

prior to an offer of employment, as is permitted in limited circumstances under §§ 60-250.42(a)(1) and (2), paragraph 7(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

2. **[The following text should be used when extending an invitation to veterans of the Vietnam era only.]** If you are a veteran of the Vietnam era, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. The term "veteran of the Vietnam era" refers to a person who served on active duty for a period of more than 180 days, and was discharged or released therefrom with other than a dishonorable discharge, if any part of such active duty occurred in the Republic of Vietnam between February 28, 1961, and May 7, 1975 or between August 5, 1964, and May 7, 1975, in all other cases. The term also refers to a person who was discharged or released from active duty for a service-connected disability if any part of such active duty was performed in the Republic of Vietnam between February 28, 1961, and May 7, 1975, or between August 5, 1964, and May 7, 1975, in all other cases.

[The following text should be used when extending an invitation to special disabled veterans only.] If you are a special disabled veteran, we would like to include you in our affirmative action program. If you would like to be included under the affirmative action program, please tell us. This information will assist us in placing you in an appropriate position and in making accommodations for your disability. The term "special disabled veteran" refers to a veteran who is entitled to compensation (or who, but for the receipt of military retired pay, would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability rated at 30 percent or more, or rated at 10 or 20 percent in the case of a veteran who has been determined by the Department of Veterans Affairs to have a serious employment handicap. The term also refers to a person who was discharged or released from active duty because of a service-connected disability.

[The following text should be used when extending an invitation to both veterans of the Vietnam era and special disabled veterans.] If you are a veteran of the Vietnam era or a special disabled veteran, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. [The contractor should include here the definitions of "veteran of the Vietnam era" and "special

disabled veteran" found in the two preceding paragraphs.]

3. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

4. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

5. The information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of special disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if you have a condition that might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by OFCCP, or enforcing the Americans with Disabilities Act, may be informed.

6. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

7. **[The following text should be used only when extending an invitation to special disabled veterans, either by themselves or in combination with veterans of the Vietnam era. Paragraph 7(ii) should be omitted when the invitation to self-identify is being extended prior to an offer of employment.]** If you are a special disabled veteran it would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations. This information will assist us in placing you in an appropriate position and in making accommodations for your disability.

Appendix C to Part 60-250—Review of Personnel Processes

The following is a set of procedures which contractors may use to meet the requirements of § 60-250.44(b):

1. The application or personnel form of each known applicant who is a special disabled veteran or veteran of the Vietnam era should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

2. The personnel or application records of each known special disabled veteran or veteran of the Vietnam era should include (i) the identification of each promotion for which the covered veteran was considered, and (ii) the identification of each training program for which the covered veteran was considered.

3. In each case where an employee or applicant who is a special disabled veteran or a veteran of the Vietnam era is rejected for employment, promotion, or training, the contractor should prepare a statement of the reason as well as a description of the accommodations considered (for a rejected special disabled veteran). The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, should be treated as confidential medical records in accordance with § 60-250.23(d). These materials should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place a special disabled veteran on the job, the contractor should make a record containing a description of the accommodation. The record should be treated as a confidential medical record in accordance with § 60-250.23(d).

[FR Doc. 98-29043 Filed 11-3-98; 8:45 am]

BILLING CODE 4510-27-P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-741

RIN 1215-AB19

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: This final rule amends Appendix C to the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503). Appendix C contains procedures that Government contractors may use to review their personnel processes to ensure that the processes are fair to disabled applicants and employees. The existing Appendix recommends that contractors attach or include a description of accommodations considered or used for special disabled veterans to application forms or personnel records. As amended, the Appendix recommends that the description of accommodations be maintained in separate confidential medical files. The amendments make Appendix C to the Rehabilitation Act rules consistent with Appendix C to OFCCP's rules implementing the Vietnam Era Veterans' Readjustment Assistance Act, which also are published elsewhere in this issue of the **Federal Register**.

EFFECTIVE DATE: These regulations are effective January 4, 1999.

FOR FURTHER INFORMATION CONTACT: James I. Melvin, Director, Division of Policy, Planning and Program Development, 202-693-0102 (voice), 1-800-326-2577 (TDD). Copies of this final rule, including copies in alternative formats, may be obtained by calling OFCCP at 202-693-0102 (voice) or 1-800-326-2577 (TDD). The alternative formats available are: Large print, electronic file on computer disk, and audio-tape. The rule also is available on the Internet at <http://www.dol.gov/dol/esa>.

SUPPLEMENTARY INFORMATION:

Rulemaking History

This final rule amends the regulations implementing Section 503. The Act, and OFCCP's implementing regulations, 41 CFR Part 60-741, require parties holding a Federal Government contract or subcontract in excess of \$10,000 to "take affirmative action to employ and advance in employment qualified individuals with disabilities." The Section 503 Rules last were revised on May 1, 1996, 61 FR 19336.

