

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND  
REHABILITATIVE SERVICES  
REHABILITATION SERVICES ADMINISTRATION  
WASHINGTON, DC 20202-2800

INFORMATION MEMORANDUM  
RSA-IM-09-03  
DATE: January 21, 2009

- ADDRESSEES:** STATE VOCATIONAL REHABILITATION AGENCIES  
STATE REHABILITATION COUNCILS  
REGIONAL REHABILITATION CONTINUING EDUCATION  
PROGRAMS  
AMERICAN INDIAN VOCATIONAL REHABILITATION SERVICES  
PROGRAMS  
CLIENT ASSISTANCE PROGRAMS  
PROJECTS WITH INDUSTRY  
CONSUMER ADVOCACY ORGANIZATIONS
- SUBJECT:** Guidance on Federal Employment of People with Disabilities
- BACKGROUND:** The federal government can provide high-quality employment options for qualified people with disabilities. In recent years, there have been several initiatives to increase the numbers of people with disabilities employed in the federal sector. People with disabilities can apply for federal jobs through the competitive employment process available to all applicants. In addition, there is an excepted service appointing authority that can streamline the hiring process for people with disabilities.
- DISCUSSION:** The final regulation guiding the *Excepted Service – Appointment of Persons with Disabilities and Career and Career-Conditional Employment* is found at 5 CFR 213.3102(u). The Office of Personnel Management (OPM) issued the final regulation on July 26, 2006; this regulation can be found at: <http://www.opm.gov/fedregis/2006/71-072606-42246-a.htm>. The final regulation changes the procedures that govern the employment of people with mental retardation, severe physical disabilities, and psychiatric disabilities. The new procedures improve the federal government's ability to hire people with these disabilities and are designed to remove barriers and increase employment opportunities for people with disabilities.

The final regulation modernizes the appointment process and represents a significant step towards removing barriers to the employment of people with disabilities in several significant ways:

- Three separate appointing authorities have been combined into one streamlined appointing authority.
- Agencies can now accept proof of disability and certification of an applicant's job readiness from an expanded number of entities.
- The distinction between proof of disability and certification of job readiness is clarified.

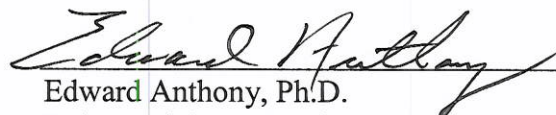
OPM also issued a questions and answers document to clarify its regulation. This document can be found at:

[http://www.opm.gov/disability/appointment\\_disabilities.asp](http://www.opm.gov/disability/appointment_disabilities.asp).

In order to clarify the Schedule A authority further, the Equal Employment Opportunity Commission (EEOC) published *The ABCs of Schedule A for the Hiring Manager: How to Hire Using the Schedule A Appointing Authority*. This publication was most recently revised in February of 2008 and can be found at:

<http://www.jan.wvu.edu/LEAD/ABCsofSchAHiringMgr.doc>. In plain language, this guide contains answers to frequently asked questions and provides resources that can help in the hiring process.

For your convenience, attached to this IM are the following documents: the final regulation concerning the excepted service appointments of people with disabilities issued by OPM, the questions and answers fact sheet that OPM issued to provide additional guidance, and EEOC's ABCs of Schedule A. Please share the attachments with those in your agency and others involved in the hiring process and encourage the use of the appointing authority for people with disabilities.



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Edward Anthony, Ph.D.  
Delegated the Authority to Perform  
the Functions of Commissioner for the  
Rehabilitation Services Administration

Attachments

cc: Council of State Administrators of Vocational Rehabilitation  
National Council of State Agencies for the Blind

[Federal Register: July 26, 2006 (Volume 71, Number 143)]

[Rules and Regulations]

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From the Federal Register Online via GPO Access [[wais.access.gpo.gov](http://wais.access.gpo.gov)]

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Rules and Regulations

Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213 and 315

RIN 3206-AK58

Excepted Service--Appointment of Persons With Disabilities and

Career and Career-Conditional Employment

AGENCY: Office of Personnel Management.

ACTION: Final rule.

