



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

August 8, 2013

Patricia A. Shiu, Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Dear Director Shiu:

You have asked whether federal contractors may invite applicants to voluntarily self-identify as individuals with disabilities for affirmative action purposes without running afoul of the general rule under Title I of the Americans with Disabilities Act (ADA) prohibiting employers from making disability-related inquiries prior to an employment offer. The EEOC's regulations implementing Title I of the ADA, the interpretive guidance accompanying those regulations, and two sub-regulatory documents published after the regulations and interpretive guidance make it clear that, for several independent reasons, compliance with a U.S. Department of Labor (DOL) regulation requiring contractors to invite applicants *pre-offer* to voluntarily self-identify as individuals with disabilities for affirmative action purposes cannot violate Title I of the ADA.

First, EEOC ADA regulations, at 29 C.F.R. § 1630.15(e), provide that no employer is liable for a violation of Title I of the ADA for an action that it is required to take by another federal statute or regulation:

(e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under 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 ... that would otherwise be required by this part.

This "other federal laws" defense insulates federal contractors from ADA liability for *any* actions that DOL regulations *require* them to take. The EEOC's Title I Technical Assistance Manual, www.askjan.org/LINKS/ADAtam1.html, issued in 1992, makes the same point. It explains that the reason private employers who are federal contractors can invite their employees to voluntarily self-identify as individuals with disabilities without otherwise violating the ADA's disability-related inquiry provision because they are required under Section 503 of the Rehabilitation Act to engage in affirmative employment efforts:

5.5(c) Exception for Federal Contractors Covered by Section 503 of the Rehabilitation Act and Other Federal Programs Requiring Identification of Disability. Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records. (For further information, see Office of Federal Contract Compliance Programs listing in Resource Directory.)

In the same section of the Technical Assistance Manual, the Commission also provided examples of how such surveys were permissible if mandated by another federal law or regulation:

A pre-employment inquiry about a disability also is permissible if it is required or necessitated by another Federal law or regulation. For example, a number of programs administered or funded by the U.S. Department of Labor target benefits to individuals with disabilities, such as, disabled veterans, veterans of the Vietnam era, individuals eligible for Targeted Job Tax Credits, and individuals eligible for Job Training Partnership Act assistance. Pre-employment inquiries about disabilities may be necessary under these laws to identify disabled applicants or clients in order to provide the required special services for such persons. These inquiries would not violate the ADA.

Moreover, the appendix to the EEOC's regulation concerning pre-employment disability-related inquiries and medical examinations, though not referencing the "other federal laws" defense, also recognizes the ability of contractors to comply with Section 503 by making pre-employment inquiries as to whether someone is an individual with a disability. *See* 29 C.F.R. 1630.14(a) ("collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by this part").

Second, the EEOC has from early in its ADA enforcement made explicit in formal policy, and repeated in numerous policy and technical assistance materials ever since, that *any* employer may invite applicants or employees to voluntarily self-identify as individuals with disabilities for affirmative action purposes, whether pursuant to a federally-mandated affirmative action requirement such as Section 503 or a voluntarily adopted program. *See* Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations (1995), www.eeoc.gov/policy/docs/preemp.html. The 1995 Enforcement Guidance states:

* May an employer ask applicants to “self-identify” as individuals with disabilities for purposes of the employer's affirmative action program?

Yes. An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if:

* the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); or

* the employer is voluntarily using the information to benefit individuals with disabilities.

Employers should remember that state or local laws sometimes permit or encourage affirmative action. In those cases, an employer may invite voluntary self-identification only if the employer uses the information to benefit individuals with disabilities.

* Are there any special steps an employer should take if it asks applicants to “self-identify” for purposes of the employer's affirmative action program?

Yes. If the employer invites applicants to voluntarily self-identify in connection with providing affirmative action, the employer must do the following:

* state clearly on any written questionnaire, or state clearly orally (if no written questionnaire is used), that the information requested is used solely in connection with its affirmative action obligations or efforts; and

* state clearly that the information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separate from the application.

Third, as DOL explained in the preamble to its Notice of Proposed Rulemaking when publishing its proposed rule for notice and comment, the EEOC ADA regulations, 29 C.F.R. 1630.1(c)(2), also permit employers to comply with any laws that afford individuals with disabilities equal or greater rights. Indeed, the appendix to the EEOC ADA regulations at 29 CFR 1630.14(a) quoted above expressly recognizes such a situation. Because complying with a DOL rule requiring contractors to invite voluntary pre-offer identification would allow applicants to self-identify for the purpose of benefitting from potential affirmative action in a hiring decision, the contractors' invitation for this purpose would not violate the ADA.

If you have any further questions, please feel free to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Peggy R. Mastroianni". The signature is written in a cursive style with a large initial "P".

Peggy R. Mastroianni
Legal Counsel