

Client Alert



A report for clients and
friends of the Firm

March 2009

Tip of the Month: Federal Contractors' Obligations to Individuals with Disabilities

Federal law requires employers with federal contracts or subcontracts that exceed \$10,000 to take affirmative steps to hire, retain, and promote qualified individuals with disabilities. From recruiting applicants with disabilities to periodically assessing their affirmative action programs, covered contractors should be aware of their legal obligations with respect to individuals with disabilities. In addition, employers who fail to recruit and employ qualified individuals with disabilities are overlooking a highly creative and skilled workforce. In complying with their obligations, contractors will likely be pleasantly surprised by the benefits of hiring individuals with disabilities. In fact, employers consistently rate workers with disabilities as average or above average in performance, attendance and safety. They also report reduced turnover costs. Lastly, surveys show that overall medical costs do not increase by hiring individuals with disabilities and that the majority of accommodations needed by workers with disabilities are minimal, costing less than \$500. The U.S. Chamber of Commerce's affiliate, the Center for Workforce Preparation, has excellent publications on this subject. See www.uschamber.com/icw/strategies/disabilityemployment.htm.

This Tip of the Month outlines several key legal requirements associated with hiring and employing individuals with disabilities.

Reaching Out to Applicants with Disabilities

Covered contractors are required to perform outreach activities to recruit qualified individuals with disabilities. Contractors should consider the following outreach efforts:

a) Contact recruiting sources, such as state vocational rehabilitation agencies, sheltered workshops (i.e., state-supported vocational programs designed to provide work for persons with cognitive disabilities), and organizations for individuals with disabilities, to attract qualified candidates with disabilities, including those who are not currently in the workforce. In addition, contractors can contact [Ticket to Work](#), a program administered by the Social Security Administration that provides vocational rehabilitation services to assist people with disabilities in obtaining employment, and [Employer Assistance & Recruiting Network \(EARN\)](#), a program that connects employers with qualified jobseekers with disabilities who are college students or recent graduates. Employers also should consider contacting nonprofit organizations such as [Just One Break, Inc.](#) See also www.abilitiesonline.org; www.nish.org.

b) Recruit individuals at educational institutions that train individuals with disabilities, such as schools for the blind, deaf or learning disabled, and participate in work-study programs with such schools or with rehabilitation facilities. For a state by state listing of such schools, see www.studysphere.com; for New York institutions for the disabled, see www.vesid.nysed.gov. For other helpful resources, see www.disabilityinfo.gov; www.ncset.org.

Ensuring Website Accessibility for Individuals with Disabilities

Covered contractors must provide qualified applicants with disabilities an equal opportunity to compete for jobs. Many online systems may not be fully accessible. For example, an individual with a visual disability may find the print or graphics on a contractor's webpage difficult to read. Contractors may therefore find it beneficial to design, or redesign, their online application systems to ensure the greatest degree of ready access to the greatest number of potential applicants with disabilities. Utilizing "universal design" techniques can be a cost-effective and efficient way to ensure that the contractor is reaching out to, and receiving applications from, the widest pool of qualified applicants.

If a contractor routinely offers applicants various methods of applying for jobs and all methods of application are treated equally, then an employer may not need to ensure that its online application system is fully accessible. But if a contractor only uses an online application system to accept applications for employment, it must ensure that potential applicants with disabilities either can use the system or can submit an application in a timely manner through alternative means. This includes providing a means to contact the contractor, other than through the online system, to request any reasonable accommodation needed to provide an applicant with a disability an equal opportunity to apply and be considered for the contractor's jobs.

Extending Invitations To Self-Identify

Federal contractors must invite an applicant to self-identify as an individual with a disability and inquire whether the applicant wishes to benefit under the affirmative action program. But, federal contractors may not solicit disability status from applicants in general. To avoid conflicts with the Equal Employment Opportunity Commission's ("EEOC's") guidance under the Americans with Disabilities Act ("ADA"), which precludes asking a job applicant about disabilities, contractors should only invite applicants to self-identify after a job offer is made, but before employment begins.