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**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final regulation regarding the excepted service appointments of persons with mental retardation, severe physical disabilities, and psychiatric disabilities. The regulation improves the Federal Government's ability to hire persons with these disabilities. It is designed to remove barriers and increase employment opportunities for persons with disabilities.

**DATES:** Effective Dates: August 25, 2006.

Conformity date: For all new appointments under 5 CFR 213.3102(u), agencies may begin using the authority on August 25, 2006. Agencies must convert all individuals who are serving under the two authorities that are abolished by this regulation, 5 CFR 213.3102(t) and 213.3102(gg), to the new appointing authority, 5 CFR 213.3102(u), by January 22, 2007.

**FOR FURTHER INFORMATION CONTACT:** Deidre Dessommes by telephone on 202-606-0960, by FAX on 202-606-2329, by TDD on 202-418-3134, or by e-mail at [deidre.dessommes@opm.gov](mailto:deidre.dessommes@opm.gov).

**SUPPLEMENTARY INFORMATION:** On January 11, 2005, OPM issued a proposed regulation at 70 FR 1833 to implement changes in the three existing Schedule A excepted service appointing authorities for persons with mental retardation, severe physical disabilities, and psychiatric disabilities, which agencies use to hire people with disabilities. The proposed regulation allowed agencies to determine, on a case-by-case basis, whether individuals with these disabilities can receive an appointment based solely on medical documentation submitted by the applicant. The proposal also sought to consolidate the three separate

Schedule A appointing authorities into one authority.

We received written comments from 17 agencies, 12 public service organizations, 7 Federal employees, and 35 individuals. In addition, we held a teleconference, at the request of the Office of Management and Budget, on February 15, 2005, with 16 agencies to discuss specific operational issues agencies had regarding the proposal. While many of these comments generally supported the proposed changes, 9 agencies, 1 public service organization, and 5 individuals expressed serious concerns over the broadened certification and determination of disability procedures and the potential liability agencies may incur as a result of these changes. After reviewing the comments, we are especially concerned that agency personnel lack the expertise to make medical disability determinations. This may result in inconsistent determinations across and within agencies and unanticipated inequities to disabled individuals; people who are not disabled could be appointed at the expense of those for whom these authorities were intended. After careful consideration of these comments, we determined that some of the proposed changes would result in unforeseen burdens and difficulties being imposed on hiring agencies as well as disabled individuals and have modified the final regulation accordingly.

The final regulation modernizes the appointment processes for people with disabilities in several significant ways:

We are consolidating the three separate Schedule A appointing authorities, 5 CFR 213.3102(t) (mental retardation), 213.3102(u) (severe physical disabilities), and 213.3102(gg) (psychiatric disabilities) into one appointing authority, 5 CFR 213.3102(u).

We are expanding agency acceptance of proof of disability and an applicant's job readiness certification to include broader types of certifying entities. Agencies may accept proof and certification from a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (i.e., State or private); or any Federal agency, State agency, or agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

We are clarifying the employment options for appointments

under this authority. In cases where an applicant does not have certification of job readiness, an agency may appoint the individual to a temporary appointment to determine the applicant's readiness for continued employment.

We are clarifying that agencies may also make temporary (for positions not expected to last more than 1 year), time-limited and permanent appointments under this authority.

We are clarifying the distinction between proof of disability and certification of job readiness (i.e., the applicant is likely to succeed in performing the duties of the position for which he or she is applying). This will help agencies make proper appointments and lessen confusion expressed by commenters.

#### Comments

In addition to the concerns noted in the previous paragraphs, OPM received comments on other aspects of the proposed regulation. We categorized the comments by the following areas: Consolidation of appointing authorities, proof of disability, certification of job readiness, employment options, noncompetitive conversion, and miscellaneous comments.

#### Consolidation of Appointing Authorities

OPM received comments from 14 agencies, 2 organizations, and 3 individuals regarding the consolidation of the three appointing authorities into one. Most of these comments favored streamlining these appointing authorities. One agency commented that the consolidation will cause an additional workload to agencies; another agency asked OPM to provide guidance on converting individuals currently serving on the Sec. 213.3102(t) and (gg) appointments to the Sec. 213.3102(u) authority. We are unclear

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how combining the authorities will increase agency workload. We are providing additional guidance on executing the final regulation in the

“Implementation” section of this final regulation's Supplemental Information and will update the Guide to Processing Personnel Actions accordingly.

