The U.S. Equal Employment Opportunity Commission

Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce

I. INTRODUCTION

In enacting Section 501 of the Rehabilitation Act of 1973, Congress charged each federal agency to promote the hiring and retention of individuals with disabilities in two ways: first, to be a model employer of individuals with disabilities through use of meaningful affirmative hiring, placement, and advancement opportunities; and second, to ensure employment non-discrimination and reasonable accommodation. To assist agencies in focusing this effort on severe disabilities that have historically been used to exclude qualified individuals from employment, the federal government has identified certain "targeted disabilities" for special emphasis in affirmative action programs. The "targeted disabilities," which were last listed on the Office of Personnel Management (OPM) Standard Form (SF) 256 in 1987,[1] include: deafness; blindness; missing extremities; partial paralysis; complete paralysis; convulsive disorders; mental retardation; mental illness; and distortion of limb and/or spine. EEOC tracks statistics on the employment by federal agencies of people with these targeted disabilities because their unemployment and under-employment rates are so high.[2] Tracking employment statistics for this population allows federal agencies to better monitor their own efforts at becoming and remaining model employers.

Despite these efforts, the percentage of federal employees with targeted disabilities has declined since it reached its peak of 1.24 percent in fiscal year 1994 (32,337 employees). In fiscal year 2007, federal employees with targeted disabilities comprised only 0.92 percent (23,993 employees) of the federal workforce. Moreover, although the federal workforce has increased by 128,973 employees from FY 1998 to FY 2007, a net increase of 5.2%, the number of federal employees with targeted disabilities decreased from 28,035 in FY 1998 to 23,993 in FY 2007, a net decrease of 14.42%.[3]

EEOC's LEAD (Leadership for the Employment of Americans with Disabilities) Initiative, launched in 2006, is a national outreach and education campaign to raise awareness about the declining numbers of people with disabilities in federal employment, to educate federal agencies and individuals with disabilities about special hiring authorities for individuals with targeted disabilities, and to provide information and resources on reasonable accommodation. Drawing on actual experiences to provide practical examples, this publication provides an overview of legal issues that affect the hiring and advancement of people with disabilities in the federal government. This document is intended as a reference tool for federal government managers and supervisors who, by hiring applicants with disabilities and ensuring equal employment opportunity for employees with disabilities, can reverse the current trend and fulfill the employment mandates of Section 501.

II. BACKGROUND ON SECTION 501

A. "Model Employer" Mandate

The statutory language of Section 501 mandates that federal agencies submit to EEOC for approval an annually updated **"affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities."** The Section 501 regulations require that the federal government be a "model employer" with respect to the employment of individuals with disabilities. To implement this mandate, EEOC's Management Directive 715 ("MD-715") directs covered agencies[4] annually to review their EEO and personnel programs, policies, and performance standards in accordance with specified criteria to identify where their EEO programs can become more effective and to identify and eliminate barriers that hamper the advancement of any applicants or employees with disabilities. The results – which must specifically address how an agency will make substantial progress in promoting the employment of qualified individuals with disabilities at all levels of the federal workforce – are reported to EEOC for review and analysis. The text of MD-715, EEOC's MD-715 instructions, and a user-friendly guide entitled ***Frequently Asked Questions about MD-715***, are available at http://www.eeoc.gov/federal/md715/index.html.

To assist agencies in reporting under MD-715, EEOC's Office of Federal Operations (OFO) provides tools and assistance to agencies to help them analyze their work forces and uncover barriers to equal employment opportunities. Once barriers are identified by agencies, OFO collaborates with them to develop creative strategies to eliminate or reduce the impact of identified obstacles. Further, OFO works with agencies to promote workplace policies and practices that foster an inclusive work culture and prevent employment discrimination. This effort includes working with federal agencies to adopt and successfully implement the attributes of the EEOC's Model EEO Program under MD-715.

B. Non-discrimination, Accommodation, and Other Requirements

Section 501 is also a **non-discrimination** law that:

- protects qualified individuals with disabilities from disparate treatment or harassment based on disability;
- provides that, absent undue hardship, agencies must provide reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability;
- limits the extent to which agencies may ask applicants and employees (not just individuals with disabilities) questions about disability or require them to take medical examinations;

- requires agencies to keep medical information about all applicants and employees (not just individuals with disabilities) confidential; and

- prohibits retaliation against all applicants and employees (not just individuals with disabilities) who oppose employer actions made unlawful under the Rehabilitation Act, or who participate or assist others in the EEO process.

Under Section 501, the term "disability" means: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of a substantially limiting impairment; or (3) being regarded (*i.e.,* treated) as having a substantially limiting impairment.[5] **This definition is broader than the above-listed "targeted" or severe disabilities that the federal government has identified for special emphasis in affirmative action and data collection. It is also broader than the severe disabilities eligible for Schedule A appointment authority discussed below.** For example, an employee with diabetes that substantially limits her in the major life activity of eating would be an "individual with a disability" protected against discrimination under Section 501, even though she would not have a "targeted disability."[6]

Section 501 protects only "qualified" individuals with disabilities from disparate treatment, harassment, or denial of accommodation. An individual with a disability is qualified if he:

- has the requisite skills, education and training (*i.e.*, meets the basic "qualification standards"); and

- can perform the essential (or fundamental) functions of a position held or desired, (meaning the current position, or one to which he could be reassigned) **with or without accommodation.**[7]

"In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities,"[8] including "modifications or adjustments to a job application process," "the work environment," "the manner or circumstances under which a position held or desired is customarily performed, or to enable an employee with a disability "to enjoy equal benefits and privileges of employment."[9] Employers may be required to remove a marginal, but not an essential, function as a reasonable accommodation. Relevant factors to consider in determining if a function is essential include but are not limited to the following: whether the reason the position exists is to perform that function; the number of people available to perform the function or among whom it can be distributed; the degree of expertise or skill required to perform the function; the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the time spent performing the function; the consequences of not requiring the employee to perform it; the terms of any applicable collective bargaining agreement; the work

experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. 29 C.F.R. Section 1630.2(n)(2) and (3). The fact that a function is listed in a job description as essential is relevant, but not necessarily controlling.

The following are answers to frequently-asked questions from managers and employees about affirmative action and non-discrimination provisions of the Rehabilitation Act applicable to applicants and employees with disabilities.

III. AFFIRMATIVE RECRUITMENT, HIRING AND ADVANCEMENT

1. Must a federal agency have an affirmative action program for individuals with disabilities that establishes specific hiring and advancement plans?

Yes. Section 501 of the Rehabilitation Act requires all agencies, regardless of their size, to have an affirmative action program plan for individuals with disabilities. Moreover, MD-715 requires those agencies with 1,000 or more employees to establish a special recruitment program with specific goals for the employment and advancement of individuals with targeted disabilities, and to submit their special program plan annually to the EEOC. **These goals should be set in a way that will achieve measurable yearly progress, accounting for attrition and for the distribution of individuals with disabilities in the agency's overall workforce, and in particular segments and levels with an under-representation.** Targeted disabilities are considered as a group, rather than separately by disability, when setting goals for special recruitment. Those agencies with fewer than 1,000 employees should maintain documentation of their Section 501 affirmative action program to allow EEOC to verify the compliance standards as set forth in MD-715. EEOC will approve or disapprove specific plans as appropriate, and will periodically conduct evaluations and program reviews to more closely assess MD-715 compliance. EEOC is also available to provide technical assistance to agencies on an ongoing basis, in order to facilitate program improvements.

For EEOC's recent assessment of agencies' efforts and specific suggested program improvements, see ***Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*** (January 2008), http://www.eeoc.gov/federal/report/pwtd.html.

2. What are some specific steps federal agencies may take to achieve their affirmative action goals for hiring and advancement of individuals with disabilities?

Some specific steps may include:

- establishing numerical hiring goals for people with targeted disabilities on an annual basis as required under Management Directive 715, and incorporating those goals into the strategic mission of the agency;

- engaging in outreach to, and targeted recruitment of, both internal and external candidates with disabilities;

- using excepted appointment authorities that apply to hiring people with targeted disabilities (see www.opm.gov/disability/appointment_disabilities.asp), discussed further below in question 4;

- taking disability into account as a selection factor where an applicant with a disability is otherwise qualified, whether or not the applicant has sought employment under one of the special appointment authorities or through the competitive process; and

- creating training and development plans for individuals with targeted disabilities once they are hired, to enhance advancement and retention.

3. In making hiring, promotion, or other employment decisions, may a federal agency give an advantage to individuals with disabilities?

Yes. Although an agency is not *required* to prefer individuals with disabilities for hire or promotion, it may do so. Favoring an individual with a disability over a non-disabled individual for purposes of affirmative action in hiring or advancement is not unlawful disparate treatment based on disability, and therefore does not violate the Rehabilitation Act. This rule stands in stark contrast to the legal standards under Title VII for making employment decisions based on race, color, sex, or national origin. For an explanation of the applicable standards under Title VII for affirmative hiring based on race or ethnicity, see ***EEOC Compliance Manual Chapter on Race and Color Discrimination***, Section VI-C (Diversity and Affirmative Action) (4/19/06), http://www.eeoc.gov/policy/docs/race-color.html, and Management Directive 715, and confer with your agency counsel. One way of engaging in affirmative hiring of people with targeted disabilities is by using the Schedule A special appointing authority described below in question 4.

> ***Example 1:*** An agency is filling a recently-vacated attorney position. The agency receives an application from an individual who had both legs amputated as the result of a car accident two years earlier. He meets the requisite qualifications for the job, but has not worked since his accident because he has been in rehabilitation. Even though the other qualified candidates have more recent experience, they are not individuals with targeted disabilities. The agency may offer the position to the individual with a disability in order to advance its affirmative hiring goals. This preferential treatment based on disability does not violate the EEO laws.

4. What is the "Schedule A" special appointing authority and how does it enable agencies to hire or promote individuals with disabilities?

The Schedule A special appointing authority provides a means by which agencies may prefer applicants with targeted disabilities. The regulations establishing this "excepted" appointing authority include provisions that allow agencies to hire people with severe physical disabilities, mental retardation, and psychiatric disabilities who are certified as likely to succeed in a particular job. Under Schedule A, the individual is appointed as an excepted service employee, and after two years of satisfactory service can then be converted to competitive status. In addition to enabling an agency to obtain a qualified employee and fulfill model employer goals, Schedule A allows agencies to hire qualified applicants with disabilities without posting a position, thereby reducing the time it may take to fill a vacancy.

