parity for Federal Employees. In his June 7, 1999 address at the White House Conference on Mental Health, President Clinton directed OPM to achieve parity for mental health and substance abuse coverage in the Federal Employees Health Benefits Program (FEHBP) by 2001. In response, OPM Director Janice R. LaChance issued a letter to over 285 participating health plans enlisting their support. The FEHBP is by far the largest employer-sponsored health insurance program in the country, covering about 9 million people including Federal employees, retirees, and their families. OPM will work with the health plans to introduce managed behavioral health care components that incorporate proven techniques such as case management, authorized treatment plans, provider networks using effective screening and referral procedures, pre-certification, and disease management. Because of its size and the large number of participating health plans, the President noted that the FEHBP is in a unique position to serve as a model for other employers and for the insurance industry. OPM has eliminated lifetime and annual maximums in the Program, and negotiated with plans to move away from contractual day and visit limitations and high deductibles, co-payments, and coinsurance for mental health coverage. For 1999, pharmacotherapy, medical visits, and testing to monitor drug treatment for mental conditions were covered as pharmaceutical disease management.

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Signed the Workforce Investment Act of 1998. On August 7, 1998, President Clinton signed the Workforce Investment Act, which included the Rehabilitation Act Amendments of 1998, helping improve worker training and placement options for people with disabilities. The law established better links between the vocational rehabilitation (VR) system and the general workforce development system. Job seekers with disabilities now have improved options for service through the mainstream worker training and placement system, and through the disability-specific VR system. The bill also strengthened the Rehabilitation Act by giving increased options to individuals with disabilities in developing VR plans.

Increasing Employment of Adults with Disabilities. President Clinton signed an Executive Order in March 1998 establishing a National Task Force on Employment of Adults with Disabilities. The Task Force was charged with creating a coordinated and aggressive national policy to move individuals with disabilities into gainful employment at a rate approaching that of the general adult population, and its 1998 recommendations were critical in developing Clinton-Gore Administration disability policies. The Task Force, chaired by the Secretary of Labor, continues its efforts to promote employment opportunities. The Task Force is analyzing the barriers to employment faced by people with disabilities and will report its findings with policy recommendations to the President on a periodic basis until its final report is presented on July 26, 2002.

Working on Innovative Strategies to Improve Employment of Adults with Disabilities.

Agencies within the Clinton Administration continue to work on innovative strategies to employ Americans with disabilities. The Social Security Administration, the Department of Health and Human Services, the Department of Labor, and the Department of Education are all participating in inter-agency demonstration projects to expand employment opportunities for persons with disabilities. For instance, the Department of Education has awarded six systems-change grants to establish models of improved cooperation and coordination between State Vocational Rehabilitation programs, public employment/employment training programs, and other related programs. The grants will assist in reducing barriers to employment and increasing the capacity of the State's overall employment system to serve individuals with disabilities. The focus of these systems change projects is increasing the employment rate of individuals with disabilities who are currently receiving support through public programs.

In addition, SSA is working under cooperative agreements with 12 states to develop innovative projects to assist adults with disabilities to reenter the workforce. This activity, the State Partnership Initiative, is designed to help states develop innovative and integrated statewide programs of services and supports for their residents with disabilities that will: increase job opportunities; and decrease dependence on benefits, including Social Security Disability Insurance and Supplemental Security Income. Moreover, the President's Committee on Employment of People with Disabilities has worked to coordinate a commitment by the U.S. Chamber of Commerce, the Society of Human Resource Managers, and dozens of other private sector companies to support several initiatives advancing the employment of people with disabilities among employers. These include the formation of local and state employer-led groups advocating for the employment of people with disabilities, the launching of a nationwide campaign to advance the employment of persons with cognitive disabilities, and supporting the President's Committee's career exploration and employment programs for youth with disabilities.

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Moving Families from Welfare to Work. Some of those who are having the hardest time moving from welfare to work are people with disabilities. Recognizing the special needs of this and other hard-to-place populations, the 1997 Balanced Budget Act included \$3 billion to assist long-term welfare recipients obtain jobs. In addition, the FY99 budget included a number of measures designed to expand welfare to work activities. The final budget included \$283 million for 50,000 new vouchers exclusively for people who need housing assistance to make the transition from welfare to work and \$75 million to assist states and localities in developing flexible transportation alternatives, such as van services. For FY 2000, the President announced that he will propose an additional \$1 billion for his Welfare-to-Work program to ensure that those remaining on the welfare rolls who face the greatest challenges can succeed in the workforce and to increase the employment of fathers of children on welfare so they can better support their children.

EDUCATION AND TRAINING

I. 2000 Legislative Priorities and FY2001 Budget Initiatives

State Grant Program. The Administration is requesting \$5.28 billion, a \$290 million or 5.8% increase, for Special Education Grants to States. If this increase is approved, it will mean that this program will have increased 127% within a six-year period. In FY 2001, the Grants to States program will provide an average of \$827 per child, an increase of 4% over the FY 2000 level. If approved, States will receive 13% of their average per pupil expenditures, or 11% of the excess costs, from the federal government for educating children with disabilities.

State Improvement Grants. The Administration requests \$45.2 million for the State Improvement Grants, an increase of \$10 million, or 28.4%, over FY 2000. The request includes funds for new awards to an estimated 15 States and territories as well as sufficient funding to continue 28 existing awards to States. The State Improvement program would expand efforts to reform and improve State systems for providing educational, early intervention and transitional services to improve results for disabled children.

Parent Training. For FY 2001, the request for the Parent Training and Information Centers program is \$26 million, an increase of \$7.5 million, or 40.3%, above the FY 2000 appropriation. The \$7.5 million increase would be used to expand the size of the awards to existing State Parent Training and Information Centers, establish four new centers for a total of 103 across the country, and provide additional technical assistance to centers. Three of the new centers would be community centers operated by local parent organizations and focus on meeting the needs of underserved parents and families of children with disabilities.

Reading and Behavior. The President's FY 2001 budget includes a request for a Primary Education Intervention initiative to be funded at \$10 million. This initiative will support projects that demonstrate effective interventions coupled with early identification to improve results for children with disabilities. Two specific populations of children with developmental delays would be targeted under this initiative: those with significant problems in learning to read, and those exhibiting behaviors that have been found to lead to significant discipline

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problems or emotional disturbance as they get older. Research shows that early intervention is particularly effective for improving educational results for children, and these funds will allow more students to benefit from timely identification and service delivery.

State Technical Assistance Awards. Helping States achieve compliance with the IDEA is critically important, and the President's FY 2001 budget includes an \$8 million request for State Technical Assistance Awards that will help address this need. These technical assistance awards will be instrumental in improving State monitoring and complaint resolution systems, and to correct deficiencies found through State and Federal monitoring of the implementation of IDEA.

II. Record of Accomplishments

Supporting Quality Education for Children with Disabilities. In 1997, the President enacted a stronger Individuals with Disabilities Education Act (IDEA), reaffirming our national commitment to provide a world class education for all our children by ensuring that our nation's schools are safe and conducive to learning, while scrupulously protecting the rights of students with disabilities. Funding for the basic IDEA grant program has increased by 100% during the Clinton-Gore Administration.

Fighting Unwise Amendments to IDEA. In the 105th Congress, the Majority in the House sought to amend the Individual with Disabilities Education Act to make it easier to expel children with disabilities who were judged by school officials to be potentially violent in school. These broad, subjective judgements could have resulted in inappropriate expulsion of large numbers of students with disabilities. The Administration, working with parents, successfully opposed these amendments.

Enforcing the Individuals with Disabilities Education Act. The Clinton Administration has supported the rights of children with disabilities under IDEA in the following Federal Court cases: *Cedar Rapids Community School District v. Garrett F.*; *Marie O. v. Edgar*; *Sacramento City Unified School District v. Holland*; *Hartmann v. Loudon County Board of Education*.

IMPROVING ACCESS AND QUALITY OF HEALTH CARE:

I. 2000 Legislative Priorities and FY2001 Budget Initiatives

Addressing the Nation's Multi-Faceted Long-Term Care Needs. The President's FY2001 budget includes a \$28 billion, 10-year investment to tackle the complex problem of long-term care, which affects millions of elderly, people with disabilities, children with special needs and the families who care for them. Its centerpiece is a \$3,000 tax credit for people with long-term care needs or their caregivers -- the budget triples the credit over last year's proposal. It also seeks to address the way in which Medicaid policy and practice has inadvertently discriminated against people with long-term care needs who want to live in the community by making it much easier to provide coverage in nursing homes than in the community. This proposal would enable states to provide services to nursing-home qualified beneficiaries at 300 percent of the

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Supplemental Security Income (SSI) limit (about \$15,000) without requiring a complicated and frequently time-consuming Federal waiver. This proposal contributes towards this goal of giving people who need long-term services and supports the choice of remaining in their homes and communities. It costs \$140 million over 5 years, \$370 million over 10 years.

Expanding Coverage to Uninsured Americans. The President has proposed a 10-year, \$110 billion initiative that would dramatically improve the affordability of and access to health insurance. The proposal would expand coverage to at least 5 million uninsured Americans and expand access to millions more. If enacted, these policies would be the largest expansion of coverage since Medicare was created in 1965.

Advocating a Strong Patients' Bill of Rights. The President and Vice President have called for passage of the bipartisan Patients Bill of Rights Act, to ensure that all Americans have essential protections, such as guaranteed access to needed health care specialists; access to emergency room services when and where the need arises; continuity of care protections to assure patient care if a patient's health care provider is dropped; access to a timely internal and independent external appeals process with a medical necessity standard; assurance that doctors and patients can openly discuss treatment options; and an enforcement mechanism that ensures recourse for patients who have been harmed as a result of health plan actions.

II. Record of Accomplishments

Extending Enforceable Patient Protections for Millions of Americans. Leading by example, the President directed all federal agencies to ensure that their employees and beneficiaries have the benefits and rights guaranteed under the proposed Patients' Bill of Rights. 85 million Americans covered by federal health plans have the security of knowing they will have fair access to health care thanks to the President's work.

Providing Access to Health Care Services for Uninsured Workers. In 1999, the President proposed and won \$25 million in funding for a program to coordinate systems of care, increase the number of services delivered and establish an accountability system to assure adequate patient care for the uninsured and low-income. This year, the President has proposed funding this initiative at \$125 million, representing a substantial down payment on the President's plan to invest \$1 billion over 5 years.

Supporting Families. President Clinton fought for and enacted the Family and Medical Leave Act, which allows workers to take up to 12 weeks of unpaid leave to care for a child or adult with a disability, seriously ill family members, newborn or adoptive children, or their own serious health problems without fear of losing their jobs. Nearly 91 million workers (71% of the labor force) are covered and millions of workers have benefited from FMLA since its enactment. President Clinton has proposed expanding FMLA to allow workers to take up to 24 unpaid hours off each year for school and early childhood education activities, routine family medical care, and caring for an elderly relative.

Increasing Access to Health Care and Supporting Employment for Disabled Americans. The Balanced Budget Act of 1997 created an optional program whereby States could allow people with disabilities who were earning up to 250 percent of poverty to purchase Medicaid

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coverage. Oregon is the first state to take advantage of this policy, and they have created a program that will let individuals go to work and get or keep Medicaid. Secretary of Health and Human Services Donna Shalala has asked every governor to seriously consider this program.

Passing Meaningful Health Insurance Reform. President Clinton signed the Health Insurance Portability and Accountability Act of 1996 which limits exclusions for pre-existing conditions, makes coverage portable and helps individuals who lose jobs maintain coverage.

Protecting the Medicaid Guarantee for People with Disabilities. The Clinton Administration refuses to go backwards on health care coverage for Americans with disabilities -- rejecting proposals to end the Medicaid guarantee to meaningful health benefits for people with disabilities. The President vetoed the Republican's proposal in the 104th Congress to block grant the Medicaid program, preserving Medicaid coverage for six million persons with disabilities. Medicaid is often the only form of health care available to people with disabilities and allows many children and adults to receive services at home rather than in institutions. Thanks to President Clinton, the 1997 Balanced Budget Act preserved the Federal guarantee of Medicaid coverage for populations who depend on it.

IMPROVING ACCESSIBILITY:

1. 2000 Legislative Priorities and FY2001 Budget Initiatives

Vocational Rehabilitation State Grants. The Administration is requesting \$2.4 billion, an increase of \$60.8 million or 2.6%, to assist State VR agencies to improve the employment outcomes of individuals with disabilities. This request would meet the statutory requirement to increase funding by at least the percentage change in the Consumer Price Index. A wide range of services is provided each year to about 1.2 million individuals with disabilities, and these funds will assist States to address the needs of this population.

Assistive Technology Initiatives. The Administration is requesting a major increase in funding for disability and technology research. The request for the National Institute on Disability and Rehabilitation Research (NIDRR) is \$100 million, an increase of \$13.5 million above the fiscal year 2000 appropriation. The increase will enable NIDRR to launch a comprehensive technology initiatives which includes the following: \$5 million for an Educational Technology Initiative to provide technical assistance and training to elementary and secondary schools; \$3.4 million for a multi-pronged Employment initiative to carry out research, training, and technical assistance to enhance the ability of individuals with disabilities to access and use information and communication technology; and \$5.1 million for a Community Independence initiative on how information and assistive technology can be used to enhance community integration and participation by individuals with disabilities. The Administration's request also includes \$15 million, an increase of approximately \$7 million over the FY 2000 level, to support grants that establish or maintain alternative loan financing programs. Most people with disabilities do not have the private financial resources to purchase the assistive technology they need. If approved, this increase would significantly enhance opportunities for individuals with disabilities to take advantage of assistive technology.

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Centers for Independent Living. The budget also includes a request of \$58 million for the Centers for Independent Living (CILs) -- a 20.8% increase over the fiscal year 2000 budget. This increase would make it possible to accomplish an increase in the stability of existing CILs and open new CILs in unserved and underserved areas. The request could provide sufficient funding to establish a \$200,000 federal funding floor. In addition, a \$10 million increase for CILs could expand the network of centers by funding up to 56 new centers in 23 States.

II. Record of Accomplishments

Ensuring that the Telecommunications Revolution Benefits All. In July 1999, the Federal Communications Commission (FCC) adopted rules on the portion (Section 225) of the Telecommunications Act of 1996 that requires that telecommunications equipment and services be accessible to individuals with disabilities, if readily achievable. This provision is known as the ADA for the Information Age. These regulations, which have been supported by the telecommunications industry, will ensure people with disabilities access to a broad range of products and services -- such as telephones, cell phones, pagers, call waiting and operator services -- where they previously experienced barriers. Telecommunications carriers may not install network features, functions or capabilities that do not comply with the regulations. The regulations also ensure that information, documentation, and customer service is conducted in accessible ways. There is no standing requirement for filing complaints, and the FCC maintains the full range of penalties for non-compliance.

Signed the Assistive Technology Act. Technology is a crucial component in enabling people with disabilities to obtain and keep meaningful employment. With the support of the Clinton-Gore Administration, Congress passed the Assistive Technology Act of 1998, which reauthorizes the "Tech Act" that created State Assistive Technology Centers to provide assistive devices to low-income individuals with disabilities.

Ensuring the Federal Government Provides Accessible Technology and Information. The Clinton-Gore Administration recommended, and Congress enacted, changes to the Rehabilitation Act strengthening the obligations of federal agencies to provide accessible information technology to their employees and customers. This enabled the federal government to use its considerable purchasing power to influence private industry toward developing universally designed technology that is accessible to almost everyone.

Increased Resources for Accessible Transportation. In 1998, President Clinton signed the Transportation Equity Act for the 21st Century (TEA-21) that provides significantly increased resources to make our Nation's surface transportation systems accessible. TEA-21 included increased funding for the Elderly Individuals and Individuals with Disabilities grant program.

Increasing Public Transportation Accessibility. The Department of Transportation and the Access Board have issued final regulations implementing the Americans with Disabilities Act provisions for over-the-road bus (OTRB) accessibility that provides a definition of what constitutes discriminatory action. The regulation requires large fixed-route operators to achieve 50% of full fleet accessibility by October 2006 and 100% by October 2012. The Department has strengthened the regulations by including provisions making OTRB operators individually and collectively accountable for providing accessible service.

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Access to Jobs Initiative. The President's Access to Jobs initiative helps communities design innovative transportation solutions, such as van services, to help former welfare recipients and other low-income workers get to work. Funding for this initiative has increased to \$75 million in FY00 and will be \$100 million in FY01 as a result of guaranteed funding in TEA-21. This innovative program emphasizes providing people with disabilities the transportation access required to achieve education, work and family goals.

Increasing Housing Options. The Clinton-Gore Administration took a number of significant actions in 1998 that advanced housing policy for people with disabilities. First, HUD issued a statement supporting the view that institutional living does not constitute real housing for people with disabilities. On April 28, 1998, Fannie Mae announced the publication of "A Home of Your Own Guide," the first manual specifically created to provide step-by-step home buying guidance for people with disabilities. And in February, HUD Secretary Cuomo issued a directive encouraging communities to use community development block grant funds for home modifications for people with disabilities. Also, in HUD's recent Notices of Funding Availability, the agency included bonus points for developers when they seek to build structures that include "visitability" by people with disabilities.

Increasing Section 8 Funding in HUD Appropriations. President Clinton supported the inclusion of \$40 million in Section 8 funding for people with disabilities, in part to offset the displacement likely to occur as a result of "elderly-only" designation of public housing formerly occupied by people with disabilities.

PROMOTING EQUALITY FOR ALL OF OUR CITIZENS:

I. 2000 Legislative Priorities and FY2001 Budget Initiatives

Increased Funding for Civil Rights Enforcement. The Clinton-Gore Administration's FY01 budget includes a request for an additional \$16 million for the Justice Department's Civil Rights Division -- a 19% increase over last year's budget of \$82.2 million. With a proposed increase of \$2.4 million for the Civil Rights Division, DOJ hopes to further implement the ADA by funding new initiatives, including an initiative to remove barriers that prevent people with disabilities from obtaining basic community services, such as calling 911, riding public transportation and attending a town meeting. Additional funding will also help begin a new initiative to train law enforcement officers on how to appropriately interact with persons with mental disabilities.