Another agency asked whether OPM considered separating the Sec. 213.3102(gg) authority for appointing persons with psychiatric disabilities from the other two because such disabilities are hidden and difficult to detect. We are not sure how discerning a disability relates to the type of appointing authority under which an agency will appoint an individual. However, we believe streamlining the three separate authorities under one appointing authority will prove to be less confusing procedurally for the hiring agencies as well as help in reducing the number of appointing authorities that currently exist.

One agency stated the consolidation of authorities could negatively impact individuals currently appointed under three separate authorities during a reduction in force (RIF). We understand the agency's concern; however, depending on the actual circumstances of the restructuring, consolidation could have either a positive or negative impact compared with the current appointing authorities' impact. Agencies have discretion in determining which positions to abolish, as well as discretion to provide competing excepted service employees with certain assignment rights. (See 5 CFR part 351 for details.)

One individual opposed the consolidation on the grounds that it will impact prior discrimination claims brought against agencies and therefore may have a negative economic impact on these agencies. We believe that consolidation will have no impact on previous discrimination claims. The basis for these claims will not be affected by the combining of three authorities into one.

#### Proof of Disability

Proof of disability is required for appointments of persons with mental retardation, severe physical disabilities, or psychiatric disabilities. Previously, past guidance limited proof of disability to State Vocational Rehabilitation Agencies or the Department of Veterans Affairs (VA); agencies did not have the discretion to make determinations without the certification. It was also unclear what “certification” referred to in the language of the appointing

authority. The final regulation allows agencies to accept as proof of disability documentation from a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (i.e., State or private); or any Federal agency, State agency, or agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

One agency and one individual asked what level of agency authority is responsible for making determinations of the disability and of the likelihood that applicants are likely to succeed in performing the duties of the position. In the final regulation, we decided against providing agencies the option of making these determinations based upon comments we received--in sum, that agency personnel lack the expertise necessary to make medical disability determinations.

One individual asked whether a disabled person could submit the same documentation or certification more than once when applying for a position under this authority. We are not imposing any requirements concerning the recency of the documentation (provided the information is accurate) or any limitations on the number of times an applicant may submit such documentation.

Another individual stated that requiring certification by applicants already employed on a permanent Schedule A excepted service appointment is repetitive, burdensome and discriminatory. The final regulation does not require certification of current Schedule A employees. To clarify this, we will address it further in the "Implementation" section of this preamble.

An agency and a public service organization commented that the requirement that applicants with life-long or well-established disabilities submit documentation places a burden on these individuals because their documentation may not be available. We agree in part that this requirement may result in a burden on some individuals. However, agencies must ensure that individuals seeking appointment under this authority meet the intent of Executive Orders 12125 and 13124. In addition, by expanding the certification resources, we believe agencies will hire more individuals which will lead to expanded job opportunities for persons with disabilities.



## Certification of Job Readiness

A public service organization asked that we clarify the processes for documenting an applicant's disability and his/her ability to perform the duties of the position. As stated in a previous paragraph, the previous guidance was confusing in regards to both certifications. The final regulation makes a distinction between (1) proof of an applicant's disability, and (2) certification of the applicant's job readiness. As noted in a previous paragraph, proof of disability is required for all appointments of persons with mental retardation, severe physical disabilities, or psychiatric disabilities. The final regulation allows agencies to accept as proof of disability documentation from a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or U.S. territory, to practice medicine), a licensed vocational rehabilitation specialist (i.e., State or private); or any Federal agency, State agency, or agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

Certification of job readiness is a determination that a disabled applicant is likely to succeed in the performance of the duties of the position he or she is seeking. Certification of job readiness is required for appointments of persons with mental retardation, severe physical disabilities, or psychiatric disabilities. The same entities listed in a previous paragraph that may provide proof of disability may also certify an individual's job readiness. In addition, agencies may give individuals a temporary appointment in order to determine the applicant's job readiness, in lieu of job readiness certification. Agencies may convert individuals serving on a temporary appointment under Sec. 213.3102(u) to a time-limited or permanent appointment under Sec. 213.3102(u) at any time during the temporary appointment.