Recent changes to OPM regulations have streamlined the non-competitive special appointment authority process, consolidating into one provision the Schedule A appointment authorities for individuals with mental retardation, severe physical disabilities, and psychiatric disabilities. For more information about non-competitive hiring authority, see ***Excepted Service – Appointment of Persons with Disabilities and Career and Career-conditional Appointment,* 5 C.F.R. § 213.3102(u)**, and the question-and-answer guide available at www.opm.gov/disability/appointment_disabilities.asp. Specifically, the revised regulations allow agencies to:

- accept proof of disability and certification of job readiness from sources in addition to a state vocational rehabilitation office, such as a licensed medical professional, licensed vocational rehabilitation specialist, or any agency of the federal, state, District of Columbia, or U.S. territory governments that provides disability benefits;

- appoint an individual with a disability to a temporary position under the excepted service authority in lieu of obtaining a job readiness certification, and then convert the individual under the excepted service authority to a time-limited or permanent appointment at any time during the temporary appointment; and

- accept service under certain other types of appointments in the competitive or excepted service as proof of job readiness.

Additional provisions under Schedule A and other authorities that may make it easier for agencies to hire individuals with disabilities include, but are not limited to the following:

- student educational employment work-study programs, 5 C.F.R. §§ 213.3202(a) and (b)(10)(ii) (see OPM's information on "Hiring Authorities

for Students with Disabilities" at http://www.opm.gov/disability/mngr_305.asp); and

- veterans preference hiring, including hiring disabled veterans into a Department of Veterans Affairs training program, 5 C.F.R. § 315.604, and preferential hiring of veterans with disability ratings of 30% or more, 5 C.F.R. §§ 316.302(b)(4) and 316.402(b)(4) (see OPM's "VetGuide" at http://www.opm.gov/veterans/html/vetguide.asp).

Appointment under Schedule A can be used even if the applicant with a disability has initially applied by submitting a resumé in response to a vacancy announcement rather than contacting a Selective Placement Coordinator, or even where an announcement has not yet been posted.

Example 2: One of the applicants for an administrative assistant position is blind. He does not have the requisite number of years of experience listed in the job announcement. However, he has extensive volunteer experience performing comparable administrative tasks for a non-profit organization, and is otherwise qualified for the job. To be a model employer, the agency should tell this candidate that he is eligible for appointment under Schedule A. If he is interested in using this process, the agency should use the Schedule A authority to appoint him to the position, even though he does not meet the stated experience requirements for competitive hire. Note that under the revised Schedule A appointment authority, an individual who has submitted proof of disability but not a certificate of job readiness can nevertheless be appointed on a temporary basis with later conversion to the competitive service. The agency may also, at its discretion, accept service under another type of temporary appointment in the competitive or excepted service as proof of job readiness.

Example 3: An agency is hiring an analyst and lists "top 10% of college graduating class" among its selection criteria. An individual with epilepsy who took six years to complete college rather than the usual four applies for the position. Her overall grade point average was not high enough to rank her in the top ten percent of her graduating class. However, during her first two years of college, the applicant experienced uncontrolled seizures which interfered with her ability to attend classes and complete assignments, which caused her to withdraw from several courses before completion. Following a year off during which she had surgery and began using a new medication, she returned to college and had significantly fewer and less severe seizures. Her grades improved dramatically. During her last two years in college, she obtained A's and B's in all of her courses, even while carrying a higher than normal courseload. The agency may take the necessary steps to appoint her to the position pursuant to its Schedule A authority instead of rejecting her application for failure to meet the competitive hiring criteria.

***Example 4*:** An agency intends to fill a vacant GS-15 office director position. Rather than posting the position, the agency may use Schedule A to hire a current employee who is deaf and is qualified for the job. While the employee would become probationary under Schedule A, he would be subject to conversion back to the competitive service after the requisite period of time under Schedule A.

In addition to the provisions that enable agencies to hire individuals with disabilities, Schedule A also includes a special appointing authority for the hiring of readers, interpreters and other personal assistants who some individuals with severe disabilities may need as a reasonable accommodation. See 5 C.F.R. § 213.3102(ll).

5. Are veterans who are applying for or employed in civilian positions eligible for other special protections besides preference in hiring?

Yes. In addition to eligibility for hiring under **civil service preference provisions,** veterans applying for or employed in civilian positions are protected under the **non-discrimination and accommodation provisions of Section 501** of the Rehabilitation Act if they meet that law's definition of an "individual with a disability," and also may have rights under the **Uniformed Services Employment and Reemployment Rights Act (USERRA)**.[10] Under USERRA, service members, veterans, and members of Reserve components recovering from injuries received during service or training may have up to two years from the date of completion of service to exercise certain rights to return to their jobs or apply for re-employment, and in certain circumstances employers must help them qualify for the position they would have held if their employment had not been interrupted by service. More information about USERRA rights and enforcement is available from the U.S. Department of Labor at http://www.dol.gov/vets/programs/userra/main.htm.

6. Must an agency hire an individual with a disability through a special appointing authority?

No. Individuals with disabilities may apply for federal employment through any of the special appointing authorities for which they qualify or through any other process available to all other applicants. However, an agency must treat an individual with a disability who has applied for or obtained employment through the process available to all applicants in a non-discriminatory way. This means that the agency (1) may not refuse to hire a qualified applicant because of a disability, (2) must make any reasonable accommodations necessary for the application process that do not impose an undue hardship, and (3) must make reasonable accommodations which do not impose an undue hardship, and that are necessary to enable the individual with a disability to perform the job and enjoy the benefits and privileges of employment. Agencies must also adhere to all of Section 501's standards regarding disparate treatment, harassment, denial of reasonable accommodation, improper disability-related inquiries and medical examinations, medical confidentiality, and non-retaliation.[11]

Section 501 applies to individuals hired through a special appointing authority whether they are still in the excepted service or after having been converted to the competitive service. Moreover, when considering selection for promotion or other advancement opportunities, a selecting official should never assume that an employee who was originally hired through a non-competitive process has more limited skills and abilities than the other candidates.

> ***Example 5*:** Several internal candidates apply for promotion from an office automation position, GS-5, to an investigator position, GS-7-9-11. The selecting official rejects a qualified candidate because he knows she was originally hired through Schedule A and then non-competitively converted from excepted to competitive status. The official states that he prefers to select a candidate who was originally hired competitively "so there are no surprises." This decision is discriminatory non-selection based on disability in violation of Section 501.

7. How may agencies increase the number of individuals with disabilities in their applicant pools and affirmatively recruit individuals with disabilities to apply for vacancies?

Any hiring manager -- not just agency selective placement coordinators -- may engage in efforts to increase the number of applicants with disabilities and in affirmative hiring efforts for individuals with disabilities. For example, the Workforce Recruitment Program for College Students with Disabilities, co-sponsored by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP) and the U.S. Department of Defense, connects federal sector employers nationwide with college students and recent graduates with disabilities. Annually, trained WRP recruiters from federal agencies conduct personal interviews with interested students of all majors on college and university campuses across the country, including graduate and law students. Information from these student interviews is compiled in a searchable database available at www.wrp.gov, to human resources specialists and other hiring officials in federal agencies. In addition, ODEP funds the Employer Assistance and Recruiting Network (EARN), www.EARNworks.com, a free service that connects employers looking for quality employees with skilled job candidates.

Hiring managers can also ensure that vacancy announcements are sent to disability-related publications that advertise job announcements to qualified individuals with disabilities (see www.nod.org for a list of various publications), independent living centers (www.ncil.org), state and local vocational rehabilitation agencies, federal One-Stop Centers (www.careeronestop.org/), and organizations of and for people with disabilities. Agencies can also send their vacancy announcements directly to EARN for wide distribution through disability-related publications and organizations.

8. May an agency indicate in a job announcement that it is seeking to recruit or hire qualified individuals with disabilities?

Yes. Agencies may include language in their vacancy announcements encouraging people with disabilities to apply for jobs, specifically stating that they are recruiting qualified applicants with disabilities, or indicating that they will prefer qualified applicants with disabilities for jobs. For example, an agency that has never hired someone with a targeted disability to perform a certain type of job may state in a vacancy announcement that it will give priority in hiring to individuals who are eligible for the position under the Schedule A special appointing authority for individuals with disabilities.

9. How may an agency track its progress in soliciting applications from, hiring, and retaining individuals with "targeted disabilities"?

Even though the Rehabilitation Act restricts when and how agencies may ask applicants or current employees for disability-related "medical information," it is permissible to identify individuals with disabilities in certain ways, including the following:

- agencies may use information from the voluntary "Self-Identification of Handicap" form (SF-256) issued by the Office of Personnel Management (OPM), or other information that individuals choose to disclose about the existence of disabilities (see also 29 C.F.R. § 1614.601(f)); or

- when tracking applications from individuals with disabilities as required under MD-715, or when considering the use of excepted appointing authorities or other special programs, the agencies may invite applicants to indicate if they have the types of disabilities covered by the program at issue.

When an agency surveys applicants or current employees to obtain disability information, it must clearly notify them that: (a) response to the invitation is voluntary and refusal to provide the information will not subject the individual to any adverse treatment; (b) the information will be kept confidential and used only for affirmative action purposes; and (c) individuals may self-identify at any time during their employment and failure to complete the SF-256 or to respond to pre-offer invitations will not excuse the agency from Rehabilitation Act requirements. Agencies may easily comply with this requirement by preparing a form cover letter issued along with the form. Federal agencies submit SF-256 forms to OPM, and these figures form the basis for annually-compiled statistics regarding the number of individuals with targeted disabilities employed by the federal government.

MD-715 encourages agencies to re-survey their workforces periodically for affirmative action purposes, inviting individuals with disabilities to complete the SF-256. Agencies that do this must clearly explain that provision of the information is voluntary and indicate how the information will be used. **Agencies may ask individuals with disabilities who request or receive accommodation to complete the SF-256 under**

these same terms, but the agency cannot make completion of the form a condition of providing reasonable accommodation.

IV. REASONABLE ACCOMMODATION

10. What types of reasonable accommodations may individuals with disabilities need for the application process, to perform an essential function of a job, or to enjoy equal benefits and privileges of employment?

Although not all individuals with disabilities need accommodation, some common types of accommodation include:

- ***purchasing equipment or modifying existing equipment, as well as making written materials accessible through alternative formats, readers, or other means***

  Example 6*:* An agency obtains screen-reader computer software, a scanner, and an audible "caller ID" telephone device for an employee who recently lost his vision while in National Guard service (for information about obtaining such accommodations at no cost, see questions 13 and 18, below, regarding the Department of Defense's Computer Electronic Accommodations Program (CAP), http://www.tricare.mil/cap/).

- ***making changes to facilities or work areas***

  Example 7: An agency retrofits a cubicle work station to accommodate a newly-hired IT specialist with an above-the-knee amputation who uses a wheelchair.

