

## Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in the Federal Employment

On January 3, 2017, the Equal Employment Opportunity Commission (EEOC or Commission) issued a final rule to amend the regulations implementing Section 501 of the Rehabilitation Act of 1973 (Section 501). A notice of proposed rulemaking was previously issued on February 24, 2016. The final rule says that agencies of the federal government must adopt employment goals for individuals with disabilities, with sub-goals for individuals with targeted disabilities, provide personal assistance services to certain employees who need them because of a disability, and meet a number of other requirements designed to improve the recruitment, hiring, retention, and advancement of individuals with disabilities in the federal workforce.

### Background

#### 1. What is Section 501?

Section 501 of the Rehabilitation Act is a federal civil rights law that prohibits federal agencies from discriminating against job applicants and employees based on disability, and requires agencies to engage in affirmative action for individuals with disabilities.

#### 2. Does Section 501 apply to private businesses?

No. These regulations apply only to the federal government and do not apply to private businesses. The Americans with Disabilities Act (ADA), prohibits private businesses with 15 or more employees from discriminating on the basis of disability, but the ADA neither requires nor prohibits affirmative action. (Note, however, that private businesses that are federal contractors are subject to a different set of affirmative action requirements under Section 503 of the Rehabilitation Act. Those requirements are not affected by this final rule.)

### Purpose of the Final Rule

#### 3. Why did the EEOC issue this final rule?

Section 501 requires federal agencies to engage in affirmative action for people with disabilities, but does not explain what "affirmative action" means. The Commission determined that stronger regulations were needed to enhance the employment, retention and promotion of qualified individuals with disabilities in the federal government. The final rule gathers together existing requirements from several Executive Orders as well as EEOC directives and other EEOC guidance documents, and adds new requirements that will further improve federal employment of individuals with **disabilities** and individuals with "**targeted disabilities**."

#### 4. What is a "disability"?

Under this regulation, the term "disability" means the same thing as under the ADA. Since the ADA Amendments Act (ADAAA) became effective in 2009, the ADA's definition of

"disability" has been very broad. It includes many kinds of mental and physical medical conditions. A condition does not have to be permanent or severe to be an ADA disability. For more information on the ADA Amendments Act definition of "disability," see the [Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA](#).

#### 5. What are "targeted disabilities"?

Targeted disabilities are a subset of the larger disability category. The federal government has recognized that qualified individuals with certain disabilities, particularly manifest disabilities, face significant barriers to employment, above and beyond the barriers faced by people with the broader range of disabilities. These barriers are often due to myths, fears, and stereotypes about such disabilities. The federal government calls these "targeted disabilities." They are:

- developmental disabilities, for example, cerebral palsy or autism spectrum disorder;
- traumatic brain injuries;
- deafness or serious difficulty hearing, benefiting from, for example, American Sign Language;
- blindness or serious difficulty seeing even when wearing glasses;
- missing extremities (arm, leg, hand and/or foot);
- significant mobility impairments, benefitting from the utilization of a wheelchair, scooter, walker, leg brace(s) and/or other supports;
- partial or complete paralysis (any cause);
- epilepsy and other seizure disorders;
- intellectual disabilities (formerly described as mental retardation);
- significant psychiatric disorders, for example, bipolar disorder, schizophrenia, PTSD, or major depression;
- dwarfism; and
- significant disfigurement, for example, disfigurements caused by burns, wounds, accidents, or congenital disorders.

#### 6. Does the final rule change anti-discrimination law?

No. Section 501 continues to prohibit discrimination on the basis of any disability, and the standards for determining whether a federal agency has discriminated on the basis of disability are the same ones that apply under the ADA. This regulation only concerns the additional affirmative action obligations placed on federal agencies by the law.

## Employment Goals

#### 7. What goals are required by the final rule?

The rule requires each federal agency to adopt the goal of having 12% of its workforce be people with disabilities, and 2% of its workforce be people with targeted disabilities. These goals apply at both higher and lower salary levels.

**8. Isn't affirmative action for people with disabilities illegal?**

No. Affirmative action for people with disabilities is not illegal. An employer is allowed to hire someone because he or she has a disability, and a rejected applicant cannot sue an employer for discrimination based on the fact that he or she does not have a disability.

**9. Are federal job applicants and employees now required to reveal their disabilities?**

No. Federal agencies, as well as private employers, have always been allowed to invite applicants and employees to identify themselves as having disabilities if the information is treated confidentially and used only for affirmative action. But an agency can't require someone to participate in an affirmative action program. (Note that agencies may also ask disability-related questions of job applicants under the following limited circumstances: when compiling employment statistics on an anonymous basis; prior to a job offer if it is reasonable to believe that the individual will require a reasonable accommodation on the job because of a known disability; and after a job offer if the same questions are asked of everyone in the same job category.)

**10. Do federal agencies now have to choose someone with a disability for a job over someone who doesn't have a disability?**

No. The final rule requires agencies to set overall goals for the percentage of people with disabilities in their workforce. The rule does not require agencies to establish a preference for hiring people with disabilities.

**11. What happens if an agency doesn't meet the 12% and 2% goals?**

The EEOC will not disapprove an agency's affirmative action plan solely because the agency has not reached the rule's employment goals. The EEOC will work with agencies who do not meet the goals to develop steps to improve their hiring. Exactly which steps an agency takes will depend on the circumstances. An agency could, for example-

- Train managers about the hiring authority for people with intellectual disabilities, severe physical disabilities, and psychiatric disabilities (commonly called "Schedule A") and use that authority more often.
- Increase its recruitment of individuals with disabilities.
- Increase efforts to hire and retain individuals who require supported employment because of a disability.

