

September 17, 2025

Submitted via Federal eRulemaking Portal: www.regulations.gov

Catherine L. Eschbach
Director
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Washington, DC 20210

Re: Center for Workplace Compliance Comments on the Office of Federal Contract Compliance Programs' Notice of Proposed Rulemaking, *Modifications to the Regulations Implementing Section 503 of the Rehabilitation Act of 1973, as Amended* (RIN 1250-AA18)

Dear Director Eschbach:

The Center for Workplace Compliance ("CWC") respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP") Notice of Proposed Rulemaking ("NPRM") pertaining to the affirmative action and nondiscrimination requirements arising under Section 503 of the Rehabilitation Act of 1973 ("Section 503"), as amended, notice of which was published in the *Federal Register* on July 1, 2025.¹

CWC appreciates the opportunity to offer these comments. As a leading nonprofit association of major employers dedicated exclusively to helping its members develop practical and effective workplace compliance programs, CWC has engaged the Labor Department on every significant Section 503 regulatory and sub-regulatory action. At times CWC has been the *only* interested stakeholder to offer comments on OFCCP's proposals, underscoring our commitment to constructive engagement with the agency on regulatory, policy, and enforcement matters affecting the federal contractor community.²

OFCCP proposes eliminating the requirement that contractors "invite applicants and employees to self-identify their disability status," along with the quantitative analytics that stem from tracking and tabulating these invitations. This includes the requirement that contractors evaluate their so-called "utilization" of individuals with disabilities, as well as key metrics used to assess the effectiveness of outreach partners and events. The agency expresses concern that these requirements are not explicitly authorized by Section 503 and cites potential conflict with the Americans with Disabilities Act ("ADA"), as amended.

¹ 90 Fed. Reg. 28,494 (July 1, 2025).

² See, for example, the revisions to and extensions of OFCCP's Section 503 recordkeeping requirements (ICR Reference Nos [202302-1250-002](#) and [201610-1250-002](#)).

As detailed below, CWC respectfully requests that OFCCP consider alternatives to its current proposal that will satisfy the agency's ADA concerns, but without jeopardizing the important disability compliance, nondiscrimination, and accessibility programs federal contractors develop each year. While OFCCP's Section 503 recordkeeping and reporting requirements are not without challenges—and the agency has at times been unwilling to seriously consider sensible revisions to them—CWC's member employers have nonetheless found the data collected under Section 503 to be of great value in ensuring individuals with disabilities have equal access to workplace programs.

Statement of Interest

CWC³ is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes U.S. employers from nearly every major industry sector and geographic region, all of whom are firmly committed to the principles and practice of equal employment opportunity.

Nearly all CWC members are subject to the nondiscrimination and affirmative action requirements of Section 503, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those triggered by the agency's Section 503 regulations, efficiently and effectively accomplish their underlying policy objectives.

The ADA and EEOC's Implementing Regulations Expressly Permit Post-Offer, Pre-Employment Disability Inquiries

As a threshold matter, we first respond to OFCCP's request for "comments on whether any form of data collection on an applicant or employee's disability status could be maintained consistent with the ADA requirements at 42 U.S.C. § 12112(d)(2)(A) and 42 U.S.C. § 12112(d)(4)(A)."⁴ Both OFCCP and the EEOC have long maintained that employers may solicit this information, provided that the inquiry is made after an offer of employment but prior to the commencement of employment duties.

The ADA expressly permits employers to conduct an "employment entrance examination," but only "after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant," and provided that: (1) "all entering employees are subjected to such an examination regardless of disability;" (2) the information is kept confidential; and (3) the results are used only in a manner that is consistent with the ADA.⁵ The EEOC's regulations implementing the ADA in turn specify that employers "may require a medical examination (and/or inquiry) after making an offer of

³ Formerly the Equal Employment Advisory Council (EEAC).

⁴ 90 Fed. Reg. 28,494, 28,495 (July 1, 2025).

⁵ 42 U.S.C. § 12112(d)(3).

employment to a job applicant and before the applicant begins his or her employment duties . . . if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.”⁶

OFCCP’s Section 503 regulations have also expressly required these invitations in the past. Prior to the 2013 changes to OFCCP’s Section 503 regulations,⁷ for decades these regulations stated that contractors “shall, *after making an offer of employment to a job applicant and before the applicant begins his or her employment duties*, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the act and wishes to benefit under the affirmative action program.”⁸ The format of that invitation was left to the contractor.