- ***shifting to other employees responsibility for minor tasks (or "marginal functions") that an employee is unable to perform because of a disability ("job restructuring")***

  Example 8*:* An accounting clerk with two prosthetic arms is relieved of doing physical inventory of supplies. The function is performed once per year, and other employees are available to perform it. Instead, she is assigned additional data entry and accounting tasks related to the annual inventory which she is able to perform with voice recognition software.

- ***altering when and/or how a task is performed***

  Example 9*:* An agency employee with a back disability is provided a stool to sit on while operating a particular machine, rather than standing as other employees typically do when performing that task.

- ***allowing an employee to work from home or a remote location***[12]

  ***Example 10*:** A supervisor proposes to deny the telework accommodation request of an attorney with a disability, even though the essential functions of the position can be performed from home, because the supervisor thinks he will be unable to monitor the quality and quantity of the employee's work. The Disability Program Manager properly instructs the supervisor that this is not a permissible basis for denying the request, suggesting instead that the supervisor can require all teleworking employees to log and report specific assignments completed each day, the amount of time worked, and any other information necessary to permit the supervisor to evaluate the teleworking employee's performance and productivity.

  Example 11: An agency researcher with multiple sclerosis teleworks two days per week, the maximum allowed under her office's telework policy. She requests full-time telework due to the effect of her deteriorating condition on her ability to commute. The agency determines that (1) she is an individual with a disability; (2) full-time telework is necessary due to her disability-related limitations; and (3) the essential functions of her job can be performed on a full-time basis from a location other than the usual workplace. Determining that no undue hardship exists, the agency modifies its telework policy for this employee to accommodate her need for full-time telework.[13]

- ***allowing an employee to use additional unpaid leave after accrued leave is exhausted for disability-related needs such as treatment, recuperation, or training***[14]

  Example 12: An employee who has exhausted his accrued leave and most of his FMLA leave requests several months of unpaid leave commencing March 1st for surgery and recuperation related to his disability. His treating physician estimates that he will be able to return in June or July, depending on the speed of his recovery. The agency determines that the length of leave requested does not pose an undue hardship in terms of expense or operations given the nature of the employee's position and the agency's resources, and grants the request.[15]

- ***modifying a workplace policy***

  ***Example 13*:** An agency provides a parking garage that employees can use for a monthly charge. Parking spaces are unassigned. An employee requests a reserved parking space next to the door because his disability restricts him from walking even relatively short distances. Determining that it will not impose an undue hardship, the agency reserves a parking space next to the door for this employee.

- ***modifying a supervisory method***

  Example 14: A groundskeeping employee with a learning disability needs to receive certain instructions verbally rather than in writing. Determining that it will not impose an undue hardship, the agency accommodates her disability by changing the method by which her supervisor conveys information.

- ***a schedule change or a switch to part-time work***

  Example 15: An agency grants the request of an employee with a psychiatric disability to switch to part-time work consistent with his doctor's recommendation.

- ***allowing a job coach***

  Example 16: A veteran who sustained a combat-related traumatic brain injury works in an agency cafeteria and has a job coach provided by a state vocational rehabilitation agency. The agency accommodates the employee by allowing the job coach to be present during new employee training, to visit the worksite periodically to observe the employee's performance of the job and provide guidance on meeting the agency's expectations, and to receive notice of, attend, and participate in the supervisor's meetings with the employee regarding any performance or conduct issues.

- ***as a last resort, reassignment to a vacant position for which the individual is qualified***

  ***Example 17*:** A material handler on a loading dock is diagnosed with a back impairment and is permanently restricted from lifting more than 15 pounds. His position, however, involves lifting 50-pound boxes on a regular basis and there is no effective accommodation that would enable the employee to perform this essential function. Because the agency need not eliminate the duty as an accommodation, it can instead reassign the employee to a vacant mailroom position for which he is qualified as a reasonable accommodation, as long as the reassignment would not violate a uniformly applied seniority system. For more information about reassignment and seniority systems, see question 27 below.

11. For what kinds of "benefits and privileges" of employment might an employee with a disability need accommodation?

"Benefits and privileges" of federal employment may include, but are not limited to, agency-sponsored training (whether provided by the agency or an outside entity), services (*e.g.*, employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), social and professional functions, emergency evacuation plans, and workplace communications through e-mail, public address systems, or during meetings, whether or not that communication relates directly to performance of an employee's essential job functions. They may also include

opportunities for advancement, such as details, temporary team leader or acting supervisor designations, and other special assignments.

> ***Example 18*:** An agency offers its employees a training course provided by a private company with which the agency has contracted. An employee who is deaf wants to take the course and asks for computer assisted real-time translation ("CART," also known as "real-time captioning") services or a sign language interpreter. Even if the private company has an obligation as a public accommodation under Title III of the ADA to provide what is needed, the agency also has its own independent obligation under Section 501 of the Rehabilitation Act to provide the employee with a reasonable accommodation. (See questions 35-37 below regarding coordinating arrangements when there is more than one entity responsible for providing an accommodation.) The agency should coordinate with the private company to determine which entity will be responsible for providing the accommodation. If the private company agrees to provide the accommodation and then fails to do so, both the agency and the private company will be legally responsible, and vice versa. By contrast, if an agency merely invites a speaker from a private company or another federal agency to make a presentation, the inviting agency is likely the sole sponsor of the event and as such is the only entity responsible for accommodation. For information about what to do if another entity prevents a federal agency from providing accommodation, see question 36.

> ***Example 19*:** An agency has prepared an emergency evacuation plan for its employees. Reasonable accommodation may require making individualized arrangements with employees with disabilities notwithstanding the existence of an otherwise uniform agency procedure for notification, mode of evacuation, continuing communications, and other matters.[16] This might include, for example, providing a pager that enables a deaf employee to receive the same emergency evacuation instructions that other employees receive over a public address system, or using an elevator or specialized evacuation equipment for people who use wheelchairs.

Reasonable Accommodation Procedures

12. Is an agency required to have written reasonable accommodation procedures?

Yes. Executive Order (E.O.) 13164 **requires** that all executive branch federal agencies have written procedures for processing disability accommodation requests, providing employees as well as supervisors and managers with an easy-to-understand, step-by-step explanation of the reasonable accommodation process. Each agency must make these procedures readily available to all applicants and employees and accessible to individuals with disabilities, with timely notice given of any revisions. The procedures can be posted on the agency's website or intranet service and included in employee handbooks. They should also be available in designated locations such as

agency libraries, EEO offices, and/or personnel offices. **In addition, E.O. 13164 requires that agencies track specific detailed information regarding the action taken on each accommodation request, which allows agencies to detect where and why delays or errors may be occurring.**

E.O. 13164 also requires that each agency (and agency component, if issuing separate procedures) submit its procedures, and any modifications it later makes to them, to the EEOC. Agencies should submit their procedures to the EEOC before final issuance to benefit from any feedback regarding their sufficiency. For more information, see ***Practical Advice For Drafting And Implementing Reasonable Accommodation Procedures Under Executive Order 13164*** (2005), http://www.eeoc.gov/federal/implementing_accommodation.html, and ***Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*** (2000), http://www.eeoc.gov/policy/docs/accommodation_procedures.html.

In addition, OPM regulations (5 C.F.R. § 330.707(b)(14)) require federal agencies to **include a reasonable accommodation statement on all vacancy announcements** to inform applicants with disabilities that federal agencies will consider reasonable accommodation requests. Although agencies may use the wording of their choice to convey the availability of reasonable accommodation, OPM recommends the following: "This agency provides reasonable accommodation to applicants with disabilities where appropriate. If you need reasonable accommodation for any part of the application and hiring process, please notify the agency. Determinations on requests for reasonable accommodation will be made on a case-by-case basis." The statement must not limit the availability of accommodations to specific impairments. In accordance with E.O. 13164, agencies should designate an individual as a contact for reasonable accommodation requests who has sufficient knowledge about the agency's internal procedures for reasonable accommodation requests to prevent misinforming or frustrating applicants seeking accommodation. OPM suggests that agencies include a general phone number, a TTY number, and an email address for the contact.

13. What steps can an agency take to ensure that its policies and procedures promote timely processing of accommodation requests?

The following are some examples of practices agencies can implement to reduce bureaucratic barriers that make it difficult for individual offices to provide effective accommodations, such as:

- entering into an agreement with the Department of Defense's Computer Electronic Accommodations Program (CAP), http://www.tricare.mil/cap/, to receive assistive technology and services for employees with disabilities at no cost;

- hiring staff sign language interpreters rather than relying on contracts, and/or making arrangements through CAP to obtain equipment needed for video

remote interpreter services to use when a staff or contract interpreter is unavailable;

- creating a central pool of staff assistant slots that would not be included in a requesting office's personnel ceiling, to provide readers, interpreters, and other assistants throughout the agency;[17]

- implementing funding mechanisms that will avoid charging individual offices for the cost of accommodations, such as a full or partial centralized agency fund for accommodation costs;

- reviewing and modifying, in advance of a specific request, any policies that might affect the agency's ability to respond promptly to requests for reasonable accommodation (*e.g.*, policies affecting purchasing or leasing of equipment, the hiring of, or contracting for, readers, interpreters, or other assistants, and the flexibility to approve leave or to restructure work schedules); and

- tracking and analyzing information on requests for accommodation consistent with the requirements of E.O. 13164 and MD-715.

Accommodation Requests

14. What should all agency supervisors and managers know about recognizing a request for reasonable accommodation and responding appropriately?

Managers and supervisors should become familiar with their own agency's reasonable accommodation procedures, including their own responsibilities under those procedures for responding to requests for accommodation. A request for accommodation is made any time an applicant or an employee asks for some change in the workplace or in the way things are usually done because of a medical condition. A request may be made to an employee's supervisor, another supervisor/manager in the employee's immediate chain of command, the EEO office, or any other office or individual designated by the agency to receive requests or oversee the reasonable accommodation process. An agency's procedures may allow an applicant to make a request for accommodation to any agency employees with whom he has contact as part of the application process, either verbally or in writing. An employee does not waive the right to accommodation by not requesting accommodation before being selected for a position or beginning employment, even if he was told in advance what the job duties of the new position would be.

Because an accommodation request does not have to contain any magic words, managers and supervisors should **consider whether the reasonable accommodation obligation applies before denying any request for an adjustment or change at work for a reason related to a medical condition.**

Frequently overlooked or ignored accommodation requests include the following:

- requests for unpaid leave for an employee's own medical condition beyond what the Family and Medical Leave Act (FMLA) or an agency's leave policy would allow;

- requests that state the need for accommodation or describe a workplace related barrier but do not include a proposed solution; or

- requests that implicate both the Rehabilitation Act and other requirements (*e.g.*, employer light/limited duty programs or workers' compensation).

