

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

**INFORMATION MEMORANDUM
RSA-IM-07-06
DATE: July 2, 2007**

ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
STATE REHABILITATION COUNCILS
REGIONAL REHABILITATION CONTINUING EDUCATION PROGRAMS
AMERICAN INDIAN VOCATIONAL REHABILITATION PROGRAMS
CLIENT ASSISTANCE PROGRAMS
PROJECTS WITH INDUSTRY
CONSUMER ADVOCACY ORGANIZATIONS

SUBJECT: New Office of Personnel Management (OPM) Regulation:
Excepted Service - Appointment of Persons with Disabilities and Career and Career-Conditional Employment Regulation

BACKGROUND: 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 final regulation changes the procedures that govern the employment of persons with mental retardation, severe physical disabilities, and psychiatric disabilities. The new procedures improve the federal government’s ability to hire persons with these disabilities and are designed to remove barriers and increase employment opportunities for persons with disabilities.

DISCUSSION: The Office of Personnel Management (OPM) issued the final regulation on July 26, 2006 regarding the excepted service appointments of persons with mental retardation, severe physical disabilities, and psychiatric disabilities. The regulation supports the President’s New Freedom Initiative and is designed to remove barriers and increase employment opportunities for persons 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.
- Employment, including temporary employment, options have been clarified.

A copy of the final regulation concerning the excepted service appointments of people with disabilities is attached. Also attached is the “Questions and Answers” fact sheet that OPM issued to provide additional guidance. 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 persons with disabilities.

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

Attachments

1. Regulation
2. Questions and Answers

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]

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Rules and Regulations

Federal Register

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.

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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.

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.

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.

Further, there is no intent to specifically include or exclude any one particular type of disability.

Four agencies and two individuals commented that the regulation should address disabled employees currently in the Federal workforce who are looking for upward mobility and career progression. Because the appointing authority is aimed at initial entry to Federal employment, we are not adopting this suggestion.

Two individuals commented that this regulation should offer a hiring priority and/or other incentives to attract individuals with disabilities to the Federal Government. We are not adopting this suggestion because hiring priorities are established by statute or Executive order.

One agency asked whether OPM will require agencies to submit annual reports describing their use of this authority. There is no such requirement in the final regulation, however, OPM captures the statistical data on the use of the Schedule A appointing authorities in the Central Personnel Data File. This will continue with the implementation of the new regulation. OPM monitors, on an ad hoc basis, the use of all Federal Government-wide appointing authorities, including the Schedule A authorities for the employment of individuals with disabilities.

One individual commented that the regulation does not hold Federal agencies accountable for using this authority nor does it encourage them to employ persons with disabilities. By law, agencies have broad discretion in terms of how they fill their positions. The decision to hire, and under what authority they do so, rests with the agency. In addition, the Code of Federal Regulations is not the proper document to include anything that is not regulatory in nature. We do believe the modernized certification flexibilities provide encouragement for agencies to increase their use of this authority.

An agency suggested that OPM should ensure that the number of persons with disabilities in the Federal workforce increases. Agencies are responsible for making their hiring decisions, based upon their resources and human capital needs. OPM's role is to provide agencies with the flexibilities for doing so and encourage their use.

Implementation

Agencies must move those who are currently serving under 5 CFR 213.3102(t) and 213.3102(gg) authorities to the new authority, 5 CFR 213.3102(u), as soon as possible. Those individuals must serve under the same time limits as the appointment from which they are being moved. They are eligible for noncompetitive conversion as long as the original appointment (from which they are converting) is not a temporary one. A current employee's service under 5 CFR 213.3102(u) and 213.3102(gg), regardless of whether the appointment is temporary or not, will count toward the 2-year period needed for noncompetitive conversion.

For those individuals who are currently serving under 5 CFR 213.3102(u), their appointments are unchanged.

Proof of disability and certification of job readiness are not required for individuals already serving in appointments under Sec. 213.3102(u). They are also not required of those who will move from Sec. Sec. 213.3102(t) and 213.3102(gg) to the revised Sec. 213.3102(u) authority.

We will update OPM's Guide to Personnel Data Standards and the Guide to Processing Personnel Actions to reflect the new changes. These Guides are available on OPM's Web site, <http://www.opm.gov>.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants and Federal employees.

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Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Parts 213 and 315

Government employees, Reporting and recordkeeping requirements.

Office of Personnel Management.

Linda M. Springer,
Director.

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Accordingly, OPM is amending 5 CFR part 213 as follows:

PART 213--EXCEPTED SERVICE

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1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218.

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 47 FR 22931, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 et seq.; Pub. L. 105-339, 112 Stat 3182-83; and E.O. 13162.

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2. Amend Sec. 213.3102 by removing and reserving paragraphs (t) and (gg), and by revising paragraph (u) to read as follows:

Sec. 213.3102 Entire executive civil service.

* * * * *

(u) Appointment of Persons with Mental Retardation, Severe Physical Disabilities, or Psychiatric Disabilities.

