

## Federal Contract Compliance Programs, Labor

## § 60-741.2

with this part: *Provided*, That compliance shall also satisfy the employment provisions of the Department of Labor's regulations implementing section 504 of the Rehabilitation Act of 1973 (see 29 CFR 32.2(b)) when the contractor is also subject to those requirements.

(c) *Construction*—(1) *In general*. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act (ADA) of 1990, as amended, (42 U.S.C. 12101 *et seq.*) or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title (29 CFR part 1630). The Interpretive Guidance on Title I of the Americans with Disabilities Act set out as an appendix to 29 CFR part 1630 issued pursuant to that title may be relied upon for guidance in interpreting the parallel non-discrimination provisions of this part.

(2) *Benefits under State worker's compensation laws*. Nothing in this part alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(3) *Relationship to other laws*. This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of individuals with disabilities as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

### § 60-741.2 Definitions.

For the purpose of this part:

(a) *Act* means the Rehabilitation Act of 1973, as amended, 29 U.S.C. 706 and 793.

(b) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance

with one or more of the requirements of section 503 of the Rehabilitation Act of 1973.

(c) *Contract* means any Government contract or subcontract.

(d) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract in excess of \$10,000.

(e) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

(f) *Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(g) *Disability*—(1) The term disability means, with respect to an individual:

- (i) A physical or mental impairment that substantially limits one or more major life activities of such individual;
  - (ii) A record of such an impairment;
- or
- (iii) Being regarded as having such an impairment (as defined in paragraph (v) of this section).

(2) As used in this part, the definition of "disability" must be construed in favor of broad coverage of individuals, to the maximum extent permitted by law. The question of whether an individual meets the definition under this part should not demand extensive analysis.

(3) An impairment that substantially limits one major life activity need not

limit other major life activities in order to be considered a disability.

(4) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(5) See paragraphs (m), (o), (t), (v), and (z) of this section, respectively, for definitions of “major life activities,” “physical or mental impairment,” “record of such an impairment,” “regarded as having such an impairment,” and “substantially limits.”

(6) See § 60-741.3 for exceptions to the definition of “disability.”

(h) *Equal opportunity clause* means the contract provisions set forth in § 60-741.5, “Equal opportunity clause.”

(i) *Essential functions*—(1) *In general.* The term *essential functions* means fundamental job duties of the employment position the individual with a disability holds or desires. The term *essential functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor’s judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(j) *Government* means the Government of the United States of America.

(k) *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 (including construction). The term *Government contract* does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) *Construction*, as used in paragraphs (k) and (x)(1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) *Contracting agency* means any department, agency, establishment, or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(4) *Nonpersonal services*, as used in paragraphs (k) and (x)(1) of this section, includes, but is not limited to, the following: utility, construction, transportation, research, insurance, and fund depository.

(5) *Person*, as used in paragraphs (k), (p), (u), (x), and (y) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(6) *Personal property*, as used in paragraphs (k) and (x)(1) of 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).

(1) *Individual with a disability*—See definition of “disability” in paragraph (g) of this section.

(m) *Major life activities* —(1) *In general.* Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) *Major bodily functions.* For purposes of paragraph (m)(1) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(n) *Mitigating measures*—(1) *In general.* The term mitigating measures includes, but is not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(2) *Ordinary eyeglasses or contact lenses.* The term *ordinary eyeglasses or contact lenses* means lenses that are in-

tended to fully correct visual acuity or to eliminate refractive error.

(3) *Low-vision devices.* The term *low-vision devices* means devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses.

(4) *Auxiliary aids and services.* The term *auxiliary aids and services* includes—

(i) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(ii) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(iii) Acquisition or modification of equipment or devices; and

(iv) Other similar services and activities.

(o) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(p) *Prime contractor* means any person holding a contract in excess of \$10,000, and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a contract subject to the act.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Qualified individual* means an individual who satisfies the requisite skill, experience, education, and other job-

related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. See § 60-741.3 for exceptions to this definition.