If these are not recognized and treated as requests for accommodation, managers and supervisors risk exposing the agency to liability for denial of reasonable accommodation. Accordingly, this is a particularly important issue on which to provide initial and continuing training. Question 17 discusses agency requests for medical information in support of a request for reasonable accommodation.

15. May an agency make workplace changes for, or provide assistance to, someone who does not have a disability?

Yes. Although an agency is not legally required to provide an accommodation unless the requesting applicant or employee needs it because of a disability,[18] agencies may, and often do, provide assistance (*e.g.*, in the form of schedule changes, physical modifications to the workplace, or special or modified equipment) without making this determination. When this is done, an agency may tell the individual that its decision was made without considering whether the individual has a disability or is entitled to a reasonable accommodation, and that the decision does not affect any other legal rights the individual may have (*e.g.*, to request a reasonable accommodation later, at which time the agency would be free to consider whether the individual has a disability prior to granting the request).

Interactive Process

16. What should happen after an accommodation request has been made?

The individual and agency should engage in an "interactive process" to determine whether and what type of accommodation is appropriate. Each agency should describe in its reasonable accommodation procedures the steps to be taken in the interactive process. Of course, accommodations vary depending on the needs of the person with a disability and the nature of a job. Sometimes the appropriate accommodation will be readily apparent. Where the appropriate accommodation is not obvious, the agency should have an informal discussion with the requester to determine a suitable accommodation.

Once an applicant or employee requests a change related to work due to a medical condition, the agency official who has received the request should act promptly to handle it, usually based on steps outlined in the agency's reasonable accommodation procedures. Consult your own agency's procedures for the specific steps to follow. Bear in mind these **keys to a successful interactive process:**

- The decision maker should communicate with the individual where the specific limitation, problem, or barrier is unclear, where the effective accommodation is not obvious, or when choosing among different possible accommodations.

- Where an individual requesting reasonable accommodation can identify the problem, but not a solution, the agency should consult in-house experts such as an agency disability program manager or reasonable accommodation coordinator, or outside resources if necessary (*e.g.*, the Job Accommodation Network, www.jan.wvu.edu).

- The employee shares responsibility for making the interactive process work by providing information that the agency reasonably needs to evaluate the accommodation request. For example, the agency may ask the employee for suggested accommodation solutions and preferences, or for supporting medical information where the disability or need for accommodation is not obvious or already known. (See question 17, below.)

- Where a requested accommodation is not effective or would pose an undue hardship, or is otherwise not legally required (*e.g.*, removing an essential job function), the agency should continue the interactive process, exploring alternatives until either a reasonable accommodation is found or the agency determines no accommodation is available.

- The accommodation preference of the individual with a disability should be given primary consideration. However, the agency may provide a different accommodation as long as it is effective.

- If an accommodation is provided but it is ineffective, the employee should promptly notify the agency, and the agency should re-initiate the interactive process, just as it would if it received another accommodation request from the same employee.

17. May an agency ask an applicant or employee for medical information in support of an accommodation request?

Yes, if it is not obvious or already known that the requester is an individual with a disability and needs an accommodation, for example if the disability is apparent or the individual has previously provided such medical information with regard to past accommodation requests. It is up to each agency to decide who will be authorized to request and review medical information. All staff who review and evaluate medical

documentation should receive training on how to comply with the Rehabilitation Act rules concerning the use and confidentiality of applicant and employee medical information.

The type of medical information an agency most often will need is:

- the past, present, and expected future nature, severity and duration of the impairment (*e.g.*, functional limitations, symptoms, side effects of any treatments, etc.);

- the activities the impairment limits;

- the extent of the limitations; and

- why the individual requires reasonable accommodation or the particular reasonable accommodation requested, and how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.

An agency is entitled only to information sufficient to show that the applicant or employee has a disability and needs a reasonable accommodation. It may not ask for information unrelated to the condition for which the accommodation has been requested (*e.g.*, an individual's entire medical record). When an individual requesting a reasonable accommodation provides insufficient documentation for the agency to process the request, it may ask for additional information. The agency may explain to the requesting individual why the documentation is insufficient and what information is needed, and allow the individual an opportunity to provide the information, or may ask the individual to sign a limited release of medical information and then either submit a list of specific questions to his health care professional or have the agency's own physician contact the requester's health care provider. If this does not result in sufficient information, the agency may require the requester to go to a health care provider of the agency's choice at the agency's expense.

> ***Example 20*****:** An agency states on its "reasonable accommodation request form" that individuals should attach "any supporting medical documentation." This will be an impermissible disability-related inquiry as to those individuals whose disability and need for accommodation is obvious or already known. Although this type of request for documentation will not necessarily violate the Rehabilitation Act with respect to individuals whose disabilities are not obvious, it is so vaguely worded that it will not serve the agency's needs, because an employee may provide either too little information, too much, or the wrong type of information. Therefore, a request for medical documentation of this sort should not be included on the reasonable accommodation request form. Instead, an agency official should determine, after reviewing the request form and having an initial discussion with the individual, whether or not the disability and the need for

accommodation are unclear. If so, the official may seek appropriate medical documentation.

***Example 21*:** Upon receipt of each request for accommodation, an agency sends a form letter to the individual's treating physician requesting information or documentation regarding findings from all previous examinations for the medical condition at issue, treatment, and responses to treatment; clinical findings from the most recent medical evaluation, including any of the following which have been obtained: findings of physical examination; results of laboratory tests; X-rays; EKGs and other special evaluations or diagnostic procedures; and, in the case of psychiatric evaluation or psychological assessment, the findings of a mental status examination and the results of psychological tests, if appropriate; diagnosis, including the current clinical status; prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery; an explanation of the impact of the medical condition on overall health and activities, among other things. This will be an impermissible disability-related inquiry as to those individuals whose disability and need for accommodation is obvious or already known. With respect to anyone whose disability and/or need for accommodation are not obvious, the request is too broad in that it asks for information that is unnecessary to determine if the individual has the specific disability for which accommodation has been requested and needs an accommodation.

Example 22: An employee gives her supervisor a note from her doctor stating that she has chemical sensitivity and requires telework as a reasonable accommodation, but without providing any other medical information. Because this conclusory information is insufficient to show that the employee's condition substantially limits a major life activity or that she needs telework as an accommodation, the agency may request reasonable medical information to determine whether she has a disability and why she needs that accommodation.

Undue Hardship

18. How should an agency determine whether a requested accommodation would pose an undue hardship?

An agency does not have to provide an accommodation that would pose an undue hardship, *i.e.*, significant difficulty or expense, based on the overall agency resources and workplace operations. Most accommodations are not expensive: one-fifth cost nothing; more than half of them only cost between $1 and $500; and the median cost is approximately $240. Technological advances continue to reduce the cost of many accommodations. Sometimes the agency can obtain the accommodation at no cost or a reduced cost from a non-profit organization or government entity. Most federal agencies have an agreement with the Department of Defense's Computer Electronic Accommodations Program (CAP), http://www.tricare.mil/cap/, to receive assistive technology and services for employees with disabilities at no cost, although

agencies incur costs for those accommodations not covered by CAP (*e.g.*, sign language interpreters).

Some accommodations pose an undue hardship not due to cost but because of their impact on the agency or on a particular office or component of the agency where the employee works, including the impact on the ability of other employees to perform their duties or the impact on the ability to conduct business. Potential impact should be assessed based on objective information and with due consideration to any options or alternatives which might lessen the impact of the proposed accommodation.

Before denying an accommodation request based on cost or operational difficulty, an agency may want to have the decision reviewed by a higher-level official with broader authority and access to the agency's resource information than the official authorized to grant an accommodation request. The reasonable accommodation procedures mandated by E.O. 13164 provide that all denials of accommodation requests be in writing and provide a specific explanation of the grounds for denial. A conclusory statement that an accommodation would impact the agency's operations or its other employees is not sufficient to establish undue hardship.

> **NOTE:** If providing a particular reasonable accommodation would result in undue hardship but another effective accommodation is available that would not, the agency must provide the other accommodation.

Agencies should also ensure that decision makers are aware of resources both inside and outside of the agency which can be consulted for accommodation suggestions before a request is denied or before resorting to an alternative. If the agency has an agreement for obtaining technology at no cost from CAP, the agency should ensure that all potential decision makers are aware of the agreement and the procedure for obtaining no-cost accommodations. Agencies should also encourage decision makers to consult with the Job Accommodation Network (JAN), 1-800-526-7234 (V/TDD), http://www.jan.wvu.edu, regarding possible no-cost or low-cost options.

Frequently Asked Questions Regarding Interpreters and Other Services for Deaf or Hearing-Impaired Individuals

19. When must an agency provide a sign language interpreter for an employee with a hearing disability?

Once a supervisor knows an employee with a hearing disability needs a sign language interpreter -- for example, because the individual has requested one -- an interpreter must be provided as a reasonable accommodation, absent undue hardship. At a minimum, the requirement to provide an interpreter for someone with a known need for one would apply to staff meetings, safety talks, and discussions relating to work procedures, policies, assignments, discipline, and performance, regardless of whether the individual has requested an interpreter. For meetings that the agency would not

know the employee planned to attend, the agency can require the employee to notify the agency of the need for an interpreter.

> **NOTE: Accommodations necessary to provide effective communication may include: interpreters for different types of sign language, CART, captioning of videos and video-streamed presentations, use of video relay services and video remote interpreting services, or other accommodations.** An agency's decision regarding what accommodation to provide for an employee who is deaf or has a hearing impairment, like any accommodation decision, is an individualized one. The appropriate accommodation may depend on the setting in which communication occurs and the ability of the employee to use certain means of communication (see Question 21), technological advancements that make once effective accommodations obsolete or ineffective, and other factors. Section 501 requires an agency to ensure that employees with disabilities have equal access to information provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs. See question 11, above.

***Example 23*:** A supervisor knows that one of the employees who reports to him is hearing impaired and needs a sign language interpreter. He calls her into a meeting in his office to critique her recent work performance, but fails to arrange for a sign language interpreter. Absent undue hardship, this violates the Rehabilitation Act.

20. Does an agency have to provide a "certified" sign language interpreter?

No. However, the interpreter must be "qualified." Someone who knows sign language, such as an employee who was not hired as a sign language interpreter but who may know some sign language, is not the same as a qualified sign language interpreter.[19] A qualified interpreter is one who, whether or not he is certified, can effectively interpret so as to allow an employee with a hearing impairment access to the same information and the same opportunity to participate as other employees.

21. Is an agency required to provide CART or a sign language interpreter if a less expensive accommodation is available?

If there are two or more effective means of communicating, the agency may choose the easier or less expensive accommodation.