Protecting All of Our Citizens. The President has called on Congress to pass the Hate Crimes Prevention Act, to strengthen hate crimes laws and expand existing law to cover cases of hate crimes based on disability, gender, or sexual orientation.

II. Record of Accomplishments

Assuring Access to Community Living for the Disabled. On June 22, 1999, the U.S. Supreme Court affirmed in Olmstead v. L.C. that, under the Americans With Disabilities Act (ADA), unjustifiable institutionalization of a person with a disability who, with proper support,

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can live in the community is discrimination. In accordance with that Court ruling, on January 14, 2000, the U.S. Department of Health and Human Services (HHS) issued guidance to state Medicaid directors on how to make state programs responsive to the desires of disabled persons to live in appropriate community-based settings. The Administration's goal is to integrate people with disabilities into the social mainstream with equal opportunities and the chance to make choices. The Clinton Administration's flexibility in granting state waivers has spurred an increase in home and community-based services; since he took office, the President has approved over 300 such waivers. As a result, the number of people with developmental disabilities served in home and community waiver programs has increased significantly.

Vigorously Enforcing Disability Rights. President Clinton has led the fight for vigorous enforcement of the Americans with Disabilities Act, the Fair Housing Act, the Individuals with Disabilities Education Act and other critical civil rights laws that prohibit discrimination against people with disabilities in housing, schools, workplaces and public areas across the nation. Under the Clinton-Gore Administration, the number of positions allocated for ADA enforcement at the Justice Department has increased by 105 percent. The Administration's FY01 budget proposal includes funding for another 29 new positions for ADA enforcement -- a 35 percent increase over FY00 funding.

Working to Stop Discrimination Against People With AIDS. President Clinton supports the Supreme Court's decision in Bragdon v. Abbott, which reinforces the protections offered by the landmark Americans With Disabilities Act for Americans living with HIV and AIDS. The President directed the Justice Department and the Equal Employment Opportunity Commission to vigorously prosecute those who discriminate against people with AIDS, leading to actions against health care providers and facilities that violate the Americans with Disabilities Act.

Working for Fair Housing. In response to the increase in reported cases of serious fair housing violations, the U.S. Department of Housing and Urban Development (HUD) has committed to doubling the number of its civil rights enforcement actions by the year 2000. In addition, the President proposed and won a major expansion of HUD's Fair Housing programs. The FY99 budget expands HUD's Fair Housing programs to \$40 million -- a \$10 million increase over FY98 funding. That 33-percent increase includes \$7.5 million for a new audit-based enforcement initiative proposed by the Administration.

Adding a New Statue to the FDR Memorial. On May 2, 1997, President Clinton dedicated the Franklin Delano Roosevelt Memorial to honor the thirty-second President of the United States. On July 2, 1998, Vice President Gore announced that the FDR Memorial will soon include an additional outdoor room at the main entrance which will depict FDR in the small wheelchair he invented. Thanks to the efforts of the disability community, the Clinton-Gore Administration has selected a specific design that will show how FDR became one of our greatest presidents while he had a disability and used a wheelchair. And last year, the Clinton-Gore Administration helped secure \$3.5 million to fund the memorial addition, which may be complete as early as this year.

Appointed the Most Diverse Administration in History. President Clinton has appointed a highly talented and the most diverse Administration in history, including the appointment of record numbers of people with disabilities in the White House and throughout the Clinton-Gore

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Administration. The Federal government now employs more than 100,000 employees with some type of disability. President Clinton's Administration appointees include: Judith Heumann, Assistant Secretary for Special Education and Rehabilitation Services; Paul Miller, Commissioner of the Equal Employment Opportunity Commission; and Fredric Schroeder, Commissioner of the Rehabilitation Services Commission. People with disabilities serve in the Departments of Education, Health and Human Services, Housing and Urban Development, Justice, State, and Transportation. President Clinton has also appointed people with disabilities to positions in such independent agencies as the National Council on Disability and the Social Security Administration, as U.S. District Court Judges and to various Presidential Committees, Commissions, and Task Forces. In the White House, Jonathan Young is the first person with a disability ever appointed to serve as Associate Director for Disability Outreach in the Office of Public Liaison.

Strengthening Affirmative Action for Persons with Disabilities

Background

The Department of Labor, through its Office of Federal Contract Compliance (OFCCP), has the responsibility for enforcing Section 503 of the Rehabilitation Act of 1973, which requires Federal contractors to take pro-active measures to hire persons with disabilities that go beyond the nondiscrimination requirements of Section 503 and the Americans with Disabilities Act. Federal contractors must demonstrate a good faith effort to recruit, retain and advance people with disabilities. In doing so, Federal contractors are required to conduct outreach and engage in a self-analysis of their policies, practices and procedures.

In its enforcement of the Section 503 affirmative action requirements, OFCCP requires employers to establish affirmative action plans involving a number of different elements, including the establishment of appropriate promotion and hiring practices, the invitation to workers to self-identify as members of the protected class, the provision of reasonable accommodations for employees, and the establishment of appropriate outreach and positive recruitment requirements. It does not, however, require employers to set goals and establish time tables for meeting goals for hiring persons with disabilities, as is presently required for women and minorities under E.O. 11246. This process involves an analysis of the utilization of women and minorities by each contractor, relative to their availability in the workforce in the local labor market area. For occupations in an employer's workforce that utilize women and minorities at levels below their availability, the employer must set goals and time tables for remedying this under-utilization. Further, employers are required to report on employment levels for women and minorities on the EEO-1 report, but not required to report the employment of persons with disabilities.

The Task Force proposes that the Administration adopt the goal of strengthening OFCCP enforcement of Section 503 affirmative action requirements, primarily by requiring employers to establish goals and timetables for persons with disabilities. Although the actual use of goals and timetables may not be feasible until 2002 or 2003 when new Census data become available, it is important that this Administration make an explicit commitment to requiring Federal contractors to engage in the same goal-setting process for persons with disabilities as they do for women and minorities. There have been various data concerns raised about the use of goals and timetables for persons with disabilities. Clearly, work needs to continue to resolve these concerns, but these concerns should not delay the commitment.

The Data

The data on workforce availability that employers currently use to set goals for women and minorities comes primarily from the 1990 Census. For example, the State of Maryland produces an annual publication of affirmative action data to assist employers in evaluating the utilization of females and minorities in the internal workforce. For an employer in a typical county in Maryland -- Allegheny County -- the publication provides persons in the civilian labor force in that county by occupation (major occupational groupings), sex and race/ethnic origin derived from the 1990 Census EEO Detailed Report. The 1990 data on all women and minorities in the local workforce, by occupational grouping, is supplemented by similar data on women and minorities seeking employment through the local Job Service office as of June 30, 1999.

The bottom-line is that the current goal-setting efforts under OFCCP for women and minorities will continue to depend primarily on the 1990 Census data, supplemented by Job Service data, until the 2000 Census EEO Detailed Report comes available in 2002 or 2003. Thus, any possible extension of goal-setting to persons with disabilities involves issues with two different data sets: (1) the feasibility of using 1990 Census data on the workforce availability of persons with disabilities; and (2) ensuring that 2000 Census data on the workforce availability of persons with disabilities is included in the EEO Detailed Report.

An interagency workgroup is currently exploring both of these issues. Census is producing an extract of 1990 Census data of persons with disabilities in the workforce by occupation, in order to assess the feasibility of using this data in an OFCCP goal-setting process. The Workgroup is also actively exploring what needs to be done to ensure that data on persons with disabilities are included in the 2000 Census EEO Detailed Report.

There are several data issues that need to be worked through before it is feasible to use either the 1990 or 2000 Census data for purposes of setting contractor goals. First, it must be determined that the population of persons with disabilities in the Census data conforms, at least roughly, with the population protected under Section 503. This may be a particular problem with the 1990 Census data because of the nature of the questions asked. Second, analysis of the data must be undertaken to determine that there are reasonable levels of availability at the local level to allow the setting of goals to take place. Third, procedures must be developed to take into the possible undercount of employees with disabilities due to the failure of such persons to self-identify. The ongoing analysis of the 1990 Census data will assess issues 1 and 2. Issue 3 will be dealt with over time by developing adjustment factors, if needed, for this problems.

The Proposed Directive

The President establishes the goal of strengthening the enforcement of Federal contractor affirmative action requirements under Section 503 of the Rehabilitation Act of 1973, primarily by requiring employers to set goals and establish time tables for the employment of persons with disabilities as currently required for women and minorities. To begin taking the steps needed to achieve this goal, the President directs that the following activities be undertaken immediately.

- (1). The Department of Labor, working with EEOC, shall take the steps necessary to expand the current EEO-1 reporting requirement to include persons with disabilities.
- (2). The Task Force, through an interagency work group including the Bureau of Labor Statistics in the Department of Labor, the Census Bureau and other Federal Agencies, shall explore the feasibility of using 1990 Census data to set employer goals for hiring persons with disabilities.
- (3). The Task Force, through the same interagency work group, shall assess the feasibility of using 2000 Census data in a goal-setting process for persons with disabilities, as well as take the steps needed to ensure that such data are included in the 2000 Census EEO Detailed File.
- (4). The Department of Labor, through its Office of Federal Contract Compliance, shall: (a) initiate a dialogue with relevant employer groups to identify and develop solutions to issues associated with setting goals for Federal contractors with respect to employing adults with disabilities, similar to the goals that are currently established for women and minorities under E.O. 11246; and (b) begin developing the regulatory changes needed to implement this requirement for Federal contractors to set goals and time tables for persons with disabilities.
- (5). The Department of Labor shall take steps necessary to strengthen OFCCP enforcement of Section 503 other than implementing the requirement that employers set goals and time tables for employing persons with disabilities.

29 USCS § 793 printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 106-55, APPROVED 8/17/99 ***
*** WITH A GAP OF 106-53 ***

TITLE 29. LABOR
CHAPTER 16. VOCATIONAL REHABILITATION AND OTHER REHABILITATION
SERVICES
RIGHTS AND ADVOCACY

29 USCS § 793 (1999)

§ 793. Employment under Federal contracts

(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified individuals with disabilities; regulations. Any contract in excess of \$ 10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of \$ 10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section [enacted Sept. 26, 1973].

(b) Administrative enforcement; complaints; investigations; departmental action. If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c) Waiver by President; national interest special circumstances for waiver of particular agreements; waiver by Secretary of Labor of affirmative action requirements.

(1) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.

(2) (A) The Secretary of Labor may waive the requirements of the affirmative action clause required by regulations promulgated under subsection (a) with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime

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contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this Act.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(e) Avoidance of duplicative efforts and inconsistencies. The Secretary shall develop procedures to ensure that administrative complaints filed under this section and under the Americans with Disabilities Act of 1990 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

HISTORY: (Sept. 26, 1973, P.L. 93-112, Title V, § 503, 87 Stat 393; Nov. 6, 1978, P.L. 95-602, Title I, § 122(d)(1), 92 Stat. 2987; Oct. 21, 1986, P.L. 99-506, Title I, § 103(d)(2)(B), (C) in part, Title X, §§ 1001(f)(2), (3), 1002(d)(3), 100 Stat. 1810, 1843, 1844; Nov. 7, 1988, P.L. 100-630, Title II, § 206(c), 102 Stat. 3312; Oct. 29, 1992, P.L. 102-569, Title I, Subtitle A, § 102(p)(31), Title V, § 505, 106 Stat. 4360, 4427.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Americans with Disabilities Act of 1990", referred to in this section, is Act July 26, 1990, P.L. 101-336, 104 Stat. 327, which appears generally as 42 USCS §§ 12101 et seq. For full classification of such Act, consult USCS Tables volumes.

Amendments:

1978. Act Nov. 6, 1978, in subsec. (a), substituted "section 7(7)" for "section 7(6)".

1986. Act Oct. 21, 1986 (effective on enactment as provided by § 1006 of such Act, which appears as 29 USCS § 701 note), in subsec. (a), substituted "individuals with handicaps" for "handicapped individuals" and "section 7(8)" for "section 7(7)"; in subsec. (b), substituted "individual with handicaps" for "handicapped individual" and "a" for "his" preceding "contract; and, in subsec. (c), substituted "The President" for "he" preceding "shall" and preceding "determines" and substituted "the" for "his" preceding "reasons".

1988. Act Nov. 7, 1988, in subsec. (a), inserted a comma after "to carry out such contract"; in subsec. (b), substituted "refused" for "refuses"; and, in subsec. (c), substituted "the President" for "The President" in two places.

1992. Act Oct. 29, 1992 (effective on enactment as provided by § 138(a) of such Act, which appears as 29 USCS § 701 note), in subsec. (a), substituted "disabilities" for "handicaps as defined in section 7(8)", in subsec. (b),

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substituted "individual with a disability" for "individual with handicaps", and substituted "individuals with disabilities" for "individuals with handicaps".

Such Act further, in subsec. (a), substituted "\$ 10,000" for "\$ 2, 500", wherever appearing, and deleted ", in employing persons to carry out such contract," after "requiring that"; in subsec. (c), designated the existing provisions as para. (1), and added para (2); and added subsecs. (d) and (e).

§NOTES:

CODE OF FEDERAL REGULATIONS

Fiscal Service, Department of the Treasury--Depositories and financial agents of the Government, 31 CFR Part 202.

Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor--Obligations of contractors and subcontractors, 41 CFR Part 60-1.

Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor--Rules of practice for administrative proceedings to enforce equal opportunity under Executive Order 11246, 41 CFR Part 60-30.

Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor--Affirmative action obligations of contractors and subcontractors for disabled veterans and veterans of the Vietnam era, 41 CFR Part 60-250.

Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor--Affirmative action and nondiscrimination obligations of contractors and subcontractors regarding individuals with disabilities, 41 CFR Part 60-741.

CROSS REFERENCES

This section is referred to in 29 USCS §§ 706, 721, 796c, 796f-4.

RESEARCH GUIDE

Federal Procedure:

6 Fed Proc L Ed, Civil Rights § 11:927.

21 Fed Proc L Ed, Job Discrimination §§ 50:553-555.

Am Jur:

45A Am Jur 2d, Job Discrimination (1993) §§ 24, 99, 101, 176, 619, 672.

45B Am Jur 2d, Job Discrimination (1993) §§ 1225, 1606, 1610, 1620, 1901, 2018, 2123.

45C Am Jur 2d, Job Discrimination (1993) §§ 2726, 2753.

Am Jur Trials:

21 Am Jur Trials, Employment Discrimination Action Under Federal Civil Rights Acts, p. 1.

Am Jur Proof of Facts:

38 Am Jur Proof of Facts 3d, Proof of Employment Discrimination on Account of a Repetitive Strain Injury Under the Americans With Disabilities Act, p. 129.

Forms:

12 Fed Procedural Forms L Ed, Job Discrimination § 45:351.

Disabilit Law:

1 Am Disab, Programs, Services and Accommodations §§ 1:2, 5, 6, 7, 10, 21, 23, 34, 48, 84, 210, 213, 221; 2:3, 58, 71; 4:2.

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Annotations:

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing private right of action for violation of federal rights, 43 L Ed 2d 833 (§ 17 superseded by Supreme Court's views as to measure or elements of damages recoverable in federal civil rights action under 42 USCS § 1983. 91 L Ed 2d 647).

§ Availability of private right of action under § 503 of Rehabilitation Act of 1973 (29 USCS § 793), providing that certain federal contracts must contain provision requiring affirmative action to employ qualified handicapped individuals. 60 ALR Fed 329.

Actions, under 42 USCS § 1983, for violations of federal statutes pertaining to rights of handicapped persons. 63 ALR Fed 215.

Charity-sponsored work programs for handicapped persons as subject to provisions of National Labor Relations Act (29 USCS §§ 141 et seq.). 68 ALR Fed 905.

Construction and application of Architectural Barriers Act (42 USCS §§ 4151-4157) providing for design and construction of public buildings to accommodate physically handicapped. 78 ALR Fed 877.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and regulations promulgated thereunder. 80 ALR Fed 830.

Right of prevailing party, in action to vindicate rights under Education of the Handicapped Act (20 USCS §§ 1400 et seq.), to award of attorneys' fees, 65 ALR Fed 574 (superseded by Award of attorneys' fees pursuant to § 615(e)(4) of the Education of the Handicapped Act (20 USCS § 1415(e)(4)) as amended by the Handicapped Children's Protection Act of 1986. 87 ALR Fed 500).

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims. 89 ALR Fed 514.

Employee's inability to work particular hours due to disability as grounds for termination or refusal of employment, notwithstanding federal statute or regulation requiring employer to make reasonable accommodation of disability. 116 ALR Fed 485.

Texts:

Danner, Pattern Discovery: Employment Discrimination.

Law Review Articles:

Miller. Hiring the Handicapped: An Analysis of Laws Prohibiting Discrimination Against the Handicapped in Employment. 16 Gonzaga L Rev 23, 1980.

Boller. Unlawful Treatment of the Handicapped by Federal Contractors and an Implied Private Cause of Action: Shall Silence Reign? 33 Hastings L J 1293, July 1982.

Choper. The Constitutionality of Affirmative Action: Views from the Supreme Court. 70 Kentucky L J 1, 1981-82.

Hogler. Equal Pay, Equal Work, and the United States Supreme Court. 32 Labor L J 737, November 1981.

Haines. E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" For Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes. 16 Loyola U L Rev (LA) 527, Summer 1983.

Civil Rights Attorney's Fees Awards in Moot Cases. 49 U Chi L Rev 819, Summer 1982.

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Lopatka. A 1977 Primer on the Federal Regulation of Employment Discrimination. 1977 *U Ill L F* 69.

Smith, Jr.; Abram. Quantitative Analysis and Proof of Employment Discrimination. 1981 *University of Illinois L Rev* 33, 1981.

Baker. The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination? 29 *UCLA L Rev* 947, April 1982.

