

# EEOC Issues New Guidance Concerning Employing Disabled Veterans

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In light of the many veterans returning from service and seeking work in the private sector, the U.S. Equal Employment Opportunity Commission (EEOC) issued two new guidance documents focusing on employment rights of disabled veterans. The first guidance document is geared toward employers and entitled, "Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers." See [http://www.eeoc.gov/eeoc/publications/ada\\_veterans\\_employers.cfm](http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm). The second guidance document is geared toward veterans and entitled, "Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Wounded Veterans." See [http://www.eeoc.gov/eeoc/publications/ada\\_veterans.cfm](http://www.eeoc.gov/eeoc/publications/ada_veterans.cfm).

Both documents discuss the impact of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) on Title I of the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) with respect to disabled veterans. They evidence greater coordination between the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) and EEOC support for the OFCCP's proposed new rules for federal contractors concerning Section 503 of the Rehabilitation Act. (For more information about these rules, see Proskauer Client Alert "OFCCP Notice of Proposed Rulemaking" found at: <http://www.proskauer.com/publications/client-alert/ofccp-notice-of-proposed-rulemaking/>.) In particular, the new EEOC guidance indicates that the proposed new rules concerning applicant tracking and pre-offer invitations to self-identify would not, in the EEOC's view, violate the ADA's prohibition of certain disability-related inquiries. However, substantial questions have been raised by the business community concerning the legality of some aspects of the OFCCP's proposed Section 503 rules, including as to pre-offer disability inquiries, and the EEOC guidance may carry little weight in the event of a court challenge. Nonetheless, employers should carefully review the guidance documents to understand what the EEOC currently views as best practices with respect to the recruitment and employment of disabled veterans.

This client alert summarizes the key aspects of both the Employer and the Veteran Guides.

## **I. Employer Guide at a Glance**

- Provides an overview of ADA and USERRA protections, and the impact of the ADAAA on each statute.
- Explains employer's pre-offer right to inquire about an applicant's "disabled veteran" status for affirmative action purposes. Permissible inquiries include: (i) an applicant's ability to perform specific job functions, including whether applicants can perform job functions with or without reasonable accommodation; (ii) an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses; and (iii) asking applicants to describe or demonstrate how they would perform job tasks.
- Explains that, at the pre-offer stage, employers may not: (i) ask disability-related questions, or (ii) require medical examinations "even if [the employer] intends to look at the answers or results only at the post-offer stage."

- "Disability-Related Question" means a question that is likely to elicit information about a disability. Examples include asking: (i) Whether an applicant has or has ever had a disability; (ii) What prescription medications applicants are taking; and (iii) The results of any genetic tests they have had.

For more information, see "Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)," found at:

<http://www.eeoc.gov/policy/docs/qanda-inquiries.html>

- Employers may, however, ask questions with several possible answers "and only some of those answers would contain disability-related information." Permissible questions are similar to those an employer may ask when inquiring about an applicant's disabled veteran status for affirmative action purposes. Employers may, for example:
  - Ask "whether applicants can perform any or all job functions, including whether applicants can perform job functions 'with or without reasonable accommodation.'"
  - Ask "applicants to describe how they would perform all job functions, as long as all applicants in the job category are asked to do this."
  - NOTE: Employers may not refuse to hire an individual based on disability-related information disclosed in response to such questions unless the reason is "job-related and consistent with business necessity."

For more information, see "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examination," found at:

<http://www.eeoc.gov/policy/docs/preemp.html>

- Supports the OFCCP's assertion that pre-offer inquiries under the proposed amendments to Section 503 of the Rehabilitation Act comply with ADA requirements.
- Recommends steps employers should take when asking "disabled veterans" to self-identify for affirmative action purposes. Recommendations include providing clear and conspicuous indications on any written questionnaire, or clear statements that:

- "[T]he information requested is intended for use in connection with [the employer's] affirmative action obligations or its voluntary affirmative action efforts;" and
  - "[T]he specific information is being requested on a voluntary basis, it will be kept confidential in accordance with the ADA, refusal to provide it will not subject the applicant to any adverse treatment, and it will be used only in accordance with the ADA."
- Provides a brief description of the special hiring authorities that federal agencies may be able to use to hire veterans with disabilities, including (i) Veterans' Recruitment Appointment (VRA); (ii) Veterans Employment Opportunity Act (VEOA); and (iii) Schedule A Appointment Authority.
  - Discusses hiring preferences that anti-discrimination statutes afford veterans with service-connected disabilities. For example, like the OFCCP, the EEOC stated that the ADA "does not prevent affirmative action on behalf of individuals with disabilities." Private employers, therefore, may "hire an individual with a disability who is qualified (including a veteran with a disability) over a qualified applicant without a disability." Further, employers should be aware that "the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) *requires* that businesses with federal contracts of \$25,000 or more take affirmative action to employ and advance qualified disabled veterans." (emphasis added). In addition, under Title 5 of the United States Code, the Veterans' Preference Act (VPA) provides that federal employers must afford "veterans with and without disabilities . . . preference over others in hiring from competitive lists of eligibles." Other preferences veterans receive under the VPA include consideration "for special noncompetitive appointments for which they are eligible," and "advantages over nonveterans in reductions in force (RIF).
  - Discusses how to determine if a veteran with a disability requires an accommodation. Employee requests, typically, alert employers to the necessity of a reasonable accommodation. Employers should note that such requests may be oral or in writing and do not require specific mention of the ADA or terms like "reasonable accommodation."
  - Discusses when an employer may ask a veteran with a disability if a reasonable accommodation is required:
    - During the application process: "[A]n employer may explain what the hiring process involves (e.g., an interview, timed written test, or job demonstration) and ask all applicants whether they will need a reasonable accommodation to

participate in any part of the process."

- Obvious Disability: "[I]f an employer reasonably believes that a veteran with an obvious service-connected disability (e.g., a veteran who is blind or missing a limb) who is applying for a particular job will need a reasonable accommodation to do that job, the employer may ask whether an accommodation is needed and, if so, what type."
- Course of Employment: "Once a veteran with a disability has started working, an employer may ask whether an accommodation is needed when it reasonably appears that the person is experiencing workplace problems because of a medical condition."
- Provides a brief overview of the differences between USERRA and ADA. For example, while both the ADA and USERRA prohibit employers from discriminating against veterans based on a disability, USERRA goes further than the ADA, protecting both disabled and non-disabled members of the uniformed services. In addition, USERRA requires "employers to . . . [make] reasonable efforts to assist a veteran who is returning to employment to become qualified for a job whether or not the veteran has a service-connected disability[;]" reasonable efforts may include "training or retraining for [a] position."

## **II. Wounded Veterans Guide at a Glance:**

- Provides an overview of ADA and USERRA protections, and the impact of the ADAAA on each statute.
- Describes what employers are covered by anti-discrimination statutes.
- Explains the rights of applicants for employment with disabilities:
  - Can an employer ask an applicant if he or she is disabled?
  - What if an applicant has an obvious disability that is likely to require a reasonable accommodation, e.g. blindness or an amputated limb?
- Discusses whether employees or applicants for employment must disclose known disabilities.
- Explains when an employer may inquire about an applicant's status as a "disabled veteran," e.g., for affirmative action purposes.
- Describes the types of reasonable accommodations an applicant for employment and employee may request.

- Provides guidance regarding how an applicant for employment or employee should request a reasonable accommodation.
- Explains what an applicant for employment or employee should do if an employer violates ADA or USERRA protections.

### **III. WHAT THIS MEANS FOR EMPLOYERS:**

The guidance documents offer a strong statement by the EEOC that the commission intends to aggressively enforce anti-discrimination laws that apply to veterans with service-connected disabilities. The EEOC guidance documents are by no means exhaustive, and employers should be aware that additional rules and requirements govern employer hiring and employment practices. Employers should be sure to fully understand and comply with veteran and disability anti-discrimination laws.

If you have any questions regarding the new EEOC guidance, compliance with ADA or USERRA, or other laws related to veterans with service-connected disabilities, please contact your Proskauer attorney or any of the attorneys listed herein.

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