Example 24: A hearing impaired employee requests full-time sign language interpreter services because in addition to formal meetings, she sometimes has brief informal interactions with co-workers, for example to locate a file or exchange information about the status of a project. If using e-mail, typing on a computer, or exchanging handwritten notes would be an effective

accommodation for these brief and infrequent communications, the agency may deny the request for a full-time sign language interpreter.

However, an agency should not assume that the same accommodation is effective in all situations. For example, someone with a hearing impairment who can lip read in one-on-one discussions involving simple matters may still need a sign language interpreter for longer, more complex discussions or for larger-group meetings. Moreover, although one employee with a hearing impairment may need a sign language interpreter, another employee who does not know or fluently use sign language may need CART or some other accommodation. The agency must provide the alternative accommodation in these circumstances, absent undue hardship.

22. May an agency refuse to hire an applicant with a hearing impairment because she will require full-time accommodation?

No. Absent undue hardship, an agency cannot refuse to hire an applicant simply because she will require an accommodation that entails expense on a continuing or full-time basis.

> ***Example 25:*** A qualified deaf individual applies for a policy advisor position at a large federal agency. The position involves participating in many meetings and making presentations, including out of town, for which she would use a sign language interpreter on a regular basis. Given the size and resources of the agency, providing a full-time interpreter, including during business travel, does not constitute an undue hardship.

23. What if the accommodations that a hearing impaired applicant or employee needs are very expensive compared to other accommodations the agency typically provides?

The fact that an accommodation is very expensive compared to other accommodations does **not** necessarily mean it poses an undue hardship. Undue hardship will only result because providing the accommodation would impose on the agency significant expense or significant administrative or operational difficulty. Because this determination is based on an agency's overall resources, an agency will generally be able to provide the accommodations needed for an employee who is deaf or who has a hearing impairment without an undue hardship.[20] **Remember that although interpreter services may be obtained on a contract basis, an agency can also use its Schedule A non-competitive hiring authority to create staff assistant slots for interpreters, readers and personal assistants.**[21] **Alternatively, interpreting services can be provided electronically through a video remote interpreter service.**

> ***Example 26*:** Using camera equipment and technical support provided by the CAP program, an agency can set up video remote interpreting services (VRIS) in order to provide sign language interpretation from an agency or private service

interpreter at any time and on very short notice. The two-way internet video technology allows the hearing impaired individual to view on a TV or computer screen an interpreter who is at another location. When a hearing person speaks, the interpreter hears the comments by microphone and is viewed on the screen signing what has been said. If the individual with a hearing impairment signs any information, the interpreter can communicate it to hearing meeting participants through TV or computer audio equipment in the meeting room.

Frequently Asked Questions Regarding Reassignment

24. When should an agency consider reassignment as an accommodation?

An agency must reassign an individual with a disability to a position if he cannot be accommodated in his current job, a vacant funded position exists for which he is qualified, it would not be unreasonable in light of an agency's seniority system, and would not pose an undue hardship. "Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time.[22]

Reassignment is the accommodation of last resort. Unless an employee voluntarily agrees, an agency may not reassign an employee who could be reasonably accommodated in his or her current position. An agency does not have to bump another employee, or promote or create a new position for the employee with a disability. **Reassignment is not limited to the facility, commuting area, sub-component, specific agency (within a Department), or type of work to which the individual with a disability is assigned at the time the need for accommodation arises. The scope of the vacancy search is limited only by undue hardship.**

***Example 27*:** An employee can no longer drive to his assigned facility due to a visual disability and the facility cannot be accessed by public transportation. Because the employee cannot perform the essential functions of his job at home, telework is not a reasonable accommodation. In the alternative, the agency offers him reassignment to a vacant equivalent position for which he is qualified at a facility to which he could commute by public transportation.

***Example 28*:** After a surgical procedure left her with a vocal cord dysfunction that prohibited her from talking more than 15 minutes per day, a service representative asked that she be assigned only written correspondence duties as a reasonable accommodation. This is not an effective accommodation because answering the telephones and waiting on customers at the service window are essential functions of her position. Because there is no accommodation that would allow her to remain in her current position, the agency offers her reassignment to an available vacant position.

Reassignment should be to a position that is equal in pay and status to the one held or as close as possible if an equivalent position is not vacant.

Example 29: An agency's vacancy search reveals the availability of five different equivalent positions for which the employee is qualified. The agency may select which position to offer the employee as an accommodation, but may not offer a position in a less preferable geographic location if one is available within the employee's current commuting area.

If reassignment must be made to a lower-paying position or a position carrying less seniority due to the absence of an equivalent vacancy, the individual receives the lesser salary and seniority of the new position unless the employer has its own policy to the contrary for voluntary transfers.

Reassignment may not be used to limit, segregate, or classify individuals with disabilities in a discriminatory manner. For example, an agency may not make employees who are reassigned as a reasonable accommodation work in portions of a facility that are separate from the areas where other employees work. Nor may an agency reassign an employee with a disability to a "rehabilitation" position, performing ad hoc duties with no opportunities for overtime or promotion, where an appropriate vacancy exists that would offer these benefits.

25. Who is responsible for identifying vacant positions when a reassignment is needed as a reasonable accommodation?

The agency is responsible for conducting the vacancy search, because it is in the best position to determine what relevant positions are vacant.[23] The employee should cooperate by providing on request any relevant information about his work-related limitations, his skills and qualifications, whether he is willing to consider positions outside his current geographical area, and, if necessary and if he is aware of any, possible accommodations that might allow performance of the new position.

The agency should consider positions that are currently vacant and those that are expected to become vacant within a reasonable time. However, the vacancy search itself need not last for a specified period of time. Sometimes, an agency may know that a specific position will become available (*e.g.*, because a particular employee is expected to retire or take another job soon). In other instances, an agency may know that a position will become available based on information about the general frequency of turnover in particular jobs or job categories.

26. What is the most practical way for an agency to determine if reassignment is appropriate and available?

The responsible agency official should explain to the employee with a disability why the agency has concluded that the employee cannot be accommodated in his or her current position, and should find out (and document) what limitations, if any, the employee has with respect to the reassignment. For example, the responsible official should inquire:

- what types of work the employee is willing and qualified to perform, and what medical restrictions or limitations he has;

- whether the employee is willing to be reassigned outside the facility or outside the commuting area, and if so, to what locations;

- whether the employee is willing to be reassigned to a different type of position for which he or she may be qualified, and if so to what type(s);

- whether the employee is willing to be reassigned to a different sub-component of the department, and if so, to which one(s); and

- whether the employee is willing, if no position is available at his or her current grade level, to be reassigned to a lower-graded position, and if so, down to what grade.

The agency can then conduct the search within the parameters the employee has set. This method considers the employee's preferences while minimizing the scope of the vacancy search. If the agency conducts a search within the parameters developed with the employee and no appropriate position is found, the agency should determine whether the employee wants to expand the scope of the search.

27. What should an agency do if it appears that a proposed reassignment may conflict with its seniority system?

A proposed reassignment that conflicts with a seniority system will not be a "reasonable" accommodation unless there are "special circumstances" that undermine other employees' expectations of consistent, uniform treatment. For example, "special circumstances" may exist where an agency retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, where a seniority system contains other exceptions, or where the seniority system includes a means of seeking exceptions. Where no conflict exists and other requirements for reassignment have been satisfied, the reassignment must be made. For example, no conflict would exist if the seniority system permits medical transfers without regard to seniority.

V. HEALTH AND SAFETY CONCERNS

28. When may an agency exclude an individual with a disability from a position due to a health or safety risk?

An agency may refuse to hire or retain an individual with a disability if he would pose a direct threat to health or safety (*i.e.,* a significant risk of substantial harm to self or others that can not be eliminated or reduced by reasonable accommodation). A slightly increased, moderate, speculative, or remote risk of harm to the individual or others is not a direct threat. Thus, if an agency excludes an individual with a disability

based on health or safety concerns, the risk posed by the individual must rise to the level of a direct threat.

The agency must conduct an individualized assessment of an applicant's or employee's present ability to perform the essential functions of the job safely, based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. Factors to be considered include the following:

(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.

In addition, if a direct threat to safety does exist, an agency must consider whether a reasonable accommodation would remove the direct threat.

> ***Example 30*:** A newly-hired computer specialist with epilepsy has a seizure during work, after which he rests at his desk for approximately 45 minutes before resuming work. When the agency asks about his medical condition to assess the potential for harm to the employee or to his co-workers, the employee tells the agency that the seizures occur approximately once per month and that he can anticipate when they are about to occur, giving him time to move to a safe location. In addition, he is able to resume his work usually within one hour following the seizure. The employee does not pose a significant risk of substantial harm to himself or others because there is no likely, imminent, and significant risk of harm.

> ***Example 31*:** An agency makes an applicant a conditional offer of employment as a law enforcement officer. During a post-offer medical exam, the agency learns that the applicant has monocular vision and is concerned that he lacks adequate depth perception and peripheral vision to perform the essential functions of the job safely. The agency inquires into the applicant's abilities and work history, including his past performance as a municipal police officer, and determines that this individual is qualified for the job and does not pose a direct threat to safety.

> ***Example 32*:** Despite the regular use of steroids, a correctional officer continues to have severe, chronic asthma. A medical evaluation reveals that the nature and dosage of her steroid use puts her at a high risk for contracting severe forms of tuberculosis, a disease which is prevalent in the particular prison population at the facility where she works. It is impossible for the agency to eliminate the correctional officer's contact with inmates infected with tuberculosis, given the

nature of her job and the operation of this facility. The agency does not violate the Rehabilitation Act when it concludes that working in that facility would pose a direct threat to her own health. However, rather than terminating the employee or requiring her to take disability retirement, the agency must consider whether she can be reassigned to another facility as a reasonable accommodation.

While an agency never has to hire or retain an individual who is not qualified to perform the position held or desired (see question 32 below), when conducting a direct threat evaluation an agency should not rely exclusively on an assessment of the individual for other purposes, such as workers' compensation benefits or veterans' benefits determination, to establish the degree of risk, if any, posed by an individual.

***Example 33*:** A job applicant with a substantially limiting impairment was denied a letter carrier position because an agency doctor classified him as being at "moderate risk" of injury. This assessment alone does not establish the existence of a direct threat to health or safety because it does not apply the "significant risk of substantial harm" standard, and therefore cannot be the basis for refusing to hire the applicant.

VI. INTERACTION OF REHABILITATION ACT WITH OTHER AGENCY OBLIGATIONS

29. Will an agency meet its reasonable accommodation obligations to a worker with a disability by complying with the Family and Medical Leave Act, the agency's light and limited duty program, a workers' compensation program, or the terms of a collective bargaining agreement?

Compliance with the FMLA or with the requirements of a workers' compensation program, limited or light duty program, or the terms of a collective bargaining agreement will sometimes, but not always, satisfy an agency's Rehabilitation Act obligations.