Hughes; Jennings; Maguire, Jr.; Shain; Tobin; and Whittle, Jr. Back Pay in Employment Discrimination Cases. 35 *Vand L Rev* 893, May 1982.

§ Yuckman. Employment Discrimination and the Visually Impaired. 39 *Washington and Lee L Rev* 59, Winter 1982.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Relation to other laws
3. --State laws
4. Right of private action
5. Administrative proceedings
6. --Mandamus action
7. Entities subject to compliance review

1. Generally

Apprentice carpenter, rejected for employment by construction contractor solely because of physical problems relating to his back, is "qualified handicapped individual" within meaning of 29 USCS § 793 in view of fact that he was capable of performing job at time of rejection; nonetheless, job requirement that screens out qualified handicapped individuals on basis of possible future injury may in fact be both consistent with business necessity and safe performance of job; determination of Assistant Secretary of Labor that risk of future injury because of physical or mental condition can never be basis for rejecting "qualified handicapped individual," irrespective of likelihood of injury, seriousness of possible injury, or imminence of injury clearly is contrary to law. *E. E. Black, Ltd. v Marshall* (1980, DC Hawaii) 497 *F Supp* 1088, 1 *AD Cas* 220, 23 *BNA FEP Cas* 1253, 24 *CCH EPD P* 31260, summary judgment den, motion gr, in part, reconsideration den, remanded (1981, DC Hawaii) 1 *AD Cas* 266, 26 *BNA FEP Cas* 1183, 27 *CCH EPD P* 32199.

Department of Labor investigation, like its final decision whether or not to take enforcement action, is committed to agency discretion. *Giacobbi v Biermann* (1992, DC Dist Col) 780 *F Supp* 33, 2 *AD Cas* 104, 57 *BNA FEP Cas* 1201, 37 *CCF P* 76251, 57 *CCH EPD P* 41172, affd (1992, App DC) 1992 *US App LEXIS* 31343.

Section 503 of Rehabilitation Act (29 USCS § 793) does not prohibit discrimination by federal contractor against job applicants with disabilities; further, § 503 does not authorize Department of Labor to prosecute federal contractor for such alleged discrimination under section itself. *American Airlines v Metzler* (1997, ND Tex) 958 *F Supp* 273, 21 *ADD* 21, 6 *AD Cas* 955, 70 *CCH EPD P* 44777.

While there is no obligation to make unreasonable efforts to accommodate handicapped employees under 29 USCS § 793, more than "evenhanded approach" is required; to determine whether federal contractor has violated 29 USCS § 793, consideration should be given whether handicapped individual is qualified to perform job despite existence of handicap and, if not, whether employee could with reasonable employer accommodation perform that job or some other job, whether requirements stated in official job description match those actually required to perform job, size of contractor, number of employees in job category which handicapped individual seeks to enter, and whether contractor's overall

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workforce is expanding or shrinking. OFCCP Policy Directive 80-34, Sep. 30, 1980.

Affirmative action requirements for federal contractors apply only to work related to federal contracts, not to total activities of contractor; it is not unlawful for federal contractor to terminate employee who worked in facility which had no government contract work. *OFCCP v Western Electric Co.*, No. 80-OFCCP-29, Mar. 4, 1981.

2. Relation to other laws

§ Claim under Rehabilitation Act (29 USCS §§ 793 and 794) may not be asserted under 42 USCS § 1983. *Moxley v Vernot* (1982, SD Ohio) 555 F Supp 554, 32 BNA FEP Cas 115, 33 CCH EPD P 34121.

Section 503 of Rehabilitation Act (29 USCS § 793) does not preempt state and common law third-party beneficiary claims arising out of federal contracts, unless those claims are grounded solely on contract clauses mandated by Act. *Iacampo v Hasbro, Inc.* (1996, DC RI) 929 F Supp 562, 16 ADD 907, 5 AD Cas 1075 (criticized in *Bergstrom v University of New Hampshire* (1996, DC NH) 943 F Supp 130, 72 BNA FEP Cas 1769, 68 CCH EPD P 44235, 132 CCH LC P 33461) and (criticized in *Danio v Emerson College* (1997, DC Mass) 963 F Supp 61, 73 BNA FEP Cas 107, 71 CCH EPD P 44894) and (criticized in *Herrera v Boyd Coating Research Co.* (1997, DC Mass) 983 F Supp 49, 75 BNA FEP Cas 993, 72 CCH EPD P 45173) and (criticized in *Szabo v Trustees of Boston Univ.* (1998, DC Mass) 1998 US Dist LEXIS 4104).

3. --State laws

Handicapped individual's state third-party beneficiary claim against federal contractor alleging discrimination on basis of handicap is pre-empted by 29 USCS § 793, which provides exclusive enforcement remedy. *Howard v Uniroyal, Inc.* (1983, CA11 Ala) 719 F2d 1552, 1 AD Cas 526, 33 BNA FEP Cas 453, 32 CCH EPD P 33927.

29 USCS § 793 does not preempt claim of handicap discrimination brought under state antidiscrimination statute. *Ellenwood v Exxon Shipping Co.* (1993, CA1 Me) 984 F2d 1270, 1 ADD 414, 2 AD Cas 415, 8 BNA IER Cas 364, 60 CCH EPD P 41964, cert den (1993) 508 US 981, 125 L Ed 2d 682, 113 S Ct 2987, 2 AD Cas 944, 61 CCH EPD P 42334, 1993 AMC 2998.

District court did not abuse its discretion in determining that § 503 of Rehabilitation Act (29 USCS § 793) did not preempt state law antidiscrimination claims against federal contractor, and thus district court properly abstained from enjoining state administrative proceedings. *Martin Marietta Corp. v Maryland Comm'n on Human Relations* (1994, CA4 Md) 38 F3d 1392, 7 ADD 36, 3 AD Cas 1429, 147 BNA LRRM 2645.

Where plaintiff made direct claim of discrimination on basis of handicap under state law, such was preempted since defendant employer was federal government contractor. *Ellenwood v Exxon Shipping Co.* (1991, DC Me) 2 AD Cas 37, 57 BNA FEP Cas 265, 6 BNA IER Cas 1623, affd in part and revd in part on other grounds, remanded (1993, CA1 Me) 984 F2d 1270, 1 ADD 414, 2 AD Cas 415, 8 BNA IER Cas 364, 60 CCH EPD P 41964, cert den (1993) 508 US 981, 125 L Ed 2d 682, 113 S Ct 2987, 2 AD Cas 944, 61 CCH EPD P 42334, 1993 AMC 2998.

Rehabilitation Act does not preempt ordinary state common law causes of action such as breach of contract, misrepresentation, defamation, and infliction of emotional distress; thus, plaintiff's conventional state common law causes of action were not preempted since they were in no way related to Rehabilitation Act, any affirmative action clause in government contract, or handicap discrimination. *Ellenwood v Exxon Shipping Co.* (1991, DC Me) 57 BNA FEP Cas

264.

Employee's contract claim that she has been discriminated against because she suffers from multiple sclerosis will not be dismissed, where complaint baldly alleges that federal contractor employer "agreed not to discriminate against persons on basis of . . . disability," because that contractual language is not specific enough to determine whether or not claim is preempted by 29 USCS § 793. *Iacampo v Hasbro, Inc.* (1996, DC RI) 929 F Supp 562, 16 ADD 907, 5 AD Cas 1075 (criticized in *Bergstrom v University of New Hampshire* (1996, DC NH) 943 F Supp 130, 72 BNA FEP Cas 1769, 68 CCH EPD P 44235, 132 CCH LC P 33461) and (criticized in *Danio v Emerson College* (1997, DC Mass) 963 F Supp 61, 73 BNA FEP Cas 107, 71 CCH EPD P 44894) and (criticized in *Herrera v Boyd Coating Research Co.* (1997, DC Mass) 983 F Supp 49, 75 BNA FEP Cas 993, 72 CCH EPD P 45173) and (criticized in *Szabo v Trustees of Boston Univ.* (1998, DC Mass) 1998 US Dist LEXIS 4104).

4. Right of private action

Handicapped persons have no private right of action against federal contractors who are obligated under 29 USCS § 793 to take affirmative action to employ and advance in employment qualified handicapped individuals. *Rogers v Frito-Lay, Inc.* (1980, CA5 Tex) 611 F2d 1074, 1 AD Cas 131, 22 BNA FEP Cas 16, 22 CCH EPD P 30657, cert den (1980) 449 US 889, 66 L Ed 2d 115, 101 S Ct 246, 1 AD Cas 250, 23 BNA FEP Cas 1668, 24 CCH EPD P 31256 and cert den (1980, US) 1 AD Cas 250 and (criticized in Office of Fed. Contract Compliance Programs, United States Dep't of Labor v American Airlines (1995, DOL) 66 CCH EPD P 43682).

Private right of action may not be implied under 29 USCS § 793(a). *Simpson v Reynolds Metals Co.* (1980, CA7 Ill) 629 F2d 1226, 1 AD Cas 206, 23 BNA FEP Cas 868, 24 CCH EPD P 31188; *Davis v United Air Lines, Inc.* (1981, CA2 NY) 662 F2d 120, 26 BNA FEP Cas 1527, 29 CCF P 81898, 27 CCH EPD P 32125, 60 ALR Fed 312, cert den (1982) 456 US 965, 72 L Ed 2d 490, 102 S Ct 2045, 28 BNA FEP Cas 1200, 28 CCH EPD P 32672; *Fisher v Tucson* (1981, CA9 Ariz) 663 F2d 861, 1 AD Cas 286, 27 BNA FEP Cas 892, 27 CCH EPD P 32289, cert den (1982) 459 US 881, 74 L Ed 2d 146, 103 S Ct 178, 1 AD Cas 392, 29 BNA FEP Cas 1560, 30 CCH EPD P 33063; *Painter v Horne Bros., Inc.* (1983, CA4 Va) 710 F2d 143, 37 BNA FEP Cas 1167; *Hodges v Atchison, T. & S. F. R. Co.* (1984, CA10 Okla) 728 F2d 414, 1 AD Cas 565, 34 BNA FEP Cas 457, 115 BNA LRRM 3222, 33 CCH EPD P 34146, 100 CCH LC P 10803, cert den (1984) 469 US 822, 83 L Ed 2d 43, 105 S Ct 97, 1 AD Cas 624, 35 BNA FEP Cas 1607, 117 BNA LRRM 2551, 35 CCH EPD P 34663, 101 CCH LC P 11195; *Simon v St. Louis County* (1980, ED Mo) 497 F Supp 141, 1 AD Cas 186, 23 BNA FEP Cas 1315, 25 CCH EPD P 31633, affd in part and revd in part on other grounds, remanded (1981, CA8 Mo) 656 F2d 316, 1 AD Cas 268, 26 BNA FEP Cas 1003, 26 CCH EPD P 32030, cert den (1982) 455 US 976, 71 L Ed 2d 688, 102 S Ct 1485, 1 AD Cas 392, 27 BNA FEP Cas 1765, 28 CCH EPD P 32435; *Moxley v Vernot* (1982, SD Ohio) 555 F Supp 554, 32 BNA FEP Cas 115, 33 CCH EPD P 34121; *Myers v New England Tel. & Tel. Co.* (1983, DC Mass) 35 BNA FEP Cas 767, 33 CCH EPD P 34040; *Bento v I.T.O. Corp. of Rhode Island* (1984, DC RI) 599 F Supp 731, 1 AD Cas 653, 36 BNA FEP Cas 1031, 37 CCH EPD P 35246.

No private right of action arises under 29 USCS § 793 and plaintiff may not avoid this rule by asserting claim as third party beneficiary of affirmative action provision. *D'Amato v Wisconsin Gas Co.* (1985, CA7 Wis) 760 F2d 1474, 1 AD Cas 737, 37 BNA FEP Cas 1092, 119 BNA LRRM 2325, 36 CCH EPD P 35159 (criticized in *Larson by Larson v Miller* (1995, CA8 Neb) 55 F3d 1343) and (criticized in *Lake v Arnold* (1997, CA3 Pa) 112 F3d 682).

No private right of action is to be implied under 29 USCS § 793, since possibility of relief independently fashioned by federal court is likely to

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impair effectiveness of administrative conciliation process as intended by Congress. *Wood v Diamond State Tel. Co.* (1977, DC Del) 440 F Supp 1003, 18 BNA FEP Cas 647, 16 CCH EPD P 8154.

Insofar as Congress intended complaint to Department of Labor to be sole means for private person to enforce contract provisions created under 29 USCS § 793 relating to affirmative action, no private right of action exists under § 793 for handicapped person to sue employer for violating affirmative action obligation under contract. *Anderson v Erie L. R. Co.* (1979, DC Ohio) 468 F Supp 934, 19 BNA FEP Cas 374, 19 CCH EPD P 9190.

No private right of action exists under 29 USCS § 793; aggrieved party is limited to administrative remedy before Department of Labor. *Doss v General Motors Corp.* (1979, CD Ill) 478 F Supp 139, 21 BNA FEP Cas 1246, 22 CCH EPD P 30651.

Private right of action is provided by 29 USCS § 793 in view of necessity of including affirmative action clause in all covered contracts, availability of attorney's fees, and underlying purpose of protecting handicapped individual from discrimination embodied within statutory language. *Davis v Modine Mfg. Co.* (1981, DC Kan) 526 F Supp 943, 28 BNA FEP Cas 155, 29 CCH EPD P 32799.

There is no private right of action under 29 USCS § 793, nor may state claim under third-party beneficiary theory be maintained. *Stephens v Roadway Express Co.* (1982, ND Ga) 37 BNA FEP Cas 1104, 119 BNA LRRM 2312, 29 CCH EPD P 32941, 95 CCH LC P 13893.

Handicapped individual claiming violations of 29 USCS § 793 and forum state's fair employment statute has no private right of action under § 793 and may not maintain pendent state claim in federal court, even though federal claim is substantial. *Miller v Union P. R. Co.* (1982, DC Neb) 539 F Supp 134, 29 BNA FEP Cas 1339.

29 USCS § 793 does not provide private right of action, particularly where administrative remedies have not been exhausted. *Thompson v Springs Mills, Inc.* (1982, DC SC) 576 F Supp 651.

Employee discharged because of epilepsy may not maintain action under 29 USCS § 793 on alternative theories that, under state law, he is third-party beneficiary of contract with government, or that § 793 was incorporated by reference in collective bargaining agreement. *Davis v United Air Lines, Inc.* (1983, ED NY) 575 F Supp 677, 33 BNA FEP Cas 1119, 33 CCH EPD P 33983.

29 USCS § 793 does not create private right of action to remedy alleged discrimination against handicapped persons by federal contractors. *Evans v Trowbridge* (1992, ED La) 60 BNA FEP Cas 324, 60 CCH EPD P 41876.

29 USCS § 793 did not create private right of action, where former Amtrak employee alleged that his discharge was in violation of statute prohibiting discrimination against qualified handicapped persons by employers with government contracts, because statute does not expressly create private right of action, and language and legislative history do not imply right of action. *Wilson v Amtrak Nat'l R.R. Corp.* (1992, DC Md) 824 F Supp 55, 63 CCH EPD P 42753.

No private right of action exists under § 503(a) of Rehabilitation Act (29 USCS § 793). *Egan v Wells Fargo Alarm Servs.* (1993, ED Mo) 7 ADD 651, 2 AD Cas 1124.

There is no private right of action under § 503 of Rehabilitation Act (29 USCS § 793). *Schrader v Gulf Oil* (1994, ED Pa) 7 ADD 358, 4 AD Cas 523, affd without op (1995, CA3 Pa) 65 F3d 163.

There is no implied private right of action under § 503 of Rehabilitation Act (29 USCS § 793); thus, action by former employee against holder of federal mining lease, which action alleges that employer discriminated against employee

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on basis of her disability in violation of § 503, will be dismissed. *Ortega v Rhone-Poulenc of Wyo., L.P.* (1994, DC Wyo) 842 F Supp 488, 4 ADD 619, 2 AD Cas 1802.

Terminated custodian's suit against long-term employer under 29 USCS § 793 must be dismissed, even though deadline for filing motion to dismiss had passed, because § 793 does not state that private individual may sue under statute, and legislative history does not clearly indicate that Congress intended that there be private right of action under statute. *Ortega v Rhone-Poulenc of Wyo., L.P.* (1994, DC Wyo) 842 F Supp 488, 4 ADD 619, 2 AD Cas 1802.

No private right of action is provided to disabled employee of federal contractor by 29 USCS § 793. *Clemmer v Enron Corp.* (1995, SD Tex) 882 F Supp 606, 9 ADD 502, 4 AD Cas 437, 67 BNA FEP Cas 872.

§ Summary dismissal is granted to airline sued by Labor Department's Office of Federal Contract Compliance Programs for alleged disability discrimination, where 29 USCS § 793, prior to 1992 amendments, did not prohibit discrimination against individuals with disabilities, because Office was not authorized in 1989 to subject airline to random compliance review or to seek individual discrimination remedies on behalf of employment applicants. *American Airlines v Hermann* (1997, ND Tex) 971 F Supp 1096, 24 ADD 937, 7 AD Cas 1, 71 CCH EPD P 44856.

5. Administrative proceedings

Office of Contract Compliance Programs did not violate regulation (41 CFR § 60.741.26(g)) by not pursuing reconciliation proceedings and discontinuing pursuit of alleged violation of Rehabilitation Act (29 USCS §§ 701 et seq.) by employer. *Presinzano v Hoffman-LaRoche, Inc.* (1984, CA3 NJ) 726 F2d 105, 1 AD Cas 552, 33 BNA FEP Cas 1723, 33 CCH EPD P 34139, 38 FR Serv 2d 773.

Section 503(b) of Rehabilitation Act (29 USCS § 793(b)) provides that handicapped individual who believes that he or she has been discriminated against may file complaint with Department of Labor. *Philip Morris, Inc. v Block* (1985, CA4 Va) 755 F2d 368, 1 AD Cas 694, 37 BNA FEP Cas 74, 36 CCH EPD P 35025.