## **Personal Assistance Services**

**12. What are personal assistance services, and what does the final rule say about them?**

Personal assistance services are services that help someone perform basic activities like eating and using the restroom. They are not the same as services that help the individual perform job-related tasks, such as sign language interpreters for individuals who are deaf or readers for

individuals who are blind or have learning disabilities. These services are already required as reasonable accommodations under the part of Section 501 that prohibits discrimination based on disability, as long as the provision of such services does not impose an undue hardship.

Personal assistance services differ from *medical* services and services that are typically performed by someone who often has the job title of "personal assistant." Personal assistance services are *non-medical services* such as helping an individual take off and put on a coat, eat, and use the restroom. These services are needed by individuals whose specific disabilities make it difficult for them to perform such activities on their own.

The rule requires federal agencies, as an aspect of affirmative action, to provide personal assistance services to employees who need them because of a targeted disability, unless doing so would impose an undue hardship on the agency.

**13. Why does the final rule include the requirement of providing personal assistance services?**

Some individuals with disabilities cannot work because personal assistance services are not provided to them in the workplace. The services will allow such individuals to enjoy the opportunity and independence offered by paid employment. It also will reduce the amount of taxpayer funds spent on public disability benefits by allowing such individuals to receive paid jobs in the competitive workplace.

**14. Do personal assistance services include doing part of the person's job?**

No. Personal assistance services only include assistance with basic human functions, and are only required if they enable the employee to do his or her job up to normal standards.

**15. What will prevent an employee from unreasonably requesting and receiving personal assistance services that the employee does not need?**

Most people, including federal employees, do not want or need help with basic human functions such as using the restroom or eating unless they actually require that help. In addition, it should be obvious whether such services are necessary based on the individual's specific disability.

**16. Won't the personal assistance requirement be too expensive for federal agencies?**

No. The number of individuals in this country with the type of disability that requires assistance in basic human functions and who will apply for federal employment is quite low. In addition, agencies will be allowed to deny a request for personal assistance services if the difficulty or cost of providing them would be an undue hardship. The process of determining whether providing personal assistance services is an undue hardship can be the same the agency uses to determine whether a reasonable accommodation poses an undue hardship.

## **Hiring, Retention, and Advancement**

### **17. How does the final rule help job applicants with disabilities?**

The rule requires federal agencies to recruit individuals with disabilities and to ensure that individuals with disabilities are aware of and have an opportunity to apply for positions. It also requires agencies to have sufficient staff to answer disability-related questions from applicants and members of the public and to process requests for reasonable accommodations in the hiring process and applications under the Schedule A hiring authority for individuals with certain disabilities.

### **18. How does the final rule improve retention and advancement of federal employees with disabilities?**

The final rule requires agencies to have sufficient opportunities for employees with disabilities to advance within the agency. Such activities might include specialized training and mentoring programs and strong enforcement against disability-based harassment. The rule also includes requirements for agencies to strengthen their programs for reasonable accommodations and ensure accessibility.

### **19. What are reasonable accommodations, and what does the final rule say about them?**

A reasonable accommodation is a change in the way things are normally done that allows an individual with a disability to apply for a job, do a job, or enjoy equal access to the benefits and privileges of employment. Federal employers have been required to provide reasonable accommodations since the 1970's. The rule requires federal agencies to have written, easily available and understood reasonable accommodation procedures and a written explanation whenever a request for a reasonable accommodation is denied. The rule also requires agencies to make sure that key decision-makers know how to access the resources necessary to pay for reasonable accommodations that are legally required.

### **20. What does the final rule say about accessibility?**

The final rule requires federal agencies to inform job applicants and employees of their accessibility rights under Section 508 of the Rehabilitation Act and the Architectural Barriers Act, and to explain how to file complaints under those laws. It also requires them to inform individuals where to file complaints if other agencies are responsible for a violation.

### **21. Does the rule change building, architectural accessibility, or electronic information standards?**

No. EEOC does not have legal authority to establish new accessibility standards, or to enforce existing standards under the Architectural Barriers Act or Section 508 of the Rehabilitation Act.

## Oversight

**22. Will the EEOC hold agencies that fail to engage in affirmative action for people with disabilities accountable?**

Yes. The law already requires each agency to submit an Affirmative Action Plan to the EEOC annually, and to make relevant records available to the EEOC upon request. If an agency has not followed the rule, the EEOC will disapprove the agency's Affirmative Action Plan, and will report the disapproval to Congress as required by law.

**23. Agencies already have to file reports on disability hiring. Will the new report be redundant?**

No, the EEOC will eliminate redundant reporting requirements and provide agencies with detailed instructions before agencies are required to begin following the final rule on January 3, 2018.

**24. Will members of the public be able to see a federal agency's Affirmative Action Plan?**

Yes. The rule requires each agency to post its Affirmative Action Plan on its public website.

**25. Must all federal agencies comply with the final rule?**

Yes. Section 501 applies the affirmative action requirement to all federal agencies and thus all agencies must comply with the rule implementing Section 501. The EEOC recognizes, however, that individual agencies may face circumstances that make it difficult to meet all the requirements of the rule. For example, an agency may not be able to meet the 12% and 2% employment goals because it has been put under a hiring freeze, or because jobs within the agency have legitimate physical standards that are difficult to meet for individuals with certain kinds of disabilities. When deciding whether to approve an agency's affirmative action plan, the EEOC will take all of the relevant circumstances of that specific agency into account.

**26. When will the final rule take effect?**

Agencies will be required to follow the final rule beginning on January 3, 2018. The delayed applicability date will allow agencies to modify their existing practices. EEOC will provide agencies with training and technical assistance during the time leading up to the applicability date.