***Example 34*:** An employee with renal failure has exhausted all accrued leave and has only 4 weeks of unpaid FMLA leave remaining available for the twelve-month period. He requests, and the agency provides, an additional 10 weeks of leave to receive and recuperate from a kidney transplant (using the 4 weeks of remaining FMLA leave and then 6 weeks provided as a reasonable accommodation, absent undue hardship).[24] Providing FMLA leave alone would not have satisfied the agency's Rehabilitation Act obligations; to the extent FMLA leave was insufficient or unavailable, the agency had to provide additional unpaid leave absent undue hardship to meet the accommodation needs of a qualified individual with a disability.

***Example 35*:** An employee files a workers' compensation claim and is placed on limited duty, which exempts him from performing some essential functions of his job. After five months, his limited duty is no longer available because he has

reached maximum medical improvement, but the agency is advised of the remaining medical restrictions that prevent him from performing some of the essential functions of his original position even with accommodation. Concluding that he is an individual with a disability, the agency should now determine if reassignment to a vacant equivalent position for which he is qualified is possible, before resorting to reassignment to a lower-salaried job, disability retirement, or termination. The Rehabilitation Act prohibits the agency in this situation from terminating the employee if there is a vacant position to which he can be reassigned as the accommodation of last resort.

30. May an agency follow another federal law or regulation that conflicts with the Rehabilitation Act?

Yes, but only if the other federal law or regulation actually *requires* some action inconsistent with the Rehabilitation Act. The "other federal laws defense" is inapplicable to workplace policies that are not mandated by law or by regulations having the force and effect of law.

> ***Example 36:*** If federal occupational safety and health regulations require that employees working in a federal correctional facility special operations response team be able to wear respirators in emergency response situations, an agency would not have to hire for the job an individual whose disability prevents him from wearing the respirator.

An agency may defend a qualification standard (whether in regulations or policies) that screens out an individual with a disability but that is not mandated by federal law by showing that the standard is job-related and consistent with business necessity. This means that the standard accurately measures the individual's ability to perform the job's essential functions or, where the standard is adopted for safety reasons, that the applicant would pose a direct threat (*i.e.*, a significant risk of substantial harm).

> ***Example 37:*** An agency voluntarily adopts for *all* its vehicle drivers the physical qualifications that U.S. Department of Transportation regulations mandate only for drivers of commercial motor vehicles. When the agency denies an applicant with a disability a job driving a vehicle that is not subject to the DOT regulations, it may not rely on the regulations but instead must demonstrate that the qualification standard is job-related and consistent with business necessity.

31. Will compliance with Section 508 of the Rehabilitation Act, which applies to all electronic and information technology purchased, maintained, or used by a federal agency, satisfy an agency's obligations under Section 501?

Not necessarily. Section 508, which requires adherence to certain accessibility standards, applies only to electronic and information technology (EIT) (such as computers, software, telephones, information kiosks, transaction machines, Internet and intranet sites (whether procured or developed in-house), multimedia materials (including

videotapes), and office equipment (including copiers and fax machines). It does not apply to accommodations such as physical modifications to facilities, modifications of policies, and alternative means of communicating written or oral information, including readers, sign language interpreters, and materials in accessible formats.[25]

Additionally, certain types of reasonable accommodations may be necessary for an individual with a disability to use EIT even if it complies with Section 508.

> ***Example 38*:** Although compliance with Section 508 will ensure that an agency's computers will be compatible with a screen reading program for people who are blind, Section 508 does not require that any office computers actually be equipped with the program until someone needs it. Therefore, even if the agency has Section 508-compliant computers that will work with screen reading programs, it does not actually have to acquire and install the program on a specific computer until an accommodation is requested.

> ***Example 39*:** Although compliance with Section 508 will require that any EIT training materials procured, developed, maintained, or used by the agency for EIT be accessible, it does not require training on how to use the equipment. This training would, however, be required as a reasonable accommodation under Section 501.

VII. CONDUCT RULES AND JOB PERFORMANCE

32. Does an agency have to lower performance or production standards, or waive uniformly-applied conduct rules, as an accommodation for an individual with a disability?

No. Hiring individuals with disabilities, and following the non-discrimination and accommodation standards of Section 501, does not mean that an agency will have to compromise the efficiency or quality of its work. Agencies never have to remove an essential function of a job as an accommodation. Moreover, because reasonable accommodation is always prospective, an agency is not required to excuse either performance or production problems, or violations of misconduct rules that are job-related and consistent with business necessity (such as rules prohibiting violence, threats of violence, theft, and destruction of property), and that apply to all employees, even if the performance problem or conduct violation resulted from a disability.

Once an individual with a disability makes an accommodation request, and assuming the discipline imposed for the performance or conduct violation is something other than termination, the Rehabilitation Act requires an agency to make a reasonable accommodation that allows the employee to meet a performance or conduct standard *in the future*, barring undue hardship.

> ***Example 40:*** A cafeteria cashier is given a verbal warning for tardiness, at which time she notifies her supervisor that her depression affects her ability to arrive at work on time. The agency does not have to excuse any tardiness that has

occurred until that point or in the future, but because her explanation constitutes a request for accommodation, the agency should determine if she is an individual with a disability and whether an accommodation, such as a schedule change, can be granted absent undue hardship.

33. Can an agency penalize an employee for work missed during leave taken as a reasonable accommodation?

No. Although production standards never have to be lowered as an accommodation, an employer cannot penalize an employee for leave granted as an accommodation. To do so would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

Example 41: A food inspector is granted six months of leave as an accommodation due to disabling cancer treatment. In her annual performance appraisal, her supervisor proposes to rate her productivity as unsatisfactory because, due to her absence, her overall production for the year was half of what would otherwise be expected. Rather than penalizing the employee for the leave she was granted, the supervisor must evaluate the productivity element of her performance by pro-rating the expected productivity based on the number of months she worked.

VIII. JOINT LIABILITY ISSUES

34. Does Section 501 also apply to applicants or workers provided through federal contractors?

Yes, **if** the worker is considered an applicant for federal employment or qualifies as an employee of a federal agency at the time of the alleged discrimination. A worker may be an employee of an agency even if he is called a "contractor," and even if he has been provided by a private firm. Whether an agency qualifies as an employer depends on a number of factors, the most important of which is whether the agency exercises control over the person's work.[26] The question of whether an employer-employee relationship exists is fact-specific and requires consideration of all aspects of the worker's relationship with the agency. Sometimes, both an agency and the private entity that has placed a worker with the agency will qualify as joint employers and can both be liable for discrimination against the worker.

Example 42: An agency uses a private contractor to fill a range of information technology (IT) positions. The agency provides the contractor with position descriptions and qualifications for each position. Salaries and benefits are paid by the contractor, but the jobs are located at agency facilities and the workers report to and receive assignments from supervisors who are employees of the agency, and complete assignments according to agency specifications. In this situation, the agency and the contractor are joint employers, and each is responsible for complying with ADA and Rehabilitation Act requirements.

An individual who believes he has been subject to discrimination by a federal agency and a contractor (private company) as "joint employers" may pursue a claim against the federal agency for violations of Section 501, and at the same time a claim against the contractor under Title I of the ADA (which applies to private employers with 15 or more employees) or under Section 503 of the Rehabilitation Act (which applies specifically to federal contractors). EEO claims against a federal agency are commenced by initiating EEO counselor contact at the federal agency alleged to have discriminated against the applicant or employee. Information about the federal sector EEO process is available at http://www.eeoc.gov/federal/ fedprocess.html. EEO claims against a private employer are commenced by filing a charge of discrimination at the nearest EEOC office. Information about the private sector charge process is available at http://www.eeoc.gov/charge/overview_charge_filing.html. Claims against federal contractors under Section 503 of the Rehabilitation Act are initiated by filing a complaint with the appropriate regional office of the Office of Federal Contract Compliance Programs, U.S. Department of Labor. For more information on this process, see http://www.dol.gov/esa/ofccp/regs/compliance/ca_503.htm. Even if a federal agency does not qualify as a joint employer, an individual may still file a charge or complaint under the ADA or Section 503 of the Rehabilitation Act against the private contractor.

35. What can an agency do if its landlord will not make a renovation to the facility that is necessary to accommodate an employee?

Where a federal employee with a disability requests a needed structural change to a workplace facility that is not owned or controlled by the agency, both the federal agency (as the employer under Section 501) and the owner or landlord (as the recipient of federal funds under Section 504 or as a public accommodation under Title III of the ADA) may be responsible for removing the barrier.[27] Where two or more entities have an independent legal obligation to provide and pay for an accommodation, they can each be held liable. Therefore, they should communicate and coordinate, **ideally in advance of an accommodation request,** to plan who will arrange for and pay the cost of accommodation. In some cases, one entity will offer to cover the entire cost; in other cases, a cost-sharing arrangement may be devised. An agency may be able to establish undue hardship if it can demonstrate that it has taken all reasonable measures to provide an accommodation but is unable to do so the because of the landlord's lack of cooperation. If a federal agency's landlord refuses after appropriate dialogue to authorize needed alterations even if the agency offers to pay, the agency should consider whether temporary measures or an alternative accommodation (*e.g.*, transfer or telework) would be equally effective and agreeable to the employee.

> ***Example 43***: An agency's offices are located in a federal government office building with a parking garage for employees, operated by the General Services Administration (GSA). Although the garage has a number of accessible parking spaces, the agency needs one more to accommodate an employee with a disability who has requested it. The agency asks GSA to create the additional accessible parking space. Pending GSA's agreement to re-line the spaces and

install appropriate signage, the agency places reserved signs on the wall in front of two regular parking spaces adjacent to the existing accessible spaces as a temporary measure to accommodate the employee.

36. Must an agency provide reasonable accommodations for employees with disabilities who attend employer-sponsored training conducted by another entity?

Yes. This is true regardless of whether the training relates to performance of the employee's essential functions and whether the training is conducted at the employing agency or off-site. Although outside entities that provide training for an agency's employees may also have obligations to provide accommodations, their failure to do so will not relieve the employing agency of its obligation. An agency should anticipate requests for accommodation when contracting with outside vendors to provide training and specify in the contract who will provide the accommodation. Failure by an outside entity to provide an accommodation in accordance with the terms of a contract, however, will not relieve the agency of its obligation to do so, absent undue hardship.

> ***Example 44*:** A blind employee needs materials in Braille for a course being given at his agency by an outside vendor, a private company covered under Title III of the ADA. Prior to the course, the agency asks the vendor to supply a Braille version of its course materials, but the vendor refuses. The agency must arrange for the needed Braille materials, absent undue hardship.