On September 24, 1996, OFCCP published a notice of proposed rulemaking (NPRM), 61 FR 50080, proposing to revise the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA). VEVRAA, and OFCCP's regulations at 41 CFR Part 60-250, require Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

OFCCP has modeled its regulations implementing VEVRAA on those implementing Section 503. This reflects the close similarity between the statutes in terms of their substantive protections and jurisdictional requirements. The September 24, 1996, VEVRAA NPRM was modeled after the May 1, 1996, Section 503 final rule.

Appendix C, Review of Personnel Processes, in the VEVRAA NPRM proposed a set of procedures that contractors could use to facilitate a review by the contractor and the Government of the contractor's personnel processes. The review is required by § 60-250.44(b), and is intended to ensure that the contractor's personnel processes provide for careful consideration of the qualifications of applicants and employees who are known to be special disabled veterans or veterans of the Vietnam era, for all employment and training opportunities.

Paragraphs 3 and 4 of Appendix C proposed to recommend that contractors attach or include a description of accommodations considered or used for special disabled veterans to application forms or personnel records. Appendix C to the VEVRAA NPRM repeated the substance of Appendix C to the May 1, 1996, Section 503 final rule.

The Equal Employment Opportunity Commission (EEOC) submitted a comment in which it asserted that in most instances descriptions of accommodations considered or used for special disabled veterans constitute medical information that must be maintained in separate files and treated as confidential medical records. Accordingly, the EEOC recommended that Appendix C be revised by changing paragraphs 3 and 4 to indicate that contractors should maintain descriptions of accommodations considered or used in separate confidential medical files. OFCCP agreed with the EEOC's recommendation and, in its VEVRAA final rule published elsewhere in this issue of the **Federal Register**, revised paragraphs 3 and 4 of Appendix C.

The EEOC's comment applies equally to Appendix C to the Section 503 rules. Just as descriptions of accommodations considered or used for special disabled veterans often constitute medical information, so, too, do descriptions of accommodations considered or used for individuals with disabilities often constitute medical information. Accordingly, OFCCP has decided to revise paragraphs 3 and 4 of the corresponding Appendix C to 41 CFR Part 60-741.

Regulatory Revision

Pursuant to this revision, paragraphs 3 and 4 to Appendix C specify:

3. Where the contractor prepares a statement of the reason why an individual with a disability was rejected and a description of accommodations considered, those materials should be treated as confidential medical records.

4. Where the contractor makes a record of accommodations undertaken in order to place an individual with a disability on the job, the record should be treated as a confidential medical record.

Regulatory Procedures

Executive Order 12866

The Department is issuing this rule in conformance with Executive Order 12866. This rule has been determined not to be significant for purposes of Executive Order 12866 and therefore need not be 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.

This conclusion is based on the fact that this rule does not substantively change the existing obligation of Federal contractors to apply a policy of nondiscrimination and affirmative action in their employment of qualified individuals with disabilities. As discussed in more detail below, the rule is interpretive in nature and does not require particular actions by contractors.

Regulatory Flexibility Act

The rule is interpretive and does not substantively change existing obligations for Federal contractors. Accordingly, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act, 5 U.S.C. 605(b), is not required.

Unfunded Mandates Reform

Executive Order 12875

This rule will not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995

This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Paperwork Reduction Act

We have reviewed this rule and we have not identified any changes in paperwork under the Paperwork Reduction Act.

Notice and Comment Rulemaking

The Department believes that notice and comment rulemaking are not required under the Administrative Procedure Act, 5 U.S.C. 553(b)(A), because this rule is interpretive rather than substantive in nature. The Section 503 regulations specifically provide as follows:

Appendix C of this part is *an example* of an appropriate set of procedures. The procedures in Appendix C of this part *are not required* and contractors may develop other procedures appropriate to their circumstances. 41 CFR 60-741.44(b) (emphasis added).

Because contractors are not required to follow Appendix C, no penalty can attach for failure to follow the

Appendix. Accordingly, the rule is not substantive in nature and notice and comment rulemaking is not required. See, e.g., *American President Lines, Ltd. v. FMC*, 316 F.2d 419 (DC Cir. 1963).

List of Subjects in 41 CFR Part 60-741

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

Signed at Washington, D.C., this 26th day of October, 1998.

Alexis M. Herman,
Secretary of Labor.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

For the reasons set forth above, 41 CFR Part 60-741 is amended as follows:

PART 60-741—[AMENDED]

1. The authority citation for part 60-741 continues to read as follows:

Authority: 29 U.S.C. 706 and 793; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

2. In Appendix C to part 60-741, the introductory text is republished and paragraphs 3 and 4 are revised to read as follows:

Appendix C to Part 60-741—Review of Personnel Processes

The following is a set of procedures which contractors may use to meet the requirements of § 60-741.44(b):

* * * * *

3. In each case where an employee or applicant who is an individual with a disability is rejected for employment, promotion, or training, the contractor should prepare a statement of the reason as well as a description of the accommodations considered. The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, should be treated as confidential medical records in accordance with § 60-

741.23(d). These materials should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place an individual with a disability on the job, the contractor should make a record containing a description of the accommodation. The record should be treated as a confidential medical record in accordance with § 60-741.23(d).

[FR Doc. 98-29042 Filed 11-3-98; 8:45 am]

BILLING CODE 4510-27-P