Department of Labor has primary jurisdiction over plaintiff's private claims under 29 USCS § 793 and plaintiff must pursue administrative remedies. *Drennon v Philadelphia General Hospital* (1977, ED Pa) 428 F Supp 809, 14 BNA FEP Cas 1385.

Refusal of government contracts compliance officer to initiate administrative proceedings in case of truck driver discharged for epilepsy was not abuse of discretion, in view of highway safety objective. *Costner v United States* (1982, ED Mo) 555 F Supp 146, 30 BNA FEP Cas 1301, 31 CCH EPD P 33446, revd on other grounds (1983, CA8 Mo) 720 F2d 539, 1 AD Cas 524, 33 BNA FEP Cas 292, 32 CCH EPD P 33911.

Office of Federal Contract Compliance Programs did not have authority to administratively prosecute federal contractor for violations of Rehabilitation Act (29 USCS § 793) allegedly committed by contractor. *American Airlines v Hermann* (1997, ND Tex) 971 F Supp 1096, 24 ADD 937, 7 AD Cas 1, 71 CCH EPD P 44856.

Complaints must be filed with Office of Federal Contract Compliance Programs within 180 days of date of alleged violation unless time for filing is extended for good cause shown; date of filing is date complaint is first received in writing by office, and request for complaint form or verbal notice of intent to file complaint is not sufficient to establish filing date; filing or processing of grievance under collective bargaining agreement does not extend filing period; date of alleged violation is date complainant knew or reasonably should

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have known of alleged discriminatory act or violation. OFCCP Order No. 630a5, March 10, 1983.

6. --Mandamus action

Handicapped employee has standing to maintain action under 29 USCS § 793 to compel Secretary to initiate action against government contractor who discharged him allegedly in violation of Rehabilitation Act (29 USCS §§ 701 et seq.). *Moon v Donovan* (1982, ND Ga) 1 AD Cas 380, 29 BNA FEP Cas 1780, 31 CCH EPD P 33402.

7. Entities subject to compliance review

For purposes of federal contract compliance laws, University of North Carolina system constitutes single, unified state agency, of which University's campuses are merely sub-agencies; thus, campuses that have not entered into §contracts with federal government must, nonetheless submit to compliance reviews

conducted by Office of Federal Contract Compliance Programs. *Board of Governors of University of North Carolina v United States Dep't of Labor* (1990, CA4 NC) 917 F2d 812, 1 AD Cas 1704, 54 BNA FEP Cas 136, 135 BNA LRRM 2760, 36 CCF P 75959, 55 CCH EPD P 40370, cert den (1991) 500 US 916, 114 L Ed 2d 100, 111 S Ct 2013, 55 BNA FEP Cas 1104, 56 CCH EPD P 40801.

Where 11 of 16 campuses in state university system had received federal contracts, campuses that did not enter contracts with federal government were nonetheless subject to affirmative action requirements of 29 USCS § 793 and Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 USCS § 2012), since university system was single state agency of which non-contracting campuses were merely constituent parts. *Board of Governors of University of North Carolina v United States Dep't of Labor* (1990, CA4 NC) 917 F2d 812, 1 AD Cas 1704, 54 BNA FEP Cas 136, 135 BNA LRRM 2760, 36 CCF P 75959, 55 CCH EPD P 40370, cert den (1991) 500 US 916, 114 L Ed 2d 100, 111 S Ct 2013, 55 BNA FEP Cas 1104, 56 CCH EPD P 40801.

In absence of waiver or exemption covering particular facility, Secretary of Labor is authorized under 29 USCS § 793 to enforce non-discrimination obligations on parties to government contracts, even with regard to separate facilities which are autonomous. *Trinity Indus., Inc. v Herman* (1999, CA4 NC) 173 F3d 527, 79 BNA FEP Cas 854, 161 BNA LRRM 2078, 75 CCH EPD P 45808.

TABLE 2—CLASSIFICATIONS

87 Stat. at Large		1973 Cong. News	U.S.Code and U.S.C.A.	
Pub.Law	Sec.	Page	Title	Sec.
93-112	103	424	29	723
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93-113	601	479	42	5041 note
93-113	602	480	5	8332(b)(7)
93-113	604(b)	480	42	3067
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62 FR 44174

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62 FR 44174, *

FEDERAL REGISTER

Vol. 62, No. 160

Rules and Regulations

DEPARTMENT OF LABOR (DOL)

Employment Standards Administration (ESA)

Office of Federal Contract Compliance Programs

41 CFR Parts 60-1, 60-60

RIN 1215-AA01

Government Contractors, Affirmative Action Requirements, Executive Order 11246

Part II

62 FR 44174

DATE: Tuesday, August 19, 1997

ACTION: Final rule.

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To view a specific page, transmit p* and the page number, e.g. p*1

[*44174]

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is revising a limited number of the regulations to implement Executive Order 11246, as amended, which prohibits employment discrimination and establishes affirmative action requirements for nonexempt Federal contractors and subcontractors. The final rule revises the regulations relating to record retention, compliance monitoring, maintenance of non-segregated facilities, and other aspects of enforcement. The revisions to the Executive Order implementing regulations effected by this final rule are expected to reduce the compliance burdens of covered contractors, and improve the efficiency of OFCCP in administering and enforcing the Executive Order.

EFFECTIVE DATE: September 18, 1997.

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone 202-219-9475 (voice), 1-800-326-2577 (TDD). Copies of this final rule, including copies in alternate formats, may be obtained by calling 202-219-9430 (voice), 1-800-326-2577 (TDD). The alternate formats available are large print, an electronic file on computer disk and audiotape. The rule also is available on the Internet at <http://www.dol.gov/dol/esa>.

SUPPLEMENTARY INFORMATION:

I. Current Regulations and Rulemaking History

Executive Order 11246, as amended, prohibits all nonexempt Government contractors and subcontractors, and federally assisted construction contractors and subcontractors, from discriminating in employment. The Executive Order also requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex and national origin. OFCCP has been assigned responsibility for administering Executive Order 11246, and has published regulations implementing the Order at 41 CFR Ch. 60.

The Executive Order regulations have not undergone substantive revision since the 1970s. A final rule was published on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), but was stayed in accordance with Executive Order 12291 on January 28, 1981 (46 FR 9084). This rule later was stayed indefinitely on August 25, 1981 (46 FR 42865), pending action on a notice of proposed rulemaking (NPRM) published on that same date (46 FR 42968; supplemented at 47 FR 17770, April 23, 1982). Both the 1980 final rule and the 1981 NPRM addressed the regulations contained in 41 CFR parts 60-1 and 60-60. No further action has been taken on the August 25, 1981, proposal, or on the 1980 stayed final rule.

On May 21, 1996, OFCCP published a proposed rule, 61 FR 25516, to revise specific regulations found at 41 CFR parts 60-1 and 60-60. The comment period closed on July 22, 1996. A total of 32 comments was received from six contractors, six contractor associations, one consulting firm, one law firm, 13 civil rights and women's rights organizations, two Federal agencies, one local government agency, and one individual. All the comments were reviewed and carefully considered in the development of this final rule.

II. Overview of the Final Rule

The final rule, for the most part, adopts the revisions that were proposed in the May 21 NPRM. However, some of the proposed provisions have been modified in response to the public comments. The changes between the NPRM and the final rule are explained in detail in the Section-by-Section Analysis.

The final rule revises the regulations in 41 CFR part 60-1 in four areas: Record retention, compliance monitoring, maintenance of non-segregated facilities, and enforcement procedures. In addition, to ensure consistency in the administration and enforcement of the Federal contract compliance laws, the final rule conforms several provisions in part 60-1 to parallel provisions in the regulations found at 41 CFR part 60-741. The latter regulations implement section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which also is administered by OFCCP. A final rule published on May 1, 1996, made comprehensive revisions to the Section 503 regulations (61 FR 19936). The conforming changes made by the final rule published today affect several definitions and some aspects of enforcement.

Further, the final rule deletes most of the existing provisions in 41 CFR part 60-60, which describe the procedures for conducting compliance reviews of nonconstruction (*i.e.*, supply and service) contractors. A few substantive provisions in part 60-60, which are not contained elsewhere in the regulations, are being transferred to part 60-1. The transferred provisions primarily relate to the procedures for protecting confidential data, the time frames within which a contractor must submit its written affirmative action program (AAP) and supporting documentation, and authorization for nationwide AAP formats.

Finally, in order to avoid conflict, the final rule withdraws part 60-1 of the final rule which was published on December 30, 1980, and subsequently suspended.

The discussion which follows identifies the significant comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed revisions.

Section-by-Section Analysis of Comments and Revisions

Section 60-1.3 Definitions

OFCCP proposed in the NPRM to add a definition for the new term "compliance evaluation." Additionally, OFCCP proposed to revise several definitions in the current regulations to make them consistent with definitions contained in the Section 503 implementing regulations. The Section 503 final rule published on May 1, 1996, made changes to several terms and phrases that are common to both Executive Order 11246 and Section 503 of the Rehabilitation Act. Specifically, the Section 503 final rule revised the regulatory definitions of "contract," "Government contract," "subcontract," and "United States," and replaced the title "Director" with the new title, "Deputy Assistant Secretary for Federal Contract Compliance." In order to maintain consistency in its administration and enforcement of the Federal contract compliance laws, OFCCP proposed to make conforming changes to the definitions of those terms found in existing § 60-1.3.

" *Compliance Evaluation.*" Under the existing regulations, the "compliance review" is the primary method utilized to investigate contractor compliance [*44175] with the requirements of the Executive Order. The current regulations prescribe a three-phase process for conducting compliance reviews: (1) An off-site or desk audit review of the contractor's written AAP and supporting documentation; (2) an on-site review of the contractor's employment policies and activities and investigation of any problem areas identified during the desk audit; and (3) where needed, an off-site analysis of data obtained during the on-site review. Under the current regulations, an on-site review is conducted at nearly every establishment selected for review, regardless of the results of the desk audit.

The existing "all or nothing" approach to compliance reviews is, in the view of OFCCP, too restrictive. OFCCP believes that more focused and streamlined procedures can be used to determine a contractor's compliance status, and that a flexible approach to monitoring compliance would enable the agency to target its enforcement resources more efficiently.

The NPRM proposed to revise the compliance review provisions found in § 60-1.20 to authorize the agency to utilize "compliance evaluations" to determine the compliance status of a contractor. The NPRM proposed to define the term "compliance evaluation" used in § 60-1.20(a) of the proposal as "any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the Executive Order 11246 requirements."

Two contractor associations mentioned the proposed definition of "compliance evaluation" in their comments. They asserted that the proposal was vague; that OFCCP had not adequately described how the compliance evaluation procedure would be implemented. These commenters also questioned whether the proposed review process for contractors would be streamlined, because the proposed definition indicated that OFCCP could take "any one or combination of actions" to

determine whether a contractor maintained nondiscriminatory employment practices and fulfilled its affirmative action obligations.

The concerns raised by these commenters actually are more properly directed at proposed § 60-1.20(a), which describes four examination procedures encompassed by the term "compliance evaluation," rather than to the language of the proposed definition. Accordingly, a response to these comments is provided below in the preamble discussion concerning § 60-1.20 of the final rule.

The proposed definition of "compliance evaluation" is carried forward in this final rule without substantive change, although the wording has been revised slightly for clarity. OFCCP expects that the flexible approach to compliance monitoring that is reflected in the term "compliance evaluation" will reduce compliance burdens for the contractors that satisfy their Executive Order obligations. OFCCP also believes this new approach will increase the efficiency of its enforcement program by allowing the agency to use its most comprehensive evaluation procedure-the compliance review-selectively. Further, a range of methods for evaluating contractor compliance will enable the agency to reach a greater percentage of its contractor universe than is reviewed currently.

"Contract." The term "contract" is defined in the current regulations as "any Government contract or any federally assisted construction contract." The NPRM proposed to amend this definition to subsume the term "subcontractor." As was explained in the preamble to the NPRM, the revision would obviate the need to make a separate reference to "subcontract," each time "contract" is referenced, to demonstrate that a particular provision applies to both contracts and subcontracts.

One contractor association objected to the proposed definition of "contract." This commenter believed that the amended definition would expand the scope of the Executive Order's coverage and impose obligations upon subcontractors that currently do not exist. This commenter's concerns are unfounded. The Executive Order always has been applicable to agreements which fall within the regulatory definition of subcontractors. No substantive changes in the Executive Order's coverage were intended nor effected by the proposed change to the regulatory definition of contract.

Another commenter urged OFCCP to amend the definition to include "all federally assisted contracts and subcontracts," not just "federally assisted construction contracts and subcontracts." However, Section 301 of Executive Order 11246 expressly limits coverage of federally assisted contracts to agreements involving federally assisted construction.

The final rule amends the definition of "contract" to include "subcontract," as proposed in the NPRM. The term "subcontract" is referenced in the rule only when necessary to the context.

"Deputy Assistant Secretary." The NPRM proposed to substitute the new title of "Deputy Assistant Secretary for Federal Contract Compliance Programs" for the title of "Director" in the current regulations, and to make the title change throughout the proposed rule. No comments were received on this proposal. The final rule adopts this title change as proposed, except that the word "Programs" has been dropped in order to more accurately reflect the title.

"Government Contract." The regulations define "Government contract" as an agreement "for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements." The NPRM proposed to revise this definition to clarify that contracts covered under Executive Order 11246 include those under which the Government is a seller of goods or services, as well as those in which it is a purchaser. The proposal substituted a reference to the contracts for the "purchase, sale or use of personal property or nonpersonal services" and a definition of the term "personal services" for the existing reference to the "furnishing" of goods or services, or for the use of real or personal property, including lease arrangements. Thus, the proposal provided, in relevant part, that a "Government contract" is "any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or

nonpersonal services."

Two commenters—a contractor association that represents small agricultural firms and a national law firm that counsels Government contractors on the requirements of the Executive Order and its implementing regulations—objected to the proposed clarification of the term "Government contract." Both argued that the proposed definition was too broad; that defining Government contract to include sales by the Government would extend the Executive Order's reach to activities that were not intended to be covered. The law firm was concerned that the revised definition of contract would expand the Executive Order's coverage to concessionaires and licensees that operate on Government lands under nonappropriated fund contracts. Specifically, this commenter was referring to those entities that contract with units of the Department of Defense called nonappropriated fund instrumentalities or "NAFIs" to operate a wide range of food, retail, and recreational concessions at military installations. The commenter noted that concession contracts with NAFIs typically do not involve appropriated [*44176] funds, and do not impose costs to the Government.

The law firm argued that Executive Order 11246 and its implementing regulations contemplated coverage of traditional procurement contracts and Government leasing of property, *i.e.*, agreements that require the Government to expend appropriated funds. Thus, the law firm contended that OFCCP did not have the authority to define "Government contracts" so as to include the contracts of nonappropriated fund instrumentalities. Further, this commenter argued alternatively that no-cost concession agreements with NAFIs should not be covered under Executive Order 11246 because OFCCP would experience difficulty computing their dollar value for the purpose of determining whether the contract satisfied the dollar thresholds for basic coverage and for the written affirmative action program requirement. This commenter requested that OFCCP either modify the definition of "Government contract" or include an express exemption for concession contracts with nonappropriated fund instrumentalities.

The assertions of this commenter ignore the longstanding policy and practice of the agency to cover concession contracts with nonappropriated fund instrumentalities or NAFIs. OFCCP consistently has taken the position that contracts with nonappropriated fund instrumentalities of the Government, such as the Army and Air Force Exchange Service, are covered by Executive Order 11246, assuming the dollar volume thresholds are met. As instrumentalities of the United States, NAFIs meet the definition of contracting agency under the regulation at 41 CFR 60-1.3. The fact that these contracts involve nonappropriated funds, rather than appropriated funds, is inconsequential. The Executive Order and implementing regulations do not distinguish between the source of the funds used to pay for the contract to determine coverage. Coverage under the Executive Order turns on the status of the parties and the nature of the agreement in issue.

OFCCP also disagrees with the commenter's contention that the decision cited in the NPRM's preamble, *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D. Md. 1976), was limited to lease coverage issues, and therefore, does not support the agency's position that "Government contract" covers sales by the Government. The plaintiff in *Kleppe*, the holder of an oil and gas lease from the Interior Department, argued that it did not have a Government contract because the financial benefit (cash flow) was toward the Government. In deciding that a lessee of an oil and gas lease was a "Government contractor," the court rejected the argument that the provisions of the Executive Order were limited to those situations in which the Government is the consumer of goods. Significantly, the court in *Kleppe* concluded that it would be an inconsistent application of the national policy to eliminate discrimination in employment to impose the Executive Order requirements on employers which had contracted to supply goods, services and leased property for use of the Government, but not to impose the requirements of the Order on employers which had contracted with the Government to receive from it goods, services and leased property to be used by the employer.

The commenter's alternative argument for exempting concession contracts with nonappropriated fund entities from the Executive Order is also unpersuasive. The regulatory provisions concerning contracts and subcontracts for indefinite quantities found in the current regulations at § 60-1.5

would govern whether dollar thresholds are satisfied for coverage purposes.

The contractor association cited recipients of disaster relief insurance proceeds as an example of a situation that would be newly covered under the Executive Order as a result of the proposed amendment to the definition of "Government contract." Disaster relief programs such as crop insurance and flood insurance usually involve federal financial assistance. The only federally assisted contracts covered by the Executive Order are federally assisted construction contracts. This does not mean, of course, that the agency is taking a position here that all transactions involving Federal disaster relief are excluded from coverage. Rather, questions relating to coverage under the Executive Order necessarily are decided case by case, based on the particulars of the program and the nature of the agreement at issue.

"Rules, regulations and relevant orders of the Secretary of Labor." A final rule published on May 3, 1996 (61 FR 19982), relating to the establishment of the Administrative Review Board, amended the definition of "Secretary" to include a "designee" of the Secretary of Labor. Consequently, the definition of "rules, regulations and relevant orders of the Secretary of Labor" in the current regulations, which makes reference to the designee of the Secretary, is no longer necessary, and has been omitted in this final rule.