IX. DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

As noted above, the Rehabilitation Act's rules regarding disability-related inquiries and medical examinations apply to all applicants and employees, not just to individuals with disabilities. For detailed information about these rules, see ***Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA***, http://www.eeoc.gov/policy/docs/guidance-inquiries.html, and ***Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations***, http://www.eeoc.gov/policy/docs/preemp.html.

37. May an agency ask applicants to identify whether they are individuals with disabilities for purposes of affirmative employment?

Yes. An employer is allowed to give applicants the option to self-identify as individuals with disabilities if:

> (1) the employer is undertaking affirmative action because of a law (including a veterans' preference law) that requires such action for individuals with disabilities (*i.e.*, the law requires some action to be taken on behalf of such individuals, such as Section 501); or

(2) the employer is voluntarily using the information to benefit individuals with disabilities. If the employer invites applicants to 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 Rehabilitation Act, 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 Rehabilitation Act.

38. When may an agency ask current employees disability-related questions or require medical examinations?

Disability-related inquiries and medical examinations of current employees must be job-related and consistent with business necessity. Generally, this standard is met when the agency has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Sometimes this standard is met when an agency knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition, or when an agency is given reliable information by a credible third party or observes symptoms indicating that an employee has a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.

> ***Example 45:*** An agency manager learns that one of the trial attorneys on his staff was diagnosed a year ago with bipolar disorder, for which he is being treated with lithium. The manager believes that the attorney's bipolar disorder will cause him to act "inappropriately" at meetings with high-level agency officials and opposing counsel, or that he might even pose a risk of violence to other employees. She also says she is concerned that the bipolar disorder, combined with the stress of litigation, will cause the attorney's performance to deteriorate. The attorney has not had any performance problems in the five years he has worked with the agency, including the year since his condition was diagnosed. The manager does not have a reasonable belief that the attorney will be unable to perform his job because of a medical condition or will pose a direct threat to safety, and so may not ask the attorney questions about his bipolar disorder.

An agency also is permitted to:

- invite employees to self-identify as individuals with disabilities under the circumstances and in the manner described in question 38;

- require employees to submit a doctor's note to verify that sick leave has been used appropriately, if this policy applies to all employees;

- make disability-related inquiries or conduct medical examinations as part of a voluntary wellness program;

- make disability-related inquiries or require medical examinations that follow up on a request for accommodation when the disability or need for accommodation is not known or obvious (see question 17, above); and

- require periodic medical examinations of employees in positions affecting public safety (*e.g.*, police officers or firefighters), provided they are narrowly tailored to address specific job-related concerns.

However, a medical examination should never be used as a form of discipline, or in retaliation for, or to interfere with, an employee's request for a reasonable accommodation.

***Example 46*:** A supervisor notices that a recently hired mail processor is frequently absent from his workstation without explanation. Several of the mail processor's co-workers have begun to complain that he frequently stops by their workstations for several minutes at a time to ask irrelevant and sometimes personal questions. The co-workers do not feel threatened; however, both the mail processor's productivity and that of his co-workers have suffered. The supervisor gives the employee verbal counseling, and the employee's performance and conduct improve for about two months, after which his prior disruptive conduct resumes. The supervisor may take the next step in the discipline process (*e.g.*, a written warning), but may not order the employee to have a psychological evaluation.

***Example 47*:** A nurse with epilepsy requests a fixed schedule to limit the frequency and severity of seizures. Documentation from her neurologist describes her condition and explains that if the employee has a regular sleep pattern, she has virtually no seizures, but may experience several each month with irregular sleep patterns. Her supervisor responds that, "with all the part-timers, people on flexible schedules, and people who just come in whenever they feel like it, this request just adds to my administrative nightmare. I'll think about it, but if you want this arrangement, you'll need to have a complete physical examination – and I mean complete." The supervisor's demand for a complete physical examination is overbroad and would violate the Rehabilitation Act.

X. CONFIDENTIALITY

39. What confidentiality requirements apply to medical information that a federal agency obtains about an applicant or employee?

With limited exceptions, Section 501 requires that an agency keep confidential any medical information it learns about any applicant or employee -- whether or not he is an individual with a disability -- and it continues to apply even after an employee leaves the agency. The Commission's view is that this restriction applies to all medical information, even if the information is disclosed by an applicant or employee voluntarily, and even if it is not generated by a health care professional. It includes past, present, and expected future diagnoses and treatment, as well as the fact that an applicant or employee has requested or received accommodation.

> ***Example 48*:** An employee asks his supervisor why a co-worker has recently been arriving at 10:00 am instead of 8:30 am. Because the supervisor may not reveal that the modified work schedule was granted as an accommodation for drowsiness caused by psychiatric medication, he instead simply responds that based on individual circumstances a modified work schedule was approved for this employee, thus avoiding any disclosure of confidential medical information.[28]

Medical information must be kept in files separate from personnel files and treated as a confidential medical record. This requirement includes, but is not limited to, any medical documentation obtained in the hiring process (*e.g.*, Schedule A certificate of disability and statement of employability, or documentation from post-offer pre-employment medical examination), as well as medical information obtained during employment (*e.g.*, relating to request for or provision of reasonable accommodation). Medical information stored electronically must be similarly protected (*e.g.*, by storing it in a separate database).

The Rehabilitation Act includes certain exceptions to confidentiality. Otherwise confidential medical information may be disclosed in the following circumstances:

- to supervisors and managers where they need it in order to provide a reasonable accommodation or to meet an employee's work restrictions;

- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in an emergency (such as help during an evacuation) because of a medical condition;

- to individuals investigating compliance with the Rehabilitation Act and with similar state and local laws; and

- pursuant to workers' compensation laws (*e.g.*, to a state workers' compensation office in order to evaluate a claim) or for insurance purposes.

***Example 49*:** An agency's reasonable accommodation procedures state that if any supporting medical information is needed, the request will be referred by the supervisor to a Disability Program Manager (DPM) who will obtain and assess the medical information from the requester's health care provider and, if necessary, from the agency's contract physician. Because this agency's procedures give managers or supervisors no role in requesting or reviewing medical information, the Rehabilitation Act confidentiality provisions limit what the DPM may reveal to the manager or supervisor, which will typically be only the information needed to provide the accommodation if granted, such as the diagnosis and restrictions.

Medical information may be given to -- and used by -- appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the Rehabilitation Act. In addition, the employer may use the information to determine reasonable accommodations for the individual. For example, the employer may share the information with a third party, such as a health care professional, to determine whether a reasonable accommodation is possible for a particular individual.

An agency may only share medical information with individuals involved in the hiring process (or in implementing an affirmative action program) who need to know the information. For example, in some cases, a number of people may be involved in evaluating an applicant. Some individuals may simply be responsible for evaluating an applicant's references. These individuals may have no need to know an applicant's medical condition and, if so, should not have access to the medical information.

XI. DISABILITY-BASED HARASSMENT

40. Do the same rules that apply to sexual, racial, or other harassment also apply to disability-based harassment?

Yes. If the harassment is by a supervisor, and the harassment results in a "tangible employment action," *i.e.*, "a significant change in employment status," the agency will be liable; no affirmative defense applies. If the harassment by a supervisor does *not* result in a tangible employment action, the agency can avoid liability by demonstrating that (1) the agency exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. If the harassment is by co-workers, an agency will be liable for the harassment if it knew or should have known of the conduct, unless it can show that it took prompt and appropriate corrective action upon learning of the harassment.

For more information on employer liability for harassment in the workplace, see ***Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors,*** http://www.eeoc.gov/policy/docs/harassment.html#2.

***Example 50*:** A Postal Service window cashier has severe depression. Two supervisors state on several occasions to the employee that because he is under psychiatric treatment, he is a security risk at the Post Office, and a third supervisor calls the employee "crazy" five or more times a day. These comments establish that the employee has been regarded as disabled (*i.e.*, incapable of working safely in any job that involves contact with co-workers), and they constitute harassment on the basis of disability.

41. What should an agency do to help prevent disability-based harassment and to address it promptly and effectively if it does occur?

An agency should have an anti-harassment policy in place which covers not only sexual harassment, but harassment on the basis of any of the protected bases, including disability. An anti-harassment policy should contain, at a minimum, the following information:

- A clear explanation of prohibited conduct;
- Assurance that employees who make claims of harassment or provide information related to such claims will be protected against retaliation;
- A clearly described complaint process that provides at least one avenue of complaint that is outside of a complainant's "chain of command";
- Assurance that the employer will protect the confidentiality of the individuals bringing harassment claims to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the agency will take immediate and appropriate corrective action when it determines that harassment has occurred.

If an agency becomes aware of harassing behavior by an employee, the agency must take prompt corrective action. Such action may entail disciplining those individuals responsible for the harassment, training employees on the harassment policy, separating the alleged harasser from the victim, and ensuring that no retaliation against the victim of the harassment takes place. Even if offensive actions or comments relating to disability do not rise to the level of actionable harassment, management's tolerance of such behavior will not signal a welcoming environment for individuals with disabilities. Agencies should consider training for supervisors and managers on their responsibilities under the harassment policy and the prohibition against retaliation. For additional information on effective anti-harassment policies, see ***Model EEO Programs Must Have an Effective Anti-Harassment Program,*** http://www.eeoc.gov/policy/docs/harassment.html#2.

XII. RETALIATION AND INTERFERENCE

Section 501 prohibits both retaliation based on protected activity and interference with the exercise or enjoyment of the rights provided under the statute. Such a claim can be sustained by an individual even if he is not an individual with a disability.

Example 51: Two days after an employee was interviewed by the EEOC as part of a co-worker's disability discrimination complaint, the agency terminated her, citing misconduct because she left a door unlocked. However, the key to the door was readily available to all employees, and upon finding the unlocked door the manager did not inventory the building, conduct an investigation, or contact agency inspectors or the police, but instead contacted a labor relations representative to report the employee's alleged misconduct. Based on the proximity in time between the protected activity and the surrounding facts, the agency's stated reason for the termination was more likely than not a pretext for retaliation in violation of Section 501.

***Example 52*:** An employee's accommodation request for a schedule change related to her disability is granted by her second-line supervisor. Her first-line supervisor, unhappy because he wants all of his team members to work the same schedule, threatens the employee with a less favorable performance appraisal or transfer to a lower grade position unless she forgoes the accommodation. Making this threat constitutes interference in violation of Section 501.

XIII. FILING A COMPLAINT OF DISCRIMINATION

42. What are the procedures for filing complaints alleging violations of Section 501?

Complaints filed by employees and applicants for employment alleging a violation of Section 501 are processed under the federal sector equal employment opportunity administrative complaint procedures, 29 C.F.R Part 1614. Detailed information about the Part 1614 process is provided on EEOC's website at http://www.eeoc.gov/federal/fedprocess.html.[29] These same procedures apply to complaints of employment discrimination by federal employees and applicants for federal employment that are filed under Section 504 of the Rehabilitation Act, which prohibits disability discrimination in federally-funded or federally-conducted programs and activities.