Thus, with regard to the current NPRM, we urge OFCCP to use this opportunity to clarify that *post-offer, pre-employment*, invitations are permissible under the ADA, consistent with the plain text of the statute and EEOC’s implementing regulations and longstanding guidance.

OFCCP and EEOC Should Publish Joint Guidance in the *Federal Register* Regarding the Appropriateness of Pre-Offer Disability Inquiries Under Section 503

CWC shares OFCCP’s concerns regarding the potential conflict between pre-offer disability-related inquiries and the ADA’s express prohibition that employers may not conduct a pre-employment “medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability,” except after an offer of employment but prior to the commencement of employment duties.⁹

Over the past 30 years, both OFCCP and the EEOC have issued conflicting guidance on this matter. For example, prior to 2013, OFCCP’s website offered the following in response to a frequently asked question on what questions employers may ask of applicants:

“Section 503 and VEVRAA *prohibit* employers from asking applicants disability-related questions (i.e., questions that are likely to elicit information about a disability) and from conducting medical examinations of applicants until *after a conditional job offer is made*. This ensures that an applicant’s possible hidden disability will not be considered prior to the employer evaluating the applicant’s non-medical qualifications.”¹⁰

The EEOC, for its part, has offered slightly different guidance. For example, in 1995 EEOC released its guidance on “Preemployment Disability-Related Questions and Medical

⁶ 29 C.F.R. § 1630.14(b).

⁷ 78 Fed. Reg. 58,733 (Sept. 24, 2013).

⁸ 61 Fed. Reg. 19,350 (May 1, 1996) (emphasis added).

⁹ 42 U.S.C. § 12112(d)(2).

¹⁰ See OFCCP, Frequently Asked Questions for the Employer #34: [What questions may employers ask on an employment application and what questions are employers prohibited from asking?](#) (Feb. 2012).

Examinations.” This guidance was issued upon approval by vote of the Commission. That guidance explicitly applies to “complaints of non-affirmative action employment discrimination arising under section 503,” and, like OFCCP’s pre-2013 guidance, states that “an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant.” The goal of this policy, according to EEOC, is also to “ensure that an applicant’s possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant’s non-medical qualifications.”¹¹

At the same time, however, the guidance states that an employer *may* invite applicants to voluntarily self-identify for purposes of the affirmative action program, but only if:

1. The employer is undertaking affirmative action because of a federal, state, or local 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
2. The employer is voluntarily using the information to benefit individuals with disabilities.

Thus, the debate has long been whether Section 503 falls within either of these two exceptions.

In light of the EEOC’s and OFCCP’s longstanding (and sometimes conflicting) positions on this topic, we recommend, as we did in 2012, that OFCCP work with the EEOC to publish guidance in the *Federal Register* regarding the appropriateness of pre-offer disability inquiries under Section 503. As the agency responsible for interpreting and implementing Title I of the ADA, EEOC is best suited to answer these questions.

Self-Identification Data Are an Important Component of Employers’ Disability Compliance Programs

While there has been much debate regarding the *instrument* used to solicit disability information, and in particular OFCCP’s prescribed form for collecting disability self-identification data from applicants and employees, formally known as “Form CC-305,”¹² CWC’s member employers have nonetheless offered broad support for the *utility* of the data collected from this exercise.

Post-offer, pre-employment disability data—once legally solicited and confidentially maintained—are used for multiple legitimate and helpful purposes. For example, once tabulated and aggregated by meaningful analytical units such as function, supervisory organization, or job profile, these data are used to assess whether there are potential

¹¹ Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990 (<http://www.eeoc.gov/policy/docs/preemp.html>).

¹² CWC will be submitting separate comments regarding Form CC-305 in response to the agency’s [pre-clearance request](#) pertaining to OFCCP’s Section 503 recordkeeping and reporting requirements. 90 Fed. Reg. 41,415 (August 25, 2025).

compliance gaps or barriers to equal employment opportunity. These barrier analyses can be used, for example, to identify: (1) supervisory organizations that warrant further review or investigation into potential ADA issues or that could benefit from additional reasonable accommodation training; (2) job profiles that require further scrutiny to ensure all job qualifications are job-related and consistent with business necessity; and (3) whether individuals with disabilities have equal access to the employer's career development programs.