"Subcontract." The definition of "subcontract" in the current regulations refers to agreements "for the furnishing of goods or services." The NPRM contained a proposal to revise this definition so that it would conform to the NPRM's definition of "Government contract." Accordingly, the proposal included a definition of "subcontract" that referenced agreements "for the purchase, sale, or use of personal property or nonpersonal services."

The contractor association which represents small agricultural firms objected to the proposal, contending that it would expand the scope of the Executive Order's coverage. The commenter said the proposed definition of "subcontract" would be particularly burdensome for companies in the agricultural industry, as the subcontracts for a producer of fruit products necessarily include growers, pickers, haulers, as well as fertilizers and pesticide applicators. This commenter raised a similar objection to the proposed definition of "contract." It appears that these comments were directed primarily at the "necessary to the performance" part of the existing regulatory definition of "subcontract," rather than the proposed "purchase, sale or use" language. As has been explained previously, the scope of coverage under the Executive Order has not been expanded. The existing definition of "subcontract" under the Executive Order regulations applies to agreements which are necessary to the performance of a Government contract, or under which part of the performance of the Government contract is assumed or undertaken.

The final rule adopts, without change, the definition of "subcontract" that was published in the NPRM.

"United States." The NPRM proposed to revise the definition of "United States," by deleting the references to Panama Canal Zone (which was ceded back to Panama under the terms of the Panama Canal Treaty), and by specifying the possessions and territories of the United States as: The Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island. No comments were received on this proposed revision. The proposed definition of "United States" is adopted.

Section 60-1.8 Segregated Facilities

Section 60-1.8 of the current regulations prohibits the maintenance of segregated facilities (paragraph (a)) and requires contractors to certify that they are in compliance with that obligation (paragraph (b)). OFCCP proposed in the NPRM to conform paragraph (a) of § 60-1.8 with the Executive Order's general [*44177] nondiscrimination requirements by expanding the list of prohibited practices to include gender-based segregation, with the proviso that separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes. Several stylistic changes to existing paragraph (a) also were proposed. In

addition, the NPRM proposed to eliminate the written certification requirement in paragraph (b).

Nearly half of the commenters addressed the proposed changes concerning segregated facilities. Commenters representing the constituencies most directly affected by the regulations-minorities, women and Government contractors-all supported the proposed prohibition against gender-based segregated employee facilities. The women's rights groups, in particular, applauded the proposal. In their view, the proposed amendment recognizes that sex-segregation remains a problem in traditionally male workplaces.

The comment of the Equal Employment Opportunity Commission (EEOC) concerned the requirement that "separate or single-user restrooms, dressing or sleeping areas shall be provided to assure privacy between the sexes." EEOC suggested that we alert contractors that, under Title VII of the Civil Rights Act of 1964, as amended, it would be an unlawful employment practice for an employer to deny employment or to otherwise adversely affect the employment opportunities of an applicant or employee in order to avoid the cost of providing separate or single restroom or dressing facilities. Likewise, contractors are advised that the costs of providing such separate facilities would not be a defense to a charge of sex-based employment discrimination brought under the Executive Order.

Further, all but two comments expressed support for the elimination of the written certification requirement in paragraph (b). A women's rights organization and a local government entity objected to the proposal. The women's rights organization argued that retention of the written certification requirement would serve as a useful reminder of the new prohibition against sex-segregated employee facilities. This commenter suggested that the benefits of the notice-serving function of the certification outweighed any time-savings that would be realized by elimination of the requirement. The governmental entity similarly commented that requiring a contractor to certify that it maintains non-segregated facilities reflected the essence of the Executive Order, but imposed only a minimal burden on contractors.

OFCCP agrees that contractors should be apprised of their obligation under the Executive Order regulations to ensure that employee facilities are not segregated on the basis of sex, except where it is necessary to safeguard privacy between men and women. The agency, however, is of the view that the prohibition against segregated facilities can be effectively enforced without the benefit of the written certification. Eliminating the certification will not, for example, affect the contractor's obligation to maintain facilities on a non-segregated basis. In short, the written certification is a paperwork requirement that does not produce commensurate benefit, and its repeal is consistent with the Administration's regulatory reform initiative.

Another commenter asked that OFCCP clarify in the final rule that repeal of the written certification will not expose prime contractors to liability for the violations of the Executive Order committed by their subcontractors. OFCCP accepts the point that the repeal will not expose prime contractors to liability for violations committed by their subcontractors. However, it is not necessary to codify the point in the regulations. Under the existing regulations, prime contractors are not responsible for the compliance of their subcontractors with the requirements of the Order and regulations. Consequently, the certification of non-segregated facilities has not, as the comment seems to suggest, served to shield prime contractors from liability for the noncompliance of their subcontractors. The certification merely has provided notice to the prime contractors of whether their subcontractors (in the latter's view at least) are complying with the nondiscrimination requirements of the order.

The final rule amends paragraph (a) and deletes paragraph (b) of § 60-1.8 as was proposed in the NPRM.

Section 60-1.12 Record Retention

Section 60-1.12(a) General Requirements

The obligation to retain relevant employment records is implicit in some of the current regulatory requirements (e.g., those relating to maintaining data on applicants, hiring, transfers and promotions, and developing and updating written affirmative action programs). However, the regulations, with one exception, do not prescribe a record retention period. That exception is the requirement under the Uniform Guidelines on Employee Selection Procedures published at 41 CFR part 60-3 (hereinafter UGESP) to keep certain adverse impact data for two years after the adverse impact has been eliminated.

Paragraph (a) of the proposal would amend the record retention obligation in several ways. First, proposed paragraph (a) would make the record retention obligation applicable to any personnel or employment record made or maintained by the contractor and lists examples of the types of records that must be retained. Second, proposed paragraph (a) would establish the required record retention period as two years. The proposal would establish a one-year record retention period for contractors that employ fewer than 150 employees or that do not have a Government contract of at least \$ 150,000. Third, proposed paragraph (a) would provide that when a contractor has been notified that a complaint has been filed, a compliance evaluation has been initiated or an enforcement action has been commenced, the contractor shall preserve all relevant personnel records until the final disposition of the action.

Several of the commenters expressed views on proposed paragraph (a). The civil rights and women's rights organizations commended the proposal to make record retention requirements explicit. They viewed the addition of a record retention regulation as essential to effective enforcement and said it would ensure consistency with the regulations under Title VII and Section 503.

The contractor community opposed the record retention proposal. Two contractor associations asserted that proposed paragraph (a) was too broad. They claimed that the proposal would expand the scope of records subject to the retention requirement; that is, the examples of records listed suggest that any document related to an employee or employment decision must be retained for two years. These commenters contended further that the proposed regulation would impose a considerable burden, particularly on the larger contractors that have employment related activities which might generate millions of records.

The concern that the proposal would oblige contractors to maintain records beyond current requirements is unfounded. The NPRM explained that the proposed record retention requirement (paragraph (a)) comports with the analogous record retention requirements under Title VII and the [*44178] Americans with Disabilities Act (ADA). In addition, proposed paragraph (a) is consistent with the provisions adopted in the Section 503 final rule. The types of employment records covered by the record retention requirement, listed in proposed paragraph (a), include items not listed in the corresponding Title VII and ADA regulations. But, as EEOC noted in its comment, those additional items-the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes-are examples of "any personnel or employment record made or kept," and, therefore, clearly fall within the coverage of the existing Title VII and ADA record retention rule.

Another contractor association contended that the proposed regulatory language was inadequate because it failed to answer contractors' recurrent questions embraced by record retention obligations under Executive Order 11246. This commenter argued that the regulations should include guidance on: (1) Who is an "applicant" for the purposes of the record retention requirement; and (2) whether and to what extent the record retention requirement applied when a contractor used electronic bulletin boards and the Internet as recruitment sources.

OFCCP has issued the following guidance on the meaning of the term "applicant":

The precise definition of the term applicant' depends upon [a contractor's] recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might

be expressed by completing an application form, or might be expressed orally, depending upon the [contractor's] practice. Question and Answer No. 15, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (44 FR 11996, 11998 (March 2, 1979)).

Accordingly, whether an individual will be considered an applicant turns on the employee selection procedures designed and utilized by the contractor. OFCCP is studying the range of ways contractors are utilizing electronic media in their employee selection processes and intends to issue guidance responding to questions most frequently asked by contractors regarding this issue.

Commenters from the contractor community criticized the two-year record retention period proposed for larger contractors. These commenters argued that it was inconsistent for OFCCP to impose a two-year retention period, when the retention period under Title VII is one-year. They argued that, because OFCCP follows the principles developed under Title VII case law to enforce the Executive Order, the agency should adopt the EEOC rule. These same commenters said that OFCCP had underestimated the administrative and storage costs associated with maintaining an additional year of records.

These comments ignore the differences in the enforcement schemes of EEOC and OFCCP. Reviews of contractors' compliance with the Executive Order and regulations cover a two-year period. The policy and practice are to examine the contractor's personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years. The two-year record retention period provides greater assurance that relevant records will be available during OFCCP compliance evaluations. In contrast, EEOC's enforcement of Title VII is triggered exclusively by charges, which must be filed within 180 days (or, in deferral jurisdictions, 300 days) of an alleged violation. EEOC's one-year retention period is designed to ensure that relevant records are not discarded before the expiration of the complaint filing period.

Turning to the concern about the burdens on contractors, OFCCP believes that requiring larger contractors to retain records for an additional year will result in only a minimal increase in burden. As was noted in the preamble to the NPRM, many large employers and some smaller employers as well, are increasingly maintaining records electronically. In such instances, compliance with the record retention requirement will impose little or no additional burden. Moreover, the decision to establish a one-year record retention period for smaller contractors-the same period required by EEOC-is part of the agency's effort to maintain burdens associated with record keeping at a minimal level. The one-year rule also will accommodate those smaller contractors that are less likely to maintain electronic records.

Two contractor associations commented on the separate record retention requirements for larger and smaller contractors. One association questioned whether OFCCP had authority under the U.S. Constitution and Federal procurement laws to tie the record retention requirement to workforce and contract size. This comment overlooks the fact that size distinctions are common in regulatory schemes. Indeed, the existing Executive Order regulations provide different requirements for smaller contractors (e.g., those that employ fewer than 50 employees or do not have a contract of at least \$ 50,000). Such contractors, for example, are exempted from the regulatory requirement to develop and maintain a written AAP.

The other contractor representative raised questions regarding the record retention obligations of contractors who are at or near the thresholds that trigger the different retention periods. Specifically, the commenter questioned what would happen if the employment levels or contract values exceed or fall below the 150 employees, \$ 150,000 thresholds during the course of the contract. A change in status relating to either threshold would affect the record retention obligation. If the number of employees should fall below 150 or if the contractor no longer has a contract of at least \$ 150,000, the contractor would not be required to retain employment records for two years. The requirement to keep records for two years would become effective again on the date that the contractor met the thresholds of 150 employees and a contract of \$ 150,000. The

record retention requirement, however, would not be applied retroactively, *i.e.*, the change from one year to two years would be phased in day-by-day. But see the discussion regarding the obligation to maintain records once a compliance evaluation has commenced, which follows.

One commenter expressed disapproval of the requirement in proposed paragraph (a) that contractors retain all relevant records once a compliance evaluation has been initiated. This commenter contended that the requirement was burdensome and unfair to contractors, particularly because of the proposal to eliminate the provision in § 60-60.7, which allows the agency 60 days to complete a compliance review.

The purpose of this record retention requirement is to ensure that OFCCP can obtain all relevant documents during a compliance investigation or enforcement action. OFCCP appreciates the contractor's concerns about the timely completion of compliance evaluations, but disagrees with the assertion that the schedule has to be codified in the regulations. In the preamble discussion concerning § 60-1.20 of the final rule, and again in the discussion regarding part 60-60 of the regulations, OFCCP explains that the agency's standards for timeliness and work schedules are not derived solely from the regulations. Therefore, there would be set time frames for completing [*44179] compliance evaluations even if the regulatory provisions were eliminated.

The final rule adopts the record retention provisions proposed in the NPRM without change.

Section 60-1.12(b) Affirmative Action Programs

Paragraph (b) of the proposal provides that a contractor establishment required to develop a written affirmative action program (AAP) shall maintain the AAP for the current year and preserve the AAP for the preceding year, together with the supporting documentation, including good faith efforts undertaken. Three commenters from the contractor community objected to proposed paragraph (b). They questioned the relevance of information contained in an expired AAP and expressed concern that OFCCP would examine the AAP for deficiencies. One of the commenters contended that the only possible reason OFCCP could have for requesting an AAP from the preceding year is to see if one exists. This commenter urged OFCCP to include a statement to that effect in the final regulation.

The written AAP serves dual purposes. The AAP is developed primarily to assist the contractor in monitoring its employment practices to ensure that they are nondiscriminatory and that affirmative action is taken to ensure equal employment opportunity. OFCCP also reviews and relies upon the AAP to determine whether the contractor is complying with the Executive Order and regulations.

The contractor's affirmative action performance (e.g., personnel activity, goals progress and good faith efforts to meet goals) is examined for at least the last full AAP year. However, a compliance evaluation may be scheduled at any time during the year. If, at the time of the review, the contractor is six months or more into its current AAP year, OFCCP examines performance under both the current year and the prior year AAP. Accordingly, the requirement in proposed paragraph (b) that the contractor preserve the AAP for the previous year would ensure the availability of an AAP covering a full AAP year.

In addition, under the current regulations the AAP for the current year must contain a progress report on goals for the previous AAP year. Whether progress or little or no improvement was made in the goal areas, the AAP for the previous year should provide an explanation of the efforts undertaken and the results achieved. For example, the AAP and documentation of good faith efforts may describe the contractor's outreach and recruitment activities designed to increase its pool of female or minority applicants, or training programs instituted to enhance the skills and talents of incumbent employees with an eye to increasing the pool of those eligible for promotion. In other words the AAP from the previous year may contain information that would allow an evaluation of those commitments that are directly related to the performance of the contractor in the current year. In addition, the affirmative action obligation is not a one-year requirement. Rather, it is a continuing obligation and maintaining the AAPs in the fashion proposed in paragraph (b) enables OFCCP to assess the quality and effectiveness of the contractor's affirmative action.

commitments on a multi-year basis.

The regulation in proposed paragraph (b) is adopted without change.

Section 60-1.12(c) Failure To Preserve Records

Paragraph (c) of the proposed rule provides that the failure to maintain and preserve the records as proposed in paragraphs (a) and (b) is a violation of Executive Order 11246. Additionally, paragraph (c) proposes that a contractor's failure to preserve required records or destruction of such records, may raise a presumption that the records, if available, would have been unfavorable to the contractor. Paragraph (c) of the proposed rule includes a proviso that the presumption shall not apply if the contractor demonstrates that the destruction or failure to preserve records resulted from circumstances beyond the contractor's control.

EEOC commented that its Compliance Manual limited application of the "adverse inference rule" to situations in which an employer acted with the intent to defeat the purposes of Title VII. The view of EEOC is that the proposal does not limit the adverse inference to instances of deliberate destruction with an intent to frustrate the purposes of the Executive Order.

OFCCP believes that clarification would be helpful. The adverse inference presumption in proposed paragraph (c) is not limited to situations in which the destruction or failure to preserve records may be attributed to the willful conduct of the contractor. The agency intends to invoke the presumption on a case-by-case basis as the circumstances warrant. The proposed rule, in recognition of this discretionary approach, states that a presumption may arise if the contractor destroyed or failed to preserve records.

One commenter suggested that we amend the proposal to expressly provide a procedure that would permit the contractor to rebut the presumption that the records destroyed or not maintained were unfavorable. The suggested amendment is unnecessary. The presumption is rebuttable, and contractors will have a full opportunity to submit evidence to refute the inference.

Another commenter recommended that the final rule set forth the sanctions that may be imposed for violations of the record retention requirements. The sanctions described in § 60-1.27 may be imposed for any violation of Executive Order 11246 or the implementing regulations, including § 60-1.12. A separate sanction provision for violations of the record retention regulations, accordingly, is unnecessary.

The final rule adopts paragraph (c) of the proposal without change.

Section 60-1.12(d) Effective Date

Paragraph (d) of the proposal provides that the contractor is obligated to preserve only those records which are created or kept on or after the effective date of this rule. No comments were received on this provision. The final rule adopts paragraph (d) as proposed.

Section 60-1.20 Compliance Evaluations

The compliance review is the primary method of evaluating a contractor's compliance with the Executive Order and regulations. Paragraph (a) of the current § 60-1.20 describes the purpose of the compliance review and provides that the review shall consist of a comprehensive analysis of each aspect of a contractor's employment practices, and where appropriate, include recommendations for appropriate sanctions.

The NPRM would amend paragraph (a) to authorize OFCCP to use a range of methods to reevaluate a contractor's compliance with the regulations. Specifically, paragraph (a) would provide that a compliance evaluation may consist of any one or a combination of the following: (1) A compliance review, (2) off-site review of records, (3) a compliance check, and (4) a focused

review.

Nearly all commenters addressed the proposed compliance evaluation regulation. The commenters from the women's rights and civil rights communities supported the proposal. They opined that the flexible approach of the proposal would improve the efficiency of OFCCP and permit the agency to target resources better. A contractor also supported proposed paragraph (a) and offered that it was a thoughtful proposal to streamline the compliance review process. [*44180]

Some of the contractor associations favored the concept of having a range of evaluation methods to determine compliance with Executive Order 11246 and the regulations, but expressed reservations about various aspects of the proposed regulation. For example, one commenter questioned the off-site review of records, especially confidential data. Another questioned whether the "compliance check" would entail an on-site visit, off-site review of records, or both. Another commenter requested that the rule be clarified as to whether the additional options for evaluating compliance-the off-site review of records of records, the compliance check and the focused review-would constitute a complete evaluation. Specifically, this commenter wanted to know whether the current practice of reviewing a contractor no more frequently than once every 24 months would continue under the expanded system.