43. Are complaints by federal employees or applicants for federal employment alleging violations of Section 508 handled the same way as complaints of employment discrimination under Section 501?

No. Because Section 508 requires federal agencies to ensure that the EIT they develop, procure, maintain, or use is accessible to and usable by individuals with

disabilities who are employees or members of the public, Section 508 complaints typically concern procurement decisions, not employment discrimination. Therefore, if an employee alleges a Section 508 violation in the EEO counseling process, an agency should advise the employee how to raise the complaint under the agency's internal procedures for Section 508 complaints.

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[1] The "targeted disabilities," as listed on the SF-256, are identified by terminology that does not necessarily reflect prevailing current usage.

[2] EEOC has issued a number of publications addressing particular targeted disabilities as well as other impairments: ***Q&A: Deafness and Hearing Impairments in the Workplace & the ADA***, http://www.eeoc.gov/facts/deafness.html; ***Q&A: Blindness & Vision Impairments in the Workplace & the ADA***; http://www.eeoc.gov/facts/blindness.html; ***Q&A: Intellectual Disabilities in the Workplace & the ADA***, http://www.eeoc.gov/facts/intellectual_disabilities.html; ***Q&A: Epilepsy in the Workplace & the ADA***, http://www.eeoc.gov/facts/epilepsy.html; ***Enforcement Guidance on the ADA and Psychiatric Disabilities***, http://www.eeoc.gov/policy/docs/psych.html; ***Q&A: Diabetes in the Workplace & the ADA***, http://www.eeoc.gov/facts/diabetes.html; ***Q&A: Cancer in the Workplace & the ADA***, http://www.eeoc.gov/facts/cancer.html.

[3] ***EEOC Annual Report on the Federal Work Force: Fiscal Year 2007,*** http://www.eeoc.gov/federal/fsp2007/index.html.

[4] **EEOC Management Directive 715** applies to all executive agencies and military departments (except uniformed members) as defined in Sections 102 and 105 of Title 5 U.S.C. (including those with employees and applicants for employment who are paid from non-appropriated funds), the United States Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, the Smithsonian Institution, and those units of the judicial branch of the federal government having positions in the competitive service.

[5] Major life activities are basic activities that the average person can perform with little or no difficulty, such as walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, eating, sleeping, performing manual tasks, caring for oneself, learning, thinking, concentrating, interacting with others, reproduction, eliminating waste, and working. "Substantially limits" means significantly restricted in the condition, manner, or duration under which an individual can perform the activity, as compared to the average person in the general population. For more guidance on determining if someone is an individual with a disability, see ***Instructions for EEOC Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified,"*** http://www.eeoc.gov/policy/docs/field-ada.html, and ***Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA,*** http://www.eeoc.gov/policy/docs/qidreps.html. ***Note:*** At the time of publication of this document, the ADA Amendments Act of 2008 is pending in the U.S.

Senate. This bill would make several changes to the definition of "disability," although the basic three-part definition remains essentially intact. If this bill is enacted, the definition provided in the text would be changed to reflect any new definition incorporated into the ADA. Any changes to the ADA's definition of "disability" would apply to federal agencies under Section 501 of the Rehabilitation Act. However, the ADA Amendments Act would not affect the definition of "targeted disability," any of the special hiring authorities applicable to people with targeted disabilities, or any affirmative efforts agencies might undertake to hire individuals with targeted disabilities.

[6] An applicant or employee who is considered disabled under another government program or statute, such as someone who has received a "veterans preference" rating, a social security disability rating, or an accessible parking permit, is not automatically considered an "individual with a disability" under Section 501. For example, a veteran who injured an arm in combat and as a result has a 30% disability rating from the Veterans Administration would have to demonstrate he is substantially limited in a major life activity (such as lifting, reaching, or performing manual tasks, compared to the average person in the general population) to show he is an "individual with a disability" entitled to reasonable accommodation in civilian federal government employment.

[7] 29 C.F.R. pt. 1630.2(m) app. § 1630.2(m).

[8] 29 C.F.R. pt. 1630.2(o) app. § 1630.2(o).

[9] 29 C.F.R. § 1630.2(o)(1)(i-iii).

[10] *See also* ***Veterans with Service-Connected Disabilities and the ADA: A Guide for Employers*** (2/29/08), http://www.eeoc.gov/facts/veterans-disabilities-employers.html, and ***Veterans with Service-Connected Disabilities in the Workplace and the ADA*** (2/29/08), http://www.eeoc.gov/facts/veterans-disabilities.html.

[11] Pursuant to the 1992 amendments to the Rehabilitation Act, the ADA's employment standards apply to all non-affirmative action employment discrimination claims of individuals with disabilities who are federal employees or applicants for federal employment. *See* 29 U.S.C. § 791(g)(1994). As noted above in n.5, the current version of the ADA Amendments Act of 2008 would make some changes to the definition of "disability" that would apply to federal agencies under Section 501. However, the basic components of reasonable accommodation, including what constitutes an accommodation request, the interactive process, the types of accommodations available, and the factors to be considered when assessing undue hardship, would remain essentially the same if the ADA Amendments Act becomes law. The proposed legislation makes no changes to the standards governing prohibited harassment and retaliation, or to the provisions limiting disability-related inquiries and medical examinations and requiring confidentiality of medical information. A provision in the proposed legislation explicitly states that individuals who are covered only under the "regarded as" definition of "disability" would not be entitled to reasonable accommodation.

[12] For more information, see ***Work At Home/Telework as a Reasonable Accommodation*****,** http://www.eeoc.gov/facts/telework.html.

[13] If the essential functions of her job could not be performed from home on a full-time basis or the accommodation would pose an undue hardship, the agency is not required to grant the accommodation, but must consider whether it can reassign the employee to a vacant position for which she was qualified that can be performed at home on a full-time basis.

[14] Extensive guidance on leave and schedule changes as an accommodation can be found in ***EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** *(*as revised October 17, 2002) at questions 17-23, http://www.eeoc.gov/policy/docs/accommodation.html.

[15] ***EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** *(*as revised October 17, 2002) at questions 16-21, http://www.eeoc.gov/policy/docs/accommodation.html.

[16] Extensive guidance is available to assist agencies, including ***Employer's Guide to Including Employees with Disabilities in Emergency Evacuation Plans*** (Job Accommodation Network), http://www.jan.wvu.edu/media/emergency.html; ***Effective Emergency Preparedness Planning: Addressing the Needs of Employees with Disabilities*** (U.S. Department of Labor), http://www.dol.gov/odep/pubs/fact/effective.htm; ***Preparing the Workplace for Everyone: Accounting for the Needs of People with Disabilities – A Framework of Emergency Preparedness Guidelines for Federal Agencies***, (Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities, Subcommittee on Emergency Preparedness in the Workplace), http://www.dol.gov/odep/pubs/ep/preparing2.htm; and ***Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures*** (EEOC), http://www.eeoc.gov/facts/evacuation.html.

[17] For sample policy language regarding creation of staff assistant slots, see http://www.eeoc.gov/federal/implementing_accommodation.html#attachmentb.

[18] For example, if an employee who uses a service animal as a result of a vision-related disability requests that he not be scheduled to work on the weekends, when the bus schedule results in a two-hour commute, the Rehabilitation Act does not require an agency to provide the requested accommodation. The weekend bus schedule would affect any employee who was dependent on public transportation and therefore the accommodation would not be considered disability-related. By contrast, if an individual who uses a wheelchair due to his disability requests an accommodation such as a schedule change or reassignment due to a change in the paratransit bus schedule he uses to commute to work, that would be an accommodation needed due to his disability.

[19] Similarly, when a hearing impaired individual requires a note taker for a training session where it is not feasible to listen simultaneously through a sign language interpreter and take notes, an agency should not assume that any co-worker is a qualified note-taker.

[20] *See Vitale v. Social Security Administration*, EEOC Appeal No. 02980014 (June 13, 2001).

[21] *See* n.17. Detailed information on additional issues relating to deaf and hearing impaired employees is available in ***Q&A: Deafness and Hearing Impairments in the Workplace & the ADA*** (7/26/06), http://www.eeoc.gov/facts/deafness.html.

[22] ***EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (as revised October 17, 2002), at questions 25-30, http://www.eeoc.gov/policy/ docs/accommodation.html. Title 29 C.F.R. § 1614.203(g), which governed and limited the obligation of reassignment in the federal sector, has been superseded and no longer applies. 67 Fed. Reg. 35732 (5/21/02); 29 C.F.R. Section 1614.203(b). The ADA standards which now apply emphasize, among other things, a broader search for a vacancy. *See* 29 C.F.R. Sections 1630.2(o) and 1630.9.

[23] This obligation of the agency to conduct the vacancy search is distinct from the evidentiary burden of the complainant in an EEO case alleging denial of reassignment to demonstrate that he is qualified by showing that there was an available vacancy at the relevant time for which he was qualified.

[24] For additional information, see ***EEOC Fact Sheet on The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964***, http://www.eeoc.gov/policy/docs/fmlaada.html, and ***Enforcement Guidance: Workers' Compensation & the ADA***, http://www.eeoc.gov/policy/docs/workcomp.html.

[25] More information about what Section 508 requires is available from the U.S. Department of Justice at www.section508.gov.

[26] *See* ***EEOC Compliance Manual, "Threshold Issues,"*** http://www.eeoc.gov/policy/docs/threshold.html, at Section 2-III.B; ***Enforcement Guidance on Application of the ADA to Contingent Workers Placed by Temporary Agencies & Other Staffing Firms***, http://www.eeoc.gov/policy/docs/guidance-contingent.html.

[27] Title III of the ADA, which applies to public accommodations (including, for example, conference centers, hotels, restaurants, theaters, as well as many vendors providing training programs), and Section 504 of the Rehabilitation Act which applies to federally funded programs or activities, have different standards which are expressed in different terms than the "reasonable accommodation" and "undue hardship" terminology familiar

in the employment context. More information about these other provisions, which are enforced by the U.S. Department of Justice, is available at www.ada.gov.

[28] For more suggestions about what supervisors can say in such instances, see ***EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (as revised October 17, 2002) at question 42, http://www.eeoc.gov/policy/docs/accommodation.html.

[29] For information about disability issues in alternative dispute resolution, see ***Q & A for Mediation Providers: Mediation and the ADA***, http://www.eeoc.gov/mediate/ada/ada_mediators.html, and ***Q & A for Parties to Mediation: Mediation and the ADA***, http://www.eeoc.gov/mediate/ada/ada_parties.html.