Operational aspects of documentation will remain with the agencies. We believe it is the agencies' responsibility to ensure procedures are followed and that proper appointing authorities are used.

One organization suggested modifying Sec. 213.3102(u)(ii), consistent with sections 501 and 504 of the Rehabilitation Act, to state that certification of whether an individual is likely to succeed

in the performance of a job is made "with or without reasonable accommodation." We are not adopting this suggestion because agencies already are required to make reasonable accommodation determinations for the work environment.

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Two agencies recommended that OPM allow instructors, teachers, professors and other education professionals to certify an individual's ability to perform the duties of the job. We are not adopting this suggestion on the basis that individuals in these professions may not be specifically trained or licensed to make employability determinations.

One individual suggested that Federal agencies should require certification from a State Vocational Rehabilitation Agency (SVRA). We disagree; entities other than SVRAs (e.g., VA, private Vocational Rehabilitation Agencies, etc.) provide certifications of job readiness. In addition, in many cases SVRA certification is time-consuming and places an unnecessary burden on individuals seeking Federal employment.

Three agencies and a public service organization commented that agencies may lack the expertise to determine whether applicants are likely to successfully perform the duties of a particular position. An agency asked what the impact would be if an agency did not agree with another agency's certification of job readiness. As stated in a previous paragraph, we decided against giving agencies the discretion to interpret an individual's certification of job readiness, which may result in inconsistent determinations across and within agencies and unanticipated inequities to disabled individuals. As noted in a previous paragraph, agencies have the discretion to decide from which entities they will accept certification of job readiness.

Another agency recommends the final regulation expands on the criteria that agencies should use to predict probable job success. We believe that the hiring agency, rather than OPM, is in the best position to determine job success for the position it wants to fill.

Employment Options

One agency asked that OPM clarify the temporary and other employment options. We agree clarification is needed. Under the new Sec. 213.3102(u) authority, an agency may make:

--A temporary appointment for an individual who has proof of disability but lacks certification for job readiness. Using some type of temporary appointment in lieu of certification of job readiness has long been available to agencies. We are continuing this practice but clarifying it in the context of the revised appointing authority. The individual may work under the Sec. 213.3102(u) appointment until the agency determines that the individual is able to perform the duties of the position, or the individual gains the certification from one of the entities listed in the appointing authority. Once certification is obtained, the agency may then appoint the individual to a time-limited or permanent appointment under the Sec. 213.3102(u) authority. If the individual does not gain certification during the appointing authority timeframe, or does not demonstrate satisfactorily his or her ability to perform the duties of the job, the agency must separate the employee. (See 5 CFR 213.104 for the definition and restrictions on temporary appointments in the excepted service.)

--A temporary appointment of an individual who provides proof of a disability and certification for job readiness, when the duties of the position do not require it to be filled on a permanent basis.

--A time-limited appointment of an individual who provides proof of disability and certification for job readiness, when the duties of the position do not require it to be filled on a permanent basis. (See 5 CFR 213.104 for the definition of time-limited.)

--A permanent appointment of an individual who provides proof of disability and certification for job readiness. However, agencies are cautioned that the intent of Executive Orders 12125 and 13124 concerning employment of persons with mental retardation, severe physical disabilities, and psychiatric disabilities is to permit these individuals to obtain "civil service competitive status." Civil service competitive status is obtained through conversion to the competitive service rather than remaining in the excepted service.

The noncompetitive conversion of individuals occurs after the

individual serves at least 2 years under a time-limited or permanent appointment under the revised Sec. 213.3102(u) authority. Time served in a temporary appointment under Sec. 213.3102(u) described in a previous paragraph is creditable toward the 2 years required for conversion. Time served in a temporary appointment in the competitive or excepted service prior to an appointment under Sec. 213.3102(u) is also creditable, as long as the position is in the same line of work as the position filled by the time-limited or permanent Sec. 213.3102(u) appointment.