Three commenters from the contractor community objected outright to the proposed compliance evaluation regulation. One of the contractor associations contended that the proposed rule would give OFCCP unbridled authority to evaluate contractor compliance, and that contractors would be subjected to endless requests for information, data, and records if the rule were finalized. In addition, this commenter contended that contractors needed regulatory notice of how each type of compliance evaluation would be implemented. Similarly, another commenter argued that the procedures for each of the evaluation methods needed to be spelled out in the regulations with the same level of detail provided in the current regulations concerning the compliance review process. These commenters believed they should have the opportunity to comment upon a proposed regulation that specified, among other things, the number of evaluation methods the contractor could expect, the frequency of such evaluations, and the time frames for completing each method of evaluation.

OFCCP has made revisions in the final rule to provide more detail about the methods for evaluating contractor compliance. The revisions are explained below. Further, OFCCP agrees that contractors should be apprised of how the agency intends to implement the proposed compliance evaluation procedures. The agency disagrees, however, with the notion that the particulars of implementation must be included in the regulations.

The Federal Contract Compliance Manual (FCCM) contains the policy guidance interpreting the Executive Order and regulations, as well as agency instructions for implementing the regulatory provisions. OFCCP's Compliance Manual currently describes the procedures for conducting compliance reviews. The aspects of implementation addressed in the Manual include the time frames for conducting the review, how to open and close a review, and how frequently reviews should be conducted. The FCCM is the appropriate medium to specify the procedures for conducting the different types of compliance evaluations. The agency, therefore, declines to adopt the changes suggested by some of the commenters. The final rule adopts the compliance evaluation provisions of proposed paragraph (a). However, paragraph (a) of the final rule differs from the proposal by including expanded descriptions of the activities contemplated under each evaluation method. The final rule for example, clarifies that a compliance review is the same comprehensive examination of the contractor's employment practices that is prescribed by the current regulations. In addition, the description of the off-site review of records is revised in the final rule to explain that the scope of the examination would be substantially similar to the desk audit phase of the compliance review. Further, the final rule provides that the compliance check involves an on-site visit to an establishment to review the contractor's books and records for the purpose of determining whether: (1) Data and other information previously submitted by the contractor are accurate and complete; (2) the contractor has maintained records consistent with the requirements of § 60-1.12; and/or (3) the contractor has developed an AAP consistent with the

requirements of § 60-1.40.

Contractor fears of repeated and unending evaluations are unfounded. OFCCP always has been sensitive to contractor concerns about the amount of time, money and personnel resources consumed by compliance reviews. Thus, the agency's practice normally has been to conduct a compliance review of a contractor no more frequently than once every two years. Additionally, the agency's Compliance Manual instructs the compliance officer to complete the compliance review within 60 days from the date the AAP is received. (See FCCM C204). The compliance officer must request an extension of time whenever it becomes apparent that the compliance review cannot be completed within the allotted time. (*Id.*)

OFCCP intends to continue to follow the currently prescribed time frames whenever the compliance review is the method used to evaluate a contractor's performance. The agency also intends to establish similar standards regarding the frequency and duration of the off-site review of records, the compliance check, and the focused review, to ensure that the compliance evaluations authorized by § 60-1.20 are not overly intrusive. Finally, OFCCP will develop other policies and procedures for compliance officers to follow when implementing these new evaluation methods. That policy and procedural guidance will be incorporated in the Compliance Manual, and thereby made available to the public, before any of the new methods for evaluating contractor compliance are utilized.

Section 60-1.20(d) Preaward Compliance Evaluations

Section 60-1.20(d) in the current regulations requires contracting agencies to obtain clearance from OFCCP prior to awarding Federal supply and service contracts of \$ 1 million or more. The current regulations require OFCCP to conduct a preaward compliance review if the facility at which the contract will be performed has not undergone a compliance review within the preceding 12 months, and to provide its report of compliance within 30 days of receipt of the request from the contracting agency.

The NPRM would revise paragraph (d) of the current regulation to make the preaward compliance evaluation optional. Under paragraph (d) of the proposed rule, OFCCP would have 15 days to inform an awarding agency of its intentions to conduct a preaward compliance evaluation. The proposed rule would allow OFCCP an additional 20 days from the date of the notice of intention to conduct the preaward evaluation to provide the conclusions regarding compliance to the contracting agency. The proposed rule further provides that clearance shall be presumed if OFCCP does not give notice of its intention to conduct a preaward compliance evaluation or does not report its conclusions within the prescribed time periods.

Several comments urged that the proposal be revised. Women's rights and civil rights groups unanimously opposed the proposal to make preaward compliance evaluations optional. They contended that changing the preaward review from a mandatory function to a discretionary function would seriously diminish the effectiveness of a compliance procedure they viewed as an important enforcement tool. A few [*44181] expressed the fear that preawards would be discontinued entirely if they were left to the discretion of the agency. As an alternative to making all preaward compliance evaluations optional, some commenters suggested that OFCCP could target its enforcement resources more efficiently by: (1) Raising the \$ 1 million minimum threshold to reflect inflation over the last 25 years; and (2) expanding the 30-day time allowed to conduct preaward compliance evaluations.

Most of the comments from the contractor community on proposed paragraph (d) were supportive of the proposal to make preaward compliance evaluations optional. However, one contractor and the Department of Defense recommended that the agency eliminate preawards entirely, and adopt a post-award notification and post-award review procedure. Another contractor questioned the feasibility of the proposed time frames for conducting preaward compliance evaluations, noting that proposed paragraph (d) requires OFCCP to report its conclusions about compliance within 20 days, while proposed paragraph (e) would allow the contractor 15 days to submit an AAP.

The NPRM discusses the problems associated with the current preaward process at length, so that discussion will not be recounted here. (See 61 FR 25516, 25519.) The NPRM explained that several models for modifying the preaward provisions were considered during the development of the proposal, including an increase in the dollar amount of the preaward contract threshold.

Upon reconsideration and in response to the comments, OFCCP has decided to maintain the current mandatory nature of preaward evaluations, but to raise the threshold trigger for the conduct of the preaward evaluation. Accordingly, the final rule requires that a preaward compliance evaluation of a prospective contractor be conducted when the amount of the contract is \$ 10 million or more, and that a preaward evaluation of known prospective subcontractors be conducted when the amount of the subcontract is \$ 10 million or more, unless OFCCP has conducted an evaluation and found them to be in compliance with the Order within the preceding 24 months. These increases in contract amount and compliance history thresholds will reduce the number of preaward compliance evaluations OFCCP will need to conduct. A reduction in the number of preaward evaluations will permit OFCCP greater flexibility in targeting its enforcement resources. Continuing the requirement that the agency conduct preawards, albeit of a smaller universe, addresses the concerns of the civil rights and women's rights groups that a discretionary preaward evaluation process would seriously undermine the utility of preaward compliance evaluations as an enforcement tool. Under the final rule, the preaward evaluation process will remain a significant component of the Executive Order enforcement program by targeting those contractors who benefit most from taxpayers-funded Government contracts.

OFCCP also studied the option of eliminating the preaward provisions, and considered replacing preawards with post-award compliance evaluations. In OFCCP's view, however, the preaward evaluation still has value as an enforcement tool. The final rule will retain the preaward clearance time frames contained in the proposal to ensure that the preaward evaluation process is conducted expeditiously. The reduction of the number of preaward evaluations which will be conducted under the final rule and the regulatory time frames for completing the evaluations, coupled with the administrative changes OFCCP is making to streamline the preaward clearance process, will significantly decrease the burden on contracting agencies of processing Executive Order preaward clearance requests during the procurement process.

As for the question regarding the compatibility of the time frames in paragraphs (d) and (e) of the proposal, the deadline for the submission of documents in proposed paragraph (e) would not apply to preaward compliance evaluations. Under the existing preaward procedures, the contractor is not asked to submit its AAP and support data for review. Currently, OFCCP either conducts an abbreviated desk audit or review of the AAP and support data on-site, or dispenses with review and analysis of the AAP and support data altogether. Contractors can expect that OFCCP will continue to adjust its compliance evaluation procedures to meet the preaward clearance time frames in paragraph (d).

The final rule revises paragraph (d) of § 60-1.20 by requiring that a preaward compliance evaluation of a prospective contractor be conducted when the amount of the contract is \$ 10 million or more and a preaward evaluation of its known first-tier prospective subcontractors be conducted when the amount of the subcontract is \$ 10 million or more, unless OFCCP has conducted an evaluation and found them to be in compliance in the preceding 24 months. The final rule establishes time frames for OFCCP to inform the awarding agency of the necessity for conducting a preaward evaluation and for OFCCP to provide its conclusions about the contractor's compliance status.

Section 60-1.20(e) Submission of Documents; Standard Affirmative Action Formats

Under § 60-60.2, a contractor must submit its AAP and supporting documents to OFCCP within 30 days of a request. If the contractor fails to submit the documents within the prescribed time period, the enforcement procedures specified in § 60-1.26 are applicable. The NPRM proposed to incorporate the provisions of § 60-60.2 as a new paragraph (e) of § 60-1.20, with one

modification. Under proposed paragraph (e), the time for submission of an AAP and supporting documentation would be reduced from 30 days to 15 days.

Several comments on the proposed change in time frames were received. The commenters from the civil rights and women's rights communities supported the proposal. They viewed 15 days as more than adequate time to submit an AAP because, they argued, contractors are required to have an AAP in place as a condition of doing business with the Federal Government. These commenters believed the 15-day deadline would address the unacceptable (and unlawful) practice of contractors waiting until a compliance review has been scheduled before they develop an AAP.

The commenters from the contractor community objected to the proposal and strongly urged retention of the 30-day time frame for submission of the AAP and supporting data. One commenter observed that the 15-day requirement assumes that a contractor could simply pull the AAP out of a file, copy it, and send it to OFCCP. But, according to this commenter and others, an AAP is a fluid, evolutionary document rather than a static piece of paper. They asserted that the 15-day deadline ignored other realities of compliance reviews and how AAPs are developed and updated.

The commenters said that even where a detailed AAP has been developed contractors frequently use the 30 days provided under the current regulations to update the support data. They pointed out that a request for an AAP may require that the contractor submit data on personnel activity for the current goal year, which normally would be compiled and analyzed during the 30-day period. Further, the commenters identified several situations [*44182] which might make it difficult for a contractor to meet the 15-day deadline. The request for the AAP might come when the company officials responsible for updating or reviewing the AAP are unavailable, or at the expiration of the AAP year and before the contractor has had an opportunity to review and analyze the current labor force statistics in order to update its AAP.

In recognition of the concerns of the contractors, OFCCP has decided not to adopt the 15-day deadline in the final regulation. The final rule retains the existing 30-day time frame for the submission of the AAP and support data.

The current regulation at § 60-60.3(a) states, in relevant part, that "Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics." OFCCP proposed also to incorporate this provision, without any changes, in new paragraph (e).

Two contractor associations and one contractor commented on this provision. All favored the inclusion of the provision in the final rule and viewed it as a change in agency policy on nationwide AAPs, which also are called standardized affirmative action formats or "SAAFs." Some officials in OFCCP had been critical of the nationwide AAP formats that had previously been negotiated and viewed them as impediments to effective enforcement of the Executive Order. In response to these agency concerns, a moratorium on new SAAF agreements was issued on December 16, 1994. That moratorium remains in effect today. Thus, the inclusion of the provision regarding nationwide AAP formats does not represent a change in agency policy. Rather, it preserves the status quo until OFCCP completes its evaluation of the concept.

The final rule adopts all the provisions proposed in paragraph (e) except the change proposed in the time frame for the submission of documents. The existing 30-day time frame for submitting the AAP and supporting documents is retained in the final regulation.

Section 60-1.20(f) Confidentiality

The regulation at § 60-60.3 provides that information made available during the on-site review may be taken off-site if the compliance officer finds that further analysis is required to make a determination of compliance. Section 60-60.4 contains procedures under which contractors may seek rulings on the relevancy of data requested for off-site analysis. The regulation also prescribes procedures for preserving the confidentiality of contractor data removed off-site for analysis.

Under the current regulations, a contractor concerned about the confidentiality of information such as employee names and compensation data may submit alphabetic and coded data for desk audit purposes. However, the contractor must provide the compliance officer with full access to all relevant data on-site, as is directed by § 60-1.43. The information to be removed for off-site analysis may be coded, but only if the key to the code is made available to the compliance officer. The contractor also may seek a ruling from the District Director as to the relevance of documents requested for off-site analysis. The District Director is allowed 10 days to issue a ruling, the contractor 10 days to appeal the District Director's ruling to the Regional Director, and the Regional Director 10 days to issue a final ruling. The current regulations provide that, during the pendency of the relevancy determination, the contractor must allow the compliance officer to remove the disputed information off-site.

The NPRM would delete part 60-60 of the regulations and transfer the provisions found in § 60-60.3(c) and § 60-60.4 to a new § 60-1.20(f). The new paragraph (f) would incorporate the substantive provisions of the current regulations, but would revise the procedures for rulings on relevancy. The proposed rule would eliminate the provision concerning the removal of disputed data off-site pending the ruling on relevancy. In addition, paragraph (f) of the proposed rule would replace the existing 10-day time frames for issuing rulings on relevancy with the requirement that the District Director and Regional Director issue their rulings "promptly."

The provisions concerning confidentiality and removal of data for off-site analysis generated extensive comments from the contractor community. All the commenters contended that the proposed rule did not ensure protection of confidential or proprietary information during compliance evaluations. Some commenters claimed that the provision requiring the contractor to make the key to coded data available to a compliance officer posed a threat to confidentiality. They recommended amending the proposed rule to provide that the key to coded data may never be taken off-site.

In fact, no changes to the provisions regarding the coding of confidential data were proposed. The proposed rule would continue the current regulatory requirement that the contractor make the key to coded data available to the compliance officer. If the key to coded data is needed for off-site analysis, contractors can be assured that confidentiality will be protected, as it has been under the current regulations. Where the contractor codes data that are submitted for desk audit purposes, the current practice is that the key to the code is retained by the contractor and made available to the compliance officer during the on-site review. (See FCCM at 2GO1). That practice would continue also under the proposed regulation.

Other commenters expressed concern about the provisions regarding rulings on the relevancy of data requested for off-site analysis. They argued that the determination of relevancy should be made prior to the removal of any confidential data off-site. The commenters asserted also that the regulations should contain definite time frames for the District Director and Regional Director to issue rulings on relevancy.

Although the NPRM proposed modifications to the procedures for obtaining rulings regarding the relevance of data requested for off-site analysis, OFCCP has decided not to adopt those changes in the final regulation. The final rule retains the provision that the contractor must allow removal of the disputed data off-site pending a final ruling on relevancy. Upon further consideration, OFCCP believes that eliminating the provision regarding off-site availability pending a relevance determination would prolong the compliance evaluation process and adversely impact efficiency and effectiveness. The resumption of an interrupted compliance evaluation might be delayed well beyond the date the final ruling regarding relevancy is issued because the compliance officer may have initiated another compliance evaluation in the interim. The current regulation and practice allows the compliance officer to proceed with the investigation while the trail is still fresh and close the compliance evaluation within a reasonable amount of time.

Further, in response to contractors' criticism concerning the proposed removal of the definite time frames for issuing relevancy determinations, OFCCP has decided not to adopt that provision of the

proposal. Instead, the final rule provides that the District Director shall issue a ruling within 10 days, and that if the contractor appeals the District Director's ruling to the Regional Director, the Regional Director shall issue a final ruling within 10 days.

The comments concerning proposed paragraph (f) reveal that the contractors' overriding concern is that confidential or proprietary information obtained by [*44183] OFCCP for off-site analysis may be disclosed pursuant to the Freedom of Information Act (FOIA). Several commenters recommended that the rule be amended to require that all confidential data be returned at the conclusion of the complaint investigation or compliance evaluation. One commenter further suggested that the amendment state expressly that contractor data are not subject to disclosure under FOIA while the investigation or compliance evaluation is open, and that the compliance review or investigation is not considered closed until all data are returned to the contractor.

OFCCP follows the Department's regulations implementing the Freedom of Information Act and Executive Order 12600 when processing FOIA requests. The Department's FOIA regulations are found at 29 CFR Part 70. Data obtained from contractors that are contained in files connected with open compliance evaluations, complaint investigations or administrative enforcement actions are not disclosed. The agency considers such information to be part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and therefore exempt from mandatory disclosure under FOIA. The exemption in FOIA for information compiled for law enforcement purposes, however, is not a permanent one. Once the compliance evaluation, complaint investigation, or enforcement action has been concluded and the investigatory files exemption no longer is in effect, another exemption would need to apply in order to protect the information in the files from disclosure in response to a FOIA request. For example, information obtained from contractors arguably might be protected from disclosure under the exemption for trade secrets or commercial or financial information that is privileged or confidential (5 U.S.C. 552(b)(4)).

The Department's FOIA regulations set forth procedures for processing requests for the disclosure of information and material provided by business submitters. Those regulations permit the contractor to designate specific information as confidential commercial information at the time of submission to the Department. 29 CFR 70.26(b). In addition, the Department's FOIA regulations require OFCCP to give the contractor written notice of any request encompassing confidential commercial information, and to provide the contractor an opportunity to object to disclosure. 29 CFR 70.26 (d) and (e).

OFCCP previously has considered the question of whether assertedly confidential data may be returned to the contractor upon completion of the investigation or compliance evaluation. The position of OFCCP is that the Federal records retention requirements do not permit the agency to return data obtained from the contractor during a compliance review or complaint investigation upon completion of the action. The information and records received from the contractors in connection with enforcement activities constitute Government records. As such, their disposition is strictly prescribed by statute and regulation and must be made in accordance with the agency's records management program, with the approval of the Archivist of the United States. The documents may be disposed of only by the methods defined by the statute, which do not include returning them to the originating source, *i.e.*, the contractor, but instead call for disposal by sale or salvage, donation for preservation and use, or destruction.