The invitation to self-identify must state that the information is being requested on a voluntary basis and will be kept confidential, and that refusal to provide it will not subject the applicant to any adverse treatment or be used in a manner inconsistent with the law. In addition, the invitation to self-identify must summarize the relevant portions of Section 503 of the Rehabilitation Act of 1973 and state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future.

Maintaining a Diverse Workplace: Affirmative Action Program and Accommodation of Disabilities

Employers who have a federal contract or subcontract of \$50,000 or more, and 50 or more employees, must prepare, implement, and maintain a written affirmative action program. The affirmative action program must include several components. Significantly, it must provide for:

- a) Developing and implementing procedures to ensure employees are not harassed because of disabilities, including posting a policy statement on company bulletin boards that states employees shall not be subject to harassment or discrimination for filing a complaint or assisting in an investigation of the employer's compliance with equal opportunity laws;
- b) Reviewing personnel processes to ensure they provide for careful, systematic consideration of job qualifications of applicants and employees with disabilities for job vacancies and training opportunities, including reviewing the physical and mental job qualification standards to ensure that qualifications are job-related and consistent with business necessity;
- c) Making reasonable accommodations to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless doing so would impose an undue hardship on the operation of the contractor's business;
- d) Auditing the affirmative action program to measure its effectiveness, as discussed below.

Evaluating the Diversity in Your Workplace: Accessibility Audit

As part of its affirmative action obligations, a contractor is required to evaluate and audit its personnel processes to determine whether it is providing equal opportunity to individuals with disabilities. A contractor must measure the effectiveness of its affirmative action program, and assess whether its personnel processes provide careful, thorough consideration of qualified individuals with disabilities.

Such an assessment should encompass a review of any online application systems.

It should also ensure managers and Human Resources professionals are familiar with the contractor's accommodation policy and understand its obligation to reasonably accommodate individuals with disabilities.

Penalties for Non-Compliance

If a contractor fails to provide equal opportunities to individuals with disabilities, individuals may file complaints against the contractor with the EEOC or the Office of Federal Contracting and Compliance Programs ("OFCCP"). The OFCCP enforces Section 503 of the Rehabilitation Act of 1973, which prohibits discrimination and requires affirmative action in the employment of qualified individuals with disabilities, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), which prohibits discrimination against specified categories of veterans, including veterans with disabilities. Alternatively, the OFCCP may investigate independently the contractor's employment practices by conducting a compliance review.

A covered contractor found in violation of its compliance obligations may be subject to sanctions, back pay, or other forms of relief for victims of discrimination. In extreme situations, federal contractors are penalized with debarment, i.e., declared ineligible for any future government contracts.

Enforcement efforts are likely to increase under the Obama administration. This is particularly true given the recent passage of the ADA Amendments Act of 2008 ("ADAAA"), which makes significant changes to the ADA's definition of "disability" that broaden the scope of coverage under both the ADA and Section 503. The ADAAA has put accommodation issues front and center in recent months. By way of example, the OFCCP recently announced its Accessible Online Application Directive, which requires federal contractors to ensure that applicants with disabilities have full use of online application processes and other electronic application methods.

We recommend that federal contractors conduct an audit of their application and personnel systems to ensure individuals with disabilities have an equal opportunity to apply for and compete for jobs, and, where necessary, are provided reasonable accommodations. As always, if you have any questions regarding this Client Alert or would like to schedule an accessibility audit, please contact your Proskauer relationship lawyer or any of the lawyers listed.

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If you have any questions or concerns regarding this new law or related issues, please contact one of the attorneys listed below:

Carolyn Doppelt Gray
202.416.5842 – cgray@proskauer.com

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

Katharine H. Parker
212.969.3009 – kparker@proskauer.com

Leslie E. Silverman
202.416.5836 – lsilverman@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Joshua A. Stein
212.969.3552 – jstein@proskauer.com

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