One agency commented that the process requiring certification of a disability for a temporary appointment is overly bureaucratic and presents a barrier to employment of disabled individuals. We disagree with this comment; agencies need proof that an applicant indeed has a disability in order to ensure the individual is eligible for appointment.

An agency asked whether these regulations impose a limitation on the number of times a person can be employed under a temporary appointment. The reference to time limitations on temporary appointments is found in Sec. 213.104; this final regulation makes no change to that section.

An agency commented that the proposed regulation created an extra step to hire individuals with disabilities on a temporary appointment if they have already demonstrated the ability to perform the job duties in a satisfactory manner. The agency suggested individuals with disabilities should be hired on a permanent basis through which the 1st year of service could serve as the trial period. OPM does not agree and is retaining the temporary employment option for those instances when an agency needs to determine an individual's job readiness.

An agency suggested that the regulation include a statement that applicants may be appointed to temporary appointments under this authority with noncompetitive conversion to a permanent excepted service appointment without further certification of job readiness. OPM agrees and revised the new, consolidated authority to clarify this point.

An individual asked whether a temporary appointment is required for employees already in the Federal workforce who are seeking permanent employment under this authority. The temporary employment option is not

intended for individuals already in the Federal workforce who have already demonstrated their ability to perform the duties of a particular job.

#### Noncompetitive Conversion

Two individuals commented that the 2-year requirement for noncompetitive conversion to the competitive service is excessive. One individual suggested we shorten this time period to 1 year. Executive Orders 12125 and 13124 make it very clear that the 2 years is required for conversion to the competitive service.

An agency suggested that conversion to a career-conditional appointment should be a mandatory condition of this hiring authority. OPM disagrees on the grounds that conversion to a career or

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career-conditional appointment is not an employee right. Agencies maintain the discretion to determine whether an employee is ready for placement in the permanent career workforce. However, as noted in a previous paragraph, we caution agencies about the intent of Executive Orders 12125 and 13124 with regard to conversion of these individuals to the competitive service.

One agency suggested that OPM specify in the final regulation that conversions to the competitive service can be made after the individual completes 2 or more years of satisfactory service under either a permanent or temporary appointment under this authority. We disagree. It is longstanding practice for appointing authorities that contain conversion provisions, both in the excepted and competitive services, to require individuals to serve on nontemporary appointments before conversion. We see no reason to change this policy. However, we are adding clarification in section 213.3102(u) concerning the applicable appointments (time-limited or permanent) required for conversion.

#### Miscellaneous Comments

An agency and a public service organization commented that the term

“mental retardation” is outdated and recommended we replace it with “persons with a cognitive disability” or “developmental disability.” OPM recognizes the term “mental retardation” is considered outdated, but the term is used in the authorizing Executive Order 12125, dated March 15, 1979. We are reluctant to change a term used in the Executive order.

An individual suggested that OPM change the term “disabilities” to “medical conditions.” OPM is not adopting this suggestion because “medical conditions” is a broader term that is undefined and general.

Two agencies suggested that OPM establish disability program points of contact (POCs) to provide technical guidance to agencies and to update contact information on the OPM Web site. OPM agrees and intends to establish one or more POCs within our Human Capital Leadership and Merit System Accountability Division.

Five agencies and one individual requested clarification and definition with respect to the following terms: “certain conditions;” “severe physical disabilities;” and “certification.” OPM does not use the phrase “certain conditions” in the final regulation. We used it in the supplementary portion of the proposed regulation to generally mean instances in which a hiring agency could make determinations of medical disabilities or employability. We are not defining “severe physical disabilities” on the basis that doing so may limit flexibility and because such a definition or finite list may exclude future conditions from consideration under this authority. We agree the term “certification” needs clarification. For the purposes of this regulation, we made a distinction between a determination of disability and a certification that a disabled applicant can perform the duties of the position.

Three public service organizations and five individuals asked whether individuals with specific conditions such as hearing impairments, kidney disease, epilepsy, learning disabilities, or cognitive deficits, or survivors of traumatic and/or acquired brain injuries would be included under this regulation. In addition, a public service organization commented that the regulation will allow OPM the opportunity to clarify the full coverage of individuals with disabilities. As stated in a previous paragraph, we are not providing a list of qualifying conditions for inclusion under this subpart.