Paragraph (f) of the proposal is adopted in the final rule with the changes regarding the procedures for issuing relevancy determinations described herein. In addition, at the suggestion of one commenter, the final rule substitutes "key to coded data" for the reference to "the code" to the data. Thus, the final rule provides, in relevant part, "Such data may only be coded if the contractor makes the key to the code available to the compliance officer."

Section 60-1.20(f) Access to Information

Section 60-60.4(d), concerning public access to information, describes outdated procedures under

which requests received from the public for information obtained from the contractor previously were processed. OFCCP proposed to substitute provisions in the current rule with a statement of the agency's current practices. Accordingly, paragraph (g) of the proposal provides that "the disclosure of information obtained from a contractor will be evaluated pursuant to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR Part 70."

No comments were received on paragraph (g) of the proposal. The provision is adopted in the final rule as proposed.

Section 60-1.26 Enforcement Proceedings

The NPRM would revise and restructure, for clarity, § 60-1.26, which specifies the Executive Order enforcement procedures. With the exception of the provisions relating to the calculation of interest, the proposal would not make substantive changes to this section. Subsection (a) of the proposal would apply to both administrative and judicial enforcement. Proposed subsection (b) would address administrative enforcement procedures. Subsections (c) and (d) of the proposed regulation would cover judicial enforcement proceedings initiated by the Department of Justice.

Several of the proposed changes are consistent with provisions included in the Section 503 implementing regulations at 41 CFR 60-741.65(a)(1). Subsection (a)(2) of the proposed regulation, clarifies that OFCCP may seek relief for victims of discrimination identified either during a compliance evaluation or a complaint investigation whether or not such individuals have filed a complaint with OFCCP. Subsection (a)(2) of the proposal would require that interest on back pay be compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

The proposal would provide, in subsection (b)(1), that administrative enforcement proceedings may be instituted where OFCCP determines that referral for formal enforcement (rather than settlement) is appropriate. Subsection (b)(1) of the proposed regulation would specify that the litigation referral will be made to the Solicitor of Labor. Further, consistent with a requirement included in the Section 503 regulations, the proposal would require that the Department's Final Administrative Order in an Executive Order case be issued within one year from the date of the Administrative Law Judge's recommended decision, or the submission of the parties' exceptions and responses to exceptions to such decision (if any), whichever is later.

The commenters from the civil rights and women's rights communities welcomed the clarification in subsection (a)(2) that OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation, regardless of whether such individuals have filed a complaint with the agency. One contractor suggested that contractors be given the opportunity to correct a discriminatory practice or situation identified for the first time during a compliance review before liability is imposed. However, simply changing the offending employment practice only addresses part of the problem. In most instances, the discriminatory practice cannot be [*44184] considered "corrected" unless and until remedial relief is provided for those victimized by the practice.

Two commenters from the contractor community objected to the proposal concerning the compounding of interest on back pay awards. One commenter suggested that compound interest provided a "windfall" to the victim. OFCCP disagrees. Compounded interest is necessary to make the victim whole. OFCCP has a longstanding policy of requiring that interest on back pay awards under the Executive Order be compounded. That policy is consistent with the policy and practice of the Department to request compounded, pre-judgment interest whenever back pay is sought in cases arising under the Fair Labor Standards Act. See e.g., Brock v. The Claridge Hotel and Casino, 644 F.Supp. 899, 908 (D.N.J. 1986), aff'd, 846 F.2d 180 (3d Cir. 1988), cert. denied, 488 U.S. 925 (1988); and Brennan v. Bd. of Ed., Jersey City, 374 F.Supp. 817, 833 (D.N.J. 1974). Moreover, as noted in the NPRM, compounding interest on awards of back pay is consistent with the case law under Title VII of Civil Rights Act of 1964 and other Federal employment discrimination laws. See

e.g., Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 144 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 820 (7th Cir. 1990), and *Mennen v. Easter Stores*, 951 F.Supp. 838, 863 n. 28 (N.D. Iowa 1997). The proposal would reinstate this policy to ensure that victims of discrimination obtain complete relief.

A contractor association objected to the provision in subsection (a)(1)(ix) of the proposal, which provides that violations of the Executive Order may be based upon the "alteration or falsification" of records. This commenter argued that the term "alteration" should be deleted because it implied that contractors could not alter records to correct errors without violating the Order. OFCCP, however, believes that it is clear from the context that the term "alteration" refers to changes or modifications in records which misrepresent the facts. Accordingly, the agency declines to make that modification to the proposed rule.

Further, a commenter from the contractor community objected to the provision in proposed subsection (b), which would provide that OFCCP may refer matters to the Solicitor of Labor with the recommendation for the institution of administrative enforcement proceedings "when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate." The commenter said the provision appeared to eliminate the duty to conciliate and considered it to be a substantive change to the existing regulations. The commenter is incorrect. The proposed regulation does not change the existing regulations; OFCCP is still required to make reasonable efforts to secure compliance through conciliation. Proposed paragraph (b), however, recognizes, that some violations, such as denial of OFCCP access, are not always amenable to conciliation, and therefore, warrant OFCCP initiating immediate administrative enforcement.

Section 60-1.26 of the proposal is adopted in the final rule. However, some modifications have been made in the final regulation. Subsection (a)(1)(ii) of the proposal, which provides that violations may be based upon the results of a compliance review, has been deleted from the final regulation as redundant. The final rule specifies that violations may be based on the results of a compliance evaluation, which includes compliance reviews. In addition, the final rule adds a new subsection which states that violations may be based on a contractor's refusal to provide data for off-site review or analysis as required in the regulations. Although subsection (a)(1)(viii) of the final rule references the refusal to furnish records, OFCCP believes the amendment is necessary to clarify that violations may be based upon the contractor's refusal to furnish records requested for off-site review or analysis.

Section 60-1.27 Sanctions

The current sanction regulation provides only that the sanctions authorized by Section 209 of the Executive Order may be exercised by or with the approval of the Director of OFCCP. The NPRM would add a new paragraph specifically to address the sanction of debarment. Paragraph (b) of the proposal would provide that the contractor may be debarred, subject to reinstatement pursuant to the provisions in § 60-1.31. The proposal also would provide that debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

Several comments were received on the proposed sanction provision. The comments from the women's rights and civil rights communities supported the proposal to make the debarment sanction explicit in the regulations. Commenters from the contractor community, however, objected to the proposed sanction regulation. It appeared from a few comments that the indefinite debarment sanction needed further explication.

The duration of an indefinite term of debarment is not indeterminable, as some commenters suggested. Under the current regulations, and the proposed reinstatement regulation as well, a contractor debarred for an indefinite term may request reinstatement at any time. Thus, as OFCCP noted in the preamble discussion concerning sanctions, a contractor debarred for an indefinite term can be reinstated immediately without incurring any economic loss.

Several commenters from the contractor community thought that fixed term debarments were too

harsh a sanction. Two commenters questioned whether fixed term debarments were authorized under the Executive Order. A contractor association argued that the Secretary does not have authority to continue a debarment beyond the time the contractor demonstrates its willingness and ability to comply. A contractor, in an extensive comment on this proposal, contended that fixed term debarments were not authorized under the Order because they were punitive in nature.

Under Section 209(a)(6) of the Order, a debarred contractor remains ineligible for future Government contracts "until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order." The Executive Order does not, as the contractor association's comment suggests, require the Secretary to reinstate a contractor merely because it promises to implement revised policies. Rather, the Order states that the Secretary must be "satisfied" that the contractor will carry out the revised policies. In some cases, a contractor will have to demonstrate its commitment to changed employment policies over a period of time, before an affirmative determination can be made about the contractor's willingness and ability to comply with the Executive Order's requirements.

The debarment for a fixed period is not intended as a "punishment." The purpose of the sanction is to provide a trial period during which a contractor can demonstrate its commitment and ability to establish employment practices that will ensure continued compliance with its Executive Order obligations. OFCCP believes that the prospect of a fixed period of ineligibility for government contracts will deter contractors from engaging in violations. Contrary to the contentions of one commenter, sanctions can discourage [*44185] certain conduct without being retributive.

Other commenters from the contractor community objected to the proposal because it would authorize the Secretary to impose a fixed term debarment for "any" violation. They said that, while the Secretary had imposed the fixed term debarment in very limited circumstances in the past, paragraph (b) of the proposal was not tailored to address these limited and unusual circumstances. A few commenters recommended that we amend the proposed regulation to specify the instances that would warrant the imposition of a fixed term debarment.

It is neither practicable nor necessary precisely to define the types of violations for which it would be appropriate to impose a fixed term debarment. Where a fixed term debarment is ordered, in contrast to an indefinite term debarment, the length of the debarment period will be determined case-by-case, and will depend upon factors such as the nature and severity of the violations. The sanction regulation is adopted in the final rule as proposed.

Section 60-1.30 Notification of Agencies

Currently, the regulations require the OFCCP distribute a list of debarred contractors to all executive departments and agencies. OFCCP proposed to eliminate this requirement because the General Services Administration now publishes a listing of debarred contractors. The proposal substitutes in its place a provision requiring the Deputy Assistant Secretary ensure that the heads of agencies are notified of debarments. The proposal also renames the section "Notification of Agencies" instead of "Contract ineligibility list."

No comments were received on proposed § 60-1.30. The regulation is adopted in the final rule as proposed.

Section 60-1.31 Reinstatement of Ineligible Contractors

The current regulation provides that a contractor declared ineligible for future contracts may request reinstatement in a letter directed to the Director. The regulations state that the contractor must show that it has established and will carry out employment policies in compliance with the equal opportunity clause in any reinstatement proceedings. The NPRM would revise the current provisions regarding reinstatement to conform them to proposed § 60-1.27(b), which authorizes debarment either for an indefinite term or for a fixed term of not less than six months. Under the

proposal, a contractor debarred for an indefinite period could request reinstatement at any time. A contractor debarred for a fixed period could request reinstatement after the expiration of the fixed period. The proposal would authorize a compliance evaluation of the contractor's employment practices before a final disposition of the reinstatement request.

Commenters from the contractor community objected to the reinstatement procedures proposed for contractors debarred for a fixed term. They contended that reinstatement should occur automatically at the conclusion of the fixed term. According to these commenters, the absence of definite time frames in the reinstatement procedures outlined in the proposal would mean that the fixed term debarment could drag on indefinitely.

OFCCP submits that the reinstatement process set forth in the proposed regulation is fair to debarred contractors. The argument that reinstatement should be automatic at the end of the fixed period misses a critical point. A debarred contractor is required to demonstrate that its employment policies and practices comply with the Order, and that showing usually is made in the context of a compliance evaluation.

Nevertheless, in response to concerns that proposed § 60-1.31 would effectively extend a debarment well beyond the original fixed-term, OFCCP has modified the reinstatement process in the final rule. Under the final rule, a contractor debarred for a fixed period may file a request for reinstatement 30 days prior to the expiration of the fixed debarment period, or at any time thereafter. However, filing a reinstatement request 30 days before the end of the debarment period will not result in early reinstatement; a contractor debarred for a fixed period may be reinstated and declared eligible for future Government contracts only upon or after the fixed debarment period expires.

OFCCP intends to process reinstatement requests in a timely manner upon receipt. In many instances the compliance evaluation or other activity necessary to ensure that the contractor is in compliance and will remain in compliance may be completed during the 30-day "window" prior to the expiration of the debarment. In other instances that activity may extend beyond the 30-days, in which case the contractor will be reinstated (or notified of a decision not to reinstate) promptly upon completion of OFCCP's examination of the contractor's compliance status.

Section 60-1.32 Intimidation and Interference

The current regulation states that sanctions and penalties may be imposed against the contractor who fails to ensure that no one intimidates, threatens, coerces or discriminates against any individual who files a complaint or otherwise participates in a compliance activity under the Executive Order or a similar Federal, state or local law. The proposal would include a similar prohibition, but would specify that the contractor itself shall not engage in such activities and shall ensure that all persons under its control do not do so, and would add that the prohibition applies to harassment. The proposed regulation would apply the prohibition to an individual's opposition to any practice that is unlawful under the Order or similar Federal, state, or local law.

The women's rights and civil rights organizations supported the proposal, and commented that the protections outlined in the proposed provisions are needed to ensure the integrity of the enforcement process. A contractor, however, was critical of the proposal. This commenter suggested that the proposed regulation be revised to clarify that the protections extended only to "persons who were known to the contractor to have participated in an investigation" or "persons who were known to the contractor to have opposed unlawful practices." The burden of proof standards applicable to disparate treatment discrimination cases are applied to retaliation cases, and thus, there must be direct or circumstantial evidence that the contractor had knowledge of the protected conduct in order to prove the violation. Accordingly, the suggested clarification is not necessary.

The provision is carried forward in the final rule as proposed.

Section 60-1.34 Violation of a Conciliation Agreement or Letter of Commitment

The current regulation sets forth the procedures that apply when a contractor violates a conciliation agreement. The proposal would add a new subsection which would provide that, in any proceedings related to an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement and shall not be required to present proof of the underlying violations resolved by the agreement.

Two comments from the contractor community objected to the proposal. A [*44186] contractor association argued that OFCCP should be required to prove the underlying violations resolved by a conciliation agreement in order to protect contractors from being coerced into signing unreasonable or impracticable agreements. Similarly, a law firm, whose clients include Government contractors, contended that contractors frequently enter into conciliation agreements in order to terminate the compliance review, and not because they have actually committed violations of the Executive Order. Thus, the law firm's argument continues, OFCCP should have the burden of proving the truth of its findings of violation, and the contractor should not be precluded from demonstrating that it did not violate the Order, in the event the contractor is unable to honor the commitments it made.

The proposal is consistent with the well-settled principle under Title VII case law that a conciliation agreement entered to resolve employment discrimination claims is specifically enforceable independent of a finding that the employer did, in fact, engage in discriminatory practices, so long as regular contract rules are satisfied and enforcement does not conflict with the purposes of Title VII. *See, e.g., EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).* The courts have concluded that conciliation agreements would be rendered worthless as a means of securing voluntary compliance with Title VII, if a finding on the merits were required before any voluntary agreement to resolve discrimination claims could be enforced.

Likewise, contractors that enter into conciliation agreements to resolve findings of discrimination or other substantive violations of the Executive Order do so voluntarily and knowingly. Contractors are under no compulsion to execute conciliation agreements; they are free to reject the terms of settlement and have the matter resolved through the contested litigation. However, if a contractor voluntarily and knowingly accepts an offer to conciliate a matter, both parties, including the Government, are entitled to rely on the representations contained in the conciliation agreement. The conciliation contract binds both parties, and no useful purpose would be served here by outlining the litany of equities and inequities that would result if one or the other party were allowed to ignore its agreement and return to ground "zero."

The final rule adopts the proposed amendment to § 60-1.34 without change.

Section 60-1.42 Notices To Be Posted

This section sets forth the language that must be included in the equal opportunity notices Government contractors must post in conspicuous places. OFCCP proposed technical corrections to the wording of the poster concerning the jurisdictional coverage of Title VII and the address of the EEOC. No comments were received on this proposal. The provision is adopted in the final rule as proposed.

Section 60-1.43 Access to Records and Site of Employment

Under the current regulations, each contractor is required to permit access to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts and other material as may be relevant to the matter under investigation or pertinent to compliance with the Order. The current regulations allow the information to be used only in connection with the administration and enforcement of the Executive Order and the Civil Rights Act of 1964.

The proposed amendment would add computerized records to those which the contractor must produce for inspection and copying. The proposal would continue the requirement that the contractor permit access to its premises for the purpose of conducting compliance evaluations and complaint investigations. In addition, the proposal would allow the information to be used in connection with the administration of other laws that are enforced in whole, or in part, by OFCCP.

Several commenters from the contractor community objected to the proposal regarding access to computerized records. They contended that the proposal would allow unlimited access to sensitive information in the contractors' human resource files, regardless of its relevancy to a determination of compliance with the Order. The commenters requested that OFCCP revise the proposal to clarify that access would be limited to existing files and that contractors would not be required to reprogram their computers to comply with an OFCCP request.

The proposed rule does not expand the scope of records that would be made available; contractors must give OFCCP access to data in computer files under the current regulations. Rather, the proposed regulation simply would clarify that records include those maintained in computerized form.

The concern that the provision would permit, if not encourage, unfettered access to confidential commercial proprietary data or irrelevant information is unjustified in OFCCP's view. Under the proposed rule, as under current regulation, access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with the Order. Further, the contractor is not required to reprogram its computers in order to generate data responsive to OFCCP's request; access is limited to the records and data that already exists in computerized form. Moreover, requests to take computerized records off-site for further analysis would be subject to the relevancy determinations prescribed by § 60-1.20(f) of the final rule.

The regulation is adopted in the final rule as proposed in the NPRM.

Part 60-60 Contractor Evaluation Procedures for Contractors for Supplies and Services

Part 60-60 of the current regulations concerns the conduct of compliance reviews. The NPRM proposed to delete a sizable portion of part 60-60. Most of part 60-60 properly is characterized as internal operating procedures. The NPRM explained that the agency's internal procedures are incorporated in the Federal Contract Compliance Manual (FCCM). Consequently, the regulations in which the procedures are published no longer are needed. However, those portions of part 60-60 that are regulatory in nature were proposed to be transferred to part 60-1. Thus, as previously has been discussed, § 60-1.20 of the final rule incorporates the substantive provisions in the current part 60-60 concerning submission of the AAP and support data (§ 60-60.2(a)), nationwide AAP formats (§ 60-60.3(a)(3)), off-site analysis of contractor data (§ 60-60.3(d)), and confidentiality and relevancy of information (§ 60-60.4 (a) through (d)).

One commenter from the contractor community objected to the elimination of part 60-60. This commenter argued that the entire provision should be retained and expanded to include detailed descriptions of the procedures that will be used to implement the new compliance evaluation provisions in § 60-1.20. According to this commenter, a regulatory provision devoted to evaluation procedures would ensure consistency in operations across OFCCP offices.