(s) *Reasonable accommodation*—(1) *In general.* The term *reasonable accommodation* means modifications or adjustments:

(i) To a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires;<sup>1</sup> or

(ii) To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) That enable the contractor's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the

<sup>1</sup>A contractor's duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

qualified individual with a disability in need of the accommodation.<sup>2</sup> This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(4) Individuals who meet the definition of "disability" solely under the "regarded as" prong of the definition of "disability" as defined in paragraph (v)(1) of this section are not entitled to receive reasonable accommodation.

(t) *Record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An individual shall be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.

(u) *Recruiting and training agency* means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(v) *Regarded as having such an impairment*—(1) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment if the individual is subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

<sup>2</sup>Before providing a reasonable accommodation, the contractor is strongly encouraged to verify with the individual with a disability that the accommodation will effectively meet the individual's needs.

(2) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts, or may or does ultimately establish a defense to such action.

(3) Establishing that an individual is regarded as having such an impairment does not, by itself, establish liability for unlawful discrimination in violation of this part. Such liability is established only when an individual proves that a contractor discriminated on the basis of disability as prohibited by this part.

(4) *Impairments that are transitory and minor.* Paragraph (v)(1) of this section shall not apply to an impairment that is shown by the contractor to be transitory and minor. The contractor must demonstrate that the impairment is both “transitory” and “minor.” Whether the impairment at issue is or would be “transitory and “minor” is to be determined objectively. The fact that a contractor subjectively believed the impairment was transitory and minor is not sufficient to defeat an individual’s coverage under paragraph (v)(1) of this section.

(i) An impairment is transitory if it has an actual or expected duration of six months or less.

(ii) [Reserved]

(w) *Secretary* means the Secretary of Labor, United States Department of Labor, or his or her designee.

(x) *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 (including construction) 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 or more contracts is performed, undertaken, or assumed.

(y) *Subcontractor* means any person holding a subcontract in excess of \$10,000 and, for the purposes of subpart D of this part, “General Enforcement

and Complaint Procedures,” any person who has held a subcontract subject to the act.

(z) *Substantially limits*—(1) *In general.* The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. *Substantially limits* is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

(2) *Non-applicability to the “regarded as” prong.* Whether an individual’s impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of paragraph (g)(1)(iii) of this section.

(3) *Ameliorative effects of mitigating measures.* Except as provided in paragraph (z)(3)(i) of this section, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures as defined in paragraph (n) of this section.

(i) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially limits a major life activity. See paragraph (n)(2) of this section for a definition of “ordinary eyeglasses or contact lenses.”

(ii) *Non-ameliorative effects of mitigating measures.* The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.

(4) In determining whether an individual is substantially limited the focus is on how a major life activity is substantially limited, and not on the outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(5) *Predictable assessments.* The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, the principles set forth in this section are intended to provide for generous coverage through a framework that is predictable, consistent, and workable for all individuals and contractors with rights and respon-

sibilities under this part. Therefore, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (g)(1)(i) or (ii) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. With respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(i) *Examples of predictable assessments.* Applying the principles set forth in this section it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis (MS) substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may also substantially limit additional major life activities not explicitly listed above.

(ii) [Reserved]

(aa) *Undue hardship—(1) In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (aa)(2) of this section.

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(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(bb) *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 the Northern Mariana Islands, and Wake Island.

### § 60-741.3 Exceptions to the definitions of "disability" and "qualified individual."

(a) *Current illegal use of drugs*—(1) *In general.* The terms "disability" and "qualified individual" do not include individuals currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use.

(2) *"Drug" defined.* The term *drug* means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) *"Illegal use of drugs" defined.* The term *illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) *Construction.* (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude from the definition of *disability* or *qualified individual* an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must, as appropriate, satisfy the requirements of the definition of *disability* and *qualified individual*.

(5) *Drug testing.* It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60-741.24(b)(1).)

(b) *Alcoholics*— (1) *In general.* The terms *disability* and *qualified individual* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (b)(1) of