This is particularly true once contractors are freed from analyzing their workforce by arbitrary factors such as affirmative action program "job groups." Prior to OFCCP's 2013 rulemaking, CWC urged the agency to "abandon the idea of a job group-by-job group analysis, and require only that contractors examine their entire workforce against a statistically and legally valid disability utilization benchmark."¹³ And while we share OFCCP's concern regarding the utility of a fixed 7% utilization "goal," we respectfully disagree with the agency's stated concern that contractors may be "induced to using quotas to meet the utilization goal." In practice, over the past twelve years, neither OFCCP nor the contractor community have used the 7% goal in this manner. Some CWC member employers have also reported that having a fixed benchmark can be beneficial when assessing the efficacy of their post-offer, pre-employment self-identification campaigns, corporate communications strategies, and outreach efforts.

OFCCP Should Consider Alternatives to the NPRM

In light of the foregoing, CWC respectfully requests that OFCCP consider alternatives to its current proposal that will satisfy the agency's ADA concerns without jeopardizing the important compliance and accessibility programs federal contractors have developed and wish to continue, even if on a voluntary basis.

With respect to disability self-identification, for example, the agency could elect to clarify that post-offer, pre-employment self-identification solicitations remain acceptable under Section 503 and the ADA, and encourage contractors to extend those invitations on a voluntary basis consistent with the ADA's enumerated safeguards. As an alternative, the agency could also simply revert 41 C.F.R. § 60-741.42 to its pre-2013 version, which read as follows:

Invitation to self-identify. (a) The contractor shall, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the act and wishes to benefit under the affirmative action program. The contractor may invite self-identification prior to making a job offer only when: (1) The invitation is made when the contractor actually is undertaking affirmative action for individuals

¹³ Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Notice of Proposed Rulemaking Pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (Feb. 21, 2012) (RIN 1250-AA02).

with disabilities at the pre-offer stage; or (2) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities.

With respect to the 7% utilization goal, we recommend, at a minimum, that OFCCP clarify that this figure—or any new figure the agency elects to publish—is simply a benchmark rather than a hiring goal, and eliminate the requirement to conduct an analysis by job group. The agency could also elect to move this section to the 41 C.F.R. Part 60-741 Appendices.

In weighing all of the above, we urge OFCCP to reflect on the fact that unlike Title VII of the Civil Rights Act and the now-rescinded Executive Order 11246—which expressly forbid using protected characteristics in making employment decisions—employers can (and do) develop robust disability hiring and employment programs, relying on guidance from the EEOC, OFCCP, and the Office of Disability Employment Policy to ensure these programs have their intended benefit and remain in full compliance with Section 503 and the ADA.

OFCCP's Rules of Practice for Administrative Proceedings Warrant Further Review

The agency is also proposing to modify the administrative enforcement procedures at 41 C.F.R. Part 60-30 to remove the E.O. 11246 components and transfer any procedures needed to enforce Section 503 to OFCCP's regulations at 41 C.F.R. Part 60-741. In light of the rescission of E.O. 11246, these changes seem reasonable, at least in the short term.

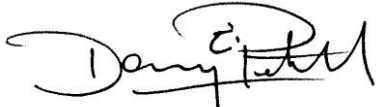
We respectfully submit, however, that recent administrative caselaw developments cast significant doubt on whether the procedures in question can survive Constitutional scrutiny.¹⁴ We recommend that the Department of Labor initiate a separate rulemaking to cure any possible Constitutional defects within its broader administrative enforcement regime.

¹⁴ See, e.g., *SEC v. Jarkesy*, 603 U.S. 109 (2024) (the 7th Amendment precludes the Securities and Exchange Commission from levying civil penalties against a defendant without a jury trial); *ABM Industry Groups, LLC v. U.S. Department of Labor*, 756 F. Supp.3d 468 (S.D. Tex. 2024) (finding that plaintiff would likely succeed on its argument that two layers of "good-cause removal" restrictions protecting Department of Labor Administrative Law Judges violates Article II of the Constitution); and *Sun Valley Orchards, LLC v. U.S. Department of Labor*, 148 F.4th 121 (3d. Cir. 2025) (Article III of the Constitution precludes the Department of Labor from seeking civil penalties and back wages through administrative proceedings).

Conclusion

CWC sincerely appreciates the opportunity to offer these comments regarding OFCCP's proposed Section 503 regulations. Please do not hesitate to contact us if we can provide further assistance or perspective as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny E. Petrella". The signature is fluid and cursive, with a large initial "D" and "P".

Danny E. Petrella
Senior Vice President, Compliance, and Assistant General Counsel