Other commenters from the contractor community objected to the removal of particular provisions in Part 60-60. One contractor was concerned that the elimination of § 60-60.3(c) would result in a change of the current agency practice of reviewing a contractor establishment no more frequently than once every 24 months. Section 60-60.3 [*44187] currently provides that an on-site review need not be conducted where the AAP is determined to be acceptable at desk audit, an on-site review has been conducted within the preceding 24 months, and the circumstances of the previous onsite review have not substantially changed. This regulatory provision, however, is not the basis for the current practice regarding the scheduling of compliance reviews.

Detailed procedures for implementing the regulatory provisions should be treated in agency guidance, not in the regulations. OFCCP already has issued guidance on the procedures for selecting and scheduling supply and service contractors for compliance reviews. That guidance provides that contractor establishments which have been reviewed in the last two years are not to be reviewed again unless certain very specific criteria are met and the Regional Director approves the scheduling of the review (OFCCP Order No. ADM 92-1/SEL). No plans are under consideration to change current scheduling practices; contractors may continue to expect that a compliance review usually will occur no more frequently than once every two years.

Other commenters objected to the proposed elimination of § 60-60.7, which prescribes a 60-day time frame for the completion of a compliance review. Again, the time frame for completing a compliance evaluation is an appropriate subject for agency guidance, not the regulations. The Compliance Manual currently states that substantial effort will be made to complete a compliance review within 60 days, although completion within that period is not a procedural prerequisite to an enforcement action (See FCCM 2C04). Contractors should not be concerned that the elimination of the regulatory provision in § 60-60.7 will mean an end to established schedules for completing evaluations of contractor compliance. OFCCP's subregulatory guidance will continue to reference the 60-day time frames even after the final rule is effective.

The final rule deletes the provisions of part 60-60 in accordance with the proposal.

Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. This rule has been determined to be significant for purposes of Executive Order 12866 and therefore has been reviewed by OMB. This rule does not meet the criteria of section 3(f)(1) of Executive Order 12866 and therefore the information enumerated in section 6(a)(3)(C) of that Order is not required.

In accordance with section 6 of Executive Order 12866, an assessment of the potential costs and benefits of this rule has been made. Although difficult to quantify, OFCCP believes that the economic impact of this rule will be positive. The compliance evaluation regulation adopted in this rule will streamline procedures for assessing contractor performance, and thereby reduce compliance costs and paperwork burdens on contractors, particularly when there are no indicators of noncompliance. In addition, the changes made by this rule to the provisions concerning preaward compliance evaluations will significantly decrease the administrative burdens and costs incurred by contracting agencies in processing requests for preaward clearance during the procurement process. Further, the compliance evaluation and preaward clearance regulations will reduce administrative costs and burdens on OFCCP, permit the agency greater flexibility in deploying its enforcement resources, and improve the agency's overall efficiency in administering the Federal contract compliance program.

As discussed below in the sections concerning the Regulatory Flexibility Act and the Paperwork Reduction Act, the record retention provisions adopted in this rule will promote efficiency in OFCCP's enforcement of the Executive Order by ensuring the availability of information needed to evaluate the compliance status of Government contractors. Further, the final rule will eliminate confusion about record retention requirements under Executive Order 11246 and ensure consistency with the record retention requirements under section 503 of the Rehabilitation Act, while imposing only a *de minimis* increase in burden on contractors. OFCCP believes the benefits provided by express record retention requirements to the agency's enforcement of the Executive Order will outweigh the minimal increase in contractor burdens. Finally, the elimination of the requirement for a written certification regarding the maintenance of non-segregated facilities will result in a reduction in contractor paperwork burdens.

In the NPRM, OFCCP stated that its goal in proposing regulatory changes is to make both contractor compliance and agency enforcement more efficient and cost effective. OFCCP invited

comments on additional ways to reduce compliance burdens such as simplified compliance procedures for small contractors. However, no comments were received in response to this request.

Regulatory Flexibility Act

All entities, regardless of size, will benefit from the repeal of the written certification regarding the maintenance of non-segregated facilities in this final rule. The record retention requirements adopted in this final rule might result in a minimal increase in the burden associated with storage of records for some small entities. However, in the agency's estimation, any increase in the corresponding storage costs would be negligible. Consequently, under the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the Secretary of Labor certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The changes to the Executive Order regulations made by the final rule published today impact the information collection requirements currently approved by OMB under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.). The record retention provisions adopted in § 60-1.12 of the final rule affect the approved record retention requirements for both supply and service (OMB Control No. 1215-0072) and construction contractors (OMB Control No. 1215-0163).

The new record retention requirements contained in this final rule have been submitted to OMB for clearance under the Paperwork Reduction Act. The new record retention requirements are not effective until OFCCP displays currently valid OMB control numbers. When OMB completes its review, OFCCP will publish a notice in the **Federal Register** regarding the control numbers.

The elimination of the certification regarding non-segregated facilities does not affect OFCCP's existing information collection requirements. Although the certification imposed paperwork burdens on contractors, such certifications were exempt under the Paperwork Reduction Act of 1980.

OFCCP predicted in the NPRM that the adoption of a two-year record retention requirement for larger contractors-those with 150 or more employees and a Government contract of at 150,000-would result in only a minimal increase in burden. OFCCP asserted that the one-year record retention period prescribed for smaller contractors (those that have fewer than 150 employees or that do not have a Government contract of \$ 150,000) would not increase the existing burden [*44188] on these contractors because they already are subject to this obligation under Title VII. Although the obligation to retain employment records for a year would be new for the small number of Government contractors that are not subject to Title VII (*i.e.*, those with fewer than 15 employees), OFCCP opined that any increase in burden associated with filing and storing employment records would be negligible for this group.

OFCCP invited the public to comment on the accuracy of the agency's estimates regarding the burdens posed by the proposed revisions to the information collection requirements, and to suggest ways of minimizing the burden and enhancing the quality and utility of the information collected. Two commenters-a consultant to Government contractors and a contractor association which represents small agricultural firms-responded to this request for comments. Several commenters from the contractor community, however, expressed opinions about the burdens associated with the record retention requirements in their comments on the regulatory provision.

Both the consultant and the contractor association contended that the proposed regulations would cause an overall increase in paperwork. According to the consultant, the two-year record retention period would be particularly burdensome for larger employers that routinely receive thousands of pages of applicant materials over the course of the year. The consultant asserted that retention of these materials for an additional year would require substantial time and effort from personnel and material handling staffs, and significant amounts of storage space as well. Comments received from two contractor associations in response to proposed § 60-1.12 expressed similar opinions

about the increased storage burden for larger contractors. The contractor association contended that the proposed regulatory revisions would generate substantially more paperwork for the small agricultural companies it represents.

OFCCP recognizes that the volume of records subject to the retention requirement and the storage burdens will vary among contractors. However, OFCCP still maintains that, on average, the increase in burdens associated with the two-year retention period will be minimal.

OFCCP stated in the NPRM that the elimination of the written certification regarding non-segregated facilities would reduce compliance burdens by roughly 850,000 hours. Accordingly to the consultant, the time and expense involved in preparing certifications have been reduced significantly by technological advances in personnel and purchasing offices, and as a result, elimination of the certification would save at most one-half of the hours that OFCCP had estimated. Even if the consultant is correct and certifications do not involve the amount of time the agency's estimate assumes, OFCCP believes the elimination of the requirement will yield a significant reduction in contractor burdens.

Unfunded Mandates Reform Act

This final rule does not include any Federal mandate that may result in the expenditures by state, local and tribal governments in the aggregate, or by the private sector, of \$ 100,000,000 or more in any one year.

List of Subjects

41 CFR Part 60-1

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Reporting and recordkeeping requirements.

41 CFR Part 60-60

Equal employment opportunity, Government procurement, Reporting and recordkeeping requirements.

Signed at Washington, DC, this 12th day of August 1997.

Alexis M. Herman,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, Part 60-1 of the rule amending 41 CFR Chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely at 46 FR 42865, and under the authority of Executive Order 11246, as amended, Title 41 of the Code of Federal Regulations, Chapter 60, is amended as follows:

PART 60-1--[AMENDED]

1. The authority citation for Part 60-1 is revised to read as follows:

Authority: Sec. 201, E.O. 11246 (30 FR 12319), as amended by E.O. 11375 (32 FR 14303) and E.O. 12086 (43 FR 46501).

2. Section 60-1.3 is amended by removing the definition of *Director*, by revising the definitions of *Contract*, *Government contract*, *Subcontract* and *United States*, and by adding, in alphabetical order, the definitions of *Compliance evaluation* and *Deputy Assistant Secretary* to read as follows:

§ 60-1.3 -- Definitions.

* * * * *

Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the requirements of Executive Order 11246.

* * * * *

Contract means any Government contract or subcontract or any federally assisted construction contract or subcontract.

* * * * *

Deputy Assistant Secretary means the Deputy Assistant Secretary for Federal Contract Compliance, United States Department of Labor, or his or her designee.

* * * * *

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term "personal property," as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term "nonpersonal services" as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include:

- (1) Agreements in which the parties stand in the relationship of employer and employee; and
- (2) Federally assisted construction contracts.

* * * * *

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

- (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or
- (2) Under which any portion of the contractor's obligation under any one of more contracts is performed, undertaken or assumed.

* * * * *

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of [44189] the Northern Mariana Islands, and Wake Island.

3. Section 60-1.8 is revised to read as follows:

§ 60-1.8 -- Segregated facilities.

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities," as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; *Provided*, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

4. A new § 60-1.12 is added to Subpart A to read as follows:

§ 60-1.12 -- Record retention.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$ 150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of not less than two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$ 150,000 shall keep such records for a period of not less than one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or enforcement action until final disposition of the complaint, compliance evaluation or enforcement action. The term "personnel records relevant to the complaint," for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers submitted by unsuccessful applicants and by all other candidates for the same position as that for which the complainant unsuccessfully applied. Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation.

(b) *Affirmative action programs.* A contractor establishment required under § 60-1.40 to develop a written affirmative action program (AAP) shall maintain its current AAP and documentation of good faith effort, and shall preserve its AAP and documentation of good faith effort for the immediately preceding AAP year, unless it was not then covered by the written AAP requirement.

(c) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraphs (a) and (b) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this Part. Where the contractor has destroyed or failed to preserve

records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided*, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control.

(d) *Effective date*. The requirements of this section shall apply only to records made or kept on or after September 18, 1997.

5. In § 60-1.20, the section heading and paragraphs (a) and (d) are revised and paragraphs (e), (f) and (g) are added to read as follows:

§ 60-1.20 -- Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review*. A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices, except in the case of preaward reviews. In a preaward review, the desk audit normally is conducted at the contractor's establishment.

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.

(2) *Off-site review of records*. An analysis and evaluation of the AAP (or any part thereof) and supporting [*44190] documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) *Compliance check*. A visit to the establishment to ascertain whether data and other information previously submitted by the contractor are complete and accurate; whether the contractor has maintained records consistent with § 60-1.12; and/or whether the contractor has developed an AAP consistent with § 60-1.40; or

(4) *Focused review*. An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

* * * * *

(d) *Preaward compliance evaluations.* Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$ 10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$ 10 million or more shall be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with the Order within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a preaward compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward compliance evaluation, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.

(e) *Submission of Documents; Standard Affirmative Action Formats.* Each prime contractor or subcontractor with 50 or more employees and a contract of \$ 50,000 or more is required to develop a written affirmative action program for each of its establishments (§ 60-1.40). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in § 60-1.26(b) shall be applicable. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.

(f) *Confidentiality and relevancy of information.* If the contractor is concerned with the confidentiality of such information as lists of employee names, reasons for termination, or pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for purposes of the compliance evaluation. The contractor must provide full access to all relevant data on-site as required by § 60-1.43. Where necessary, the compliance officer may take information made available during the on-site evaluation off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made. The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis. Such data may only be coded if the contractor makes the key to the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director. The OFCCP District/Area Director shall issue a ruling within 10 days. The contractor may appeal that ruling to the OFCCP Regional Director within 10 days. The Regional Director shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (g) of this section. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied by OFCCP and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(g) *Public access to information.* The disclosure of information obtained from a contractor will be evaluated pursuant to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR Part 70.

6. Section 60-1.26 is revised to read as follows:

§ 60-1.26 -- Enforcement proceedings.

(a) *General.* (1) Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings. Violations may be found based upon, *inter alia*, any of the following:

(i) The results of a complaint investigation;

(ii) The results of a compliance evaluation;

(iii) Analysis of an affirmative action program;

(iv) The results of an on-site review of the contractor's compliance with the Order and its implementing regulations;

(v) A contractor's refusal to submit an affirmative action program;

(vi) A contractor's refusal to allow an on-site compliance evaluation to be conducted;

(vii) A contractor's refusal to provide data for off-site review or analysis as required by the regulations in this Chapter;

(viii) A contractor's refusal to establish, maintain and supply records or other information as required by the regulations in this chapter or applicable construction industry requirements;

(ix) A contractor's alteration or falsification of records and information required to be maintained by the regulations in this chapter; or

(x) Any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations in this chapter.

(2) OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.

(b) *Administrative enforcement.* (1) OFCCP may refer matters to the [*44191] Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate. However, if a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review, and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter.

(2) Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30 of this chapter and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a Final Administrative Order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any), whichever is later.

(c) *Referrals to the Department of Justice.* (1) The Deputy Assistant Secretary may refer matters to the Department of Justice with a recommendation for the institution of judicial enforcement proceedings. There are no procedural prerequisites to a referral to the Department of Justice. Such referrals may be accomplished without proceeding through the conciliation procedures in this Chapter, and a referral may be made at any stage in the procedures under this Chapter.

(2) Whenever a matter has been referred to the Department of Justice for consideration of judicial enforcement, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction (including relief against noncontractors, including labor unions, who seek to thwart the implementation of the Order and regulations), and an order for such additional sanctions or relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above in this paragraph (c)(2).

(3) The Attorney General is authorized to conduct such investigation of the facts as he/she deem necessary or appropriate to carry out his/her responsibilities under the regulations in this Chapter.

(4) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Deputy Assistant Secretary, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. The Attorney General may do so by providing the contractor and any other respondent with reasonable notice of his/her findings, his/her intent to file suit, and the actions he/she believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(5) As used in the regulations in this Part, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(6) The Deputy Assistant Secretary or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(d) *Initiation of lawsuits by the Attorney General without referral from the Deputy Assistant Secretary.* In addition to initiating lawsuits upon referral under this section, the Attorney General may, subject to approval by the Deputy Assistant Secretary, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he/she shall make reasonable efforts to secure compliance with the contract provisions of the Order. He/she may do so by providing the contractor and any other respondent with reasonable notice of the Department of Justice's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Deputy Assistant Secretary, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional sanctions or equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above in this paragraph (d).

(e) To the extent applicable, this section and part 60-30 of this chapter shall govern proceedings resulting from any Deputy Assistant Secretary's determinations under § 60-2.2(b) of this chapter.

7. Section 60-1.27 is revised to read as follows:

§ 60-1.27 -- Sanctions.

(a) *General.* The sanctions described in subsections (1), (5), and (6) of section 209(a) of the Order may be exercised only by or with the approval of the Deputy Assistant Secretary. Referral of any matter arising under the Order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Deputy Assistant Secretary.

(b) *Debarment.* A contractor may be debarred from receiving future contracts or modifications or extensions of existing contracts, subject to reinstatement pursuant to § 60-1.31, for any violation of Executive Order 11246 or the implementing rules, regulations and orders of the Secretary of Labor. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

8. Section 60-1.30 is revised to read as follows:

§ 60-1.30 -- Notification of agencies.

The Deputy Assistant Secretary shall ensure that the heads of all agencies are [*44192] notified of any debarment taken against any contractor.

9. Section 60-1.31 is revised to read as follows:

§ 60-1.31 -- Reinstatement of ineligible contractors.

A contractor debarred from further contracts for an indefinite period under the Order may request reinstatement in a letter filed with the Deputy Assistant Secretary at any time after the effective date of the debarment. A contractor debarred for a fixed period may request reinstatement in a letter filed with the Deputy Assistant Secretary 30 days prior to the expiration of the fixed debarment period, or at any time thereafter. The filing of a reinstatement request 30 days before a fixed debarment period ends will not result in early reinstatement. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Order and implementing regulations. Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary shall issue a written decision on the request.

10. Section 60-1.32 is revised to read as follows:

§ 60-1.32 -- Intimidation and interference.

(a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;

(3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or

(4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

11. In § 60-1.34, paragraph (a)(4) is added to read as follows:

§ 60-1.34 -- Violation of a conciliation agreement or letter of commitment.

(a) * * *

(4) In any proceeding involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

* * * * *

12. Section 60-1.42 is amended by revising paragraph (a) to read as follows:

§ 60-1.42 -- Notices to be posted.

(a) Unless alternative notices are prescribed by the Deputy Assistant Secretary, the notices which contractors are required to post by paragraphs (1) and (3) of the equal opportunity clause in § 60-1.4 will contain the following language and be provided by the contracting or administering agencies:

Equal Employment Opportunity is the Law--Discrimination is Prohibited by the Civil Rights Act of 1964 and by Executive Order No. 11246

Title VII of the Civil Rights Act of 1964- *Administered by:*

The Equal Employment Opportunity Commission

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 15 or more employees, by Labor Organizations, by Employment Agencies, and by Apprenticeship or Training Programs

Any person

Who believes he or she has been discriminated against

Should Contact

The Equal Employment Opportunity Commission

1801 L Street NW., Washington, DC 20507, Executive Order No. 11246- *Administered by:*

The Office of Federal Contract Compliance Programs

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

Any person

Who believes he or she has been discriminated against

Should Contact

The Office of Federal Contract Compliance Programs

U.S. Department of Labor, Washington, DC 20210

* * * * *

13. Section 60-1.43 is revised to read as follows:

§ 60-1.43 -- Access to records and site of employment.

Each contractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance evaluations and complaint investigations. Each contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary. Information obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP.

PART 60-60--[REMOVED]

14. Part 60-60 is removed.

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