(1) Purpose. An agency may appoint, on a permanent, time-limited, or temporary basis, a person with mental retardation, a severe physical disability, or a psychiatric disability according to the provisions

described below.

(2) Proof of disability. (i) An agency must require proof of an applicant's mental retardation, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of an individual's mental retardation, severe physical disability, or psychiatric disability, appropriate documentation (e.g., records, statements, or other appropriate information) issued 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 an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(3) Certification of job readiness. (i) An agency may accept certification that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. Certification of job readiness may be provided by any entity specified in paragraph (u)(2)(ii) of this section.

(ii) In cases where certification has not been provided, the hiring agency may give the individual a temporary appointment under this authority to determine the individual's job readiness. The agency may also accept, at the agency's discretion, service under another type of temporary appointment in the competitive or excepted services as proof of job readiness.

(4) Permanent or time-limited employment options. (i) An agency may make a permanent or time-limited appointment based upon:

(A) Proof of disability; and

(B) A certification of job readiness, or demonstration of job readiness through a temporary appointment.

(5) Temporary employment options. An agency may make a temporary appointment based upon proof of disability specified in paragraph (u)(2) of this section when:

(i) It is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an

individual's job readiness, the hiring agency may convert the individual to a permanent appointment whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The individual has a certification of job readiness and the work is of a temporary nature.

(6) Noncompetitive conversion to the competitive service. (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service in a nontemporary appointment under this authority in accordance with the provisions of Executive Order 12125 as amended by Executive Order 13124 and Sec. 315.709 of this chapter.

(ii) An agency may credit time spent on a temporary appointment specified in paragraph (u)(5) of this section towards the 2-year requirement.

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PART 315--CAREER AND CAREER-CONDITIONAL EMPLOYMENT

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3. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577. 3 CFR, 1954-1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p. 111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964-1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(d). Sec. 315.611 also issued under Section 511, Pub. L. 106-117, 113 Stat. 1575-76. Sec. 315.708 also issued under E.O. 13318. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987, Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart B--The Career-Conditional Employment System

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4. In Sec. 315.201 revise paragraph (b)(1)(xii) to read as follows:

Sec. 315.201 Service requirement for career tenure.

* * * * *

(b) * * *

(1) * * *

(xii) The date of nontemporary appointment under Schedule A, Sec. 213.3102(u) of this chapter, of a person with mental retardation, a severe physical disability, or a psychiatric disability, provided the employee's appointment is converted to a career or career-conditional appointment under Sec. 315.709;

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Subpart G--Conversion to Career or Career-Conditional Employment
From Other Types of Employment

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5. Revise Sec. 315.709 to read as follows:

Sec. 315.709 Appointment for Persons With Disabilities.

(a) Coverage. An employee appointed under Sec. 213.3102(u) of this chapter may have his or her appointment converted to a career or career-conditional appointment when he or she:

(1) Completes 2 or more years of satisfactory service, without a break of more than 30 days, under a nontemporary appointment under Sec. 213.3102(u);

(2) Is recommended for such conversion by his or her supervisor;

(3) Meets all requirements and conditions governing career and career-conditional appointment except those requirements concerning competitive selection from a register and medical qualifications; and

(4) Is converted without a break in service of one workday.

(b) Tenure on conversion. An employee converted under paragraph (a) of this section becomes:

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(1) A career-conditional employee, except as provided in paragraph (b)(2) of this section; or

(2) A career employee if he or she has completed 3 years of substantially continuous service in a temporary appointment under Sec. 213.3102(u) of this chapter, or has otherwise completed the service requirement for career tenure, or is excepted from it by Sec. 315.201(c).

(c) Acquisition of competitive status. A person whose employment is converted to career or career-conditional employment under this section acquires a competitive status automatically on conversion.

[FR Doc. 06-6464 Filed 7-25-06; 8:45 am]

BILLING CODE 6325-39-P

Excepted Service-Appointment of Persons with Disabilities and Career and Career-Conditional Employment Regulation

Questions and Answers

The regulations guiding the Excepted Service --Appointment of Persons with Disabilities and Career and Career-Conditional Appointment are found in the Code of Federal Regulations (CFR). The citation is 5 CFR 213.3102(u). The questions and answers listed here are not meant to be a substitute for reading the regulations. We hope this information will be helpful to your agency's managers, Human Resources offices and Special Program Coordinators.

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Overview

Q. Where can the new regulation be found?

A. The Federal Register has posted the new regulation on the Federal Register Web site at <http://origin.www.gpoaccess.gov/fr/> and the Office of Personnel Management (OPM) has posted it on its website at www.opm.gov/fedregis and www.opm.gov/disability. OPM provided notification to Federal agencies through the Chief Human Capital Officer Council.

Q. What is the effective date of the new regulation?

A. The date the regulation goes into effect is 30 days after publication in the Federal Register.

Q. Why are the rules on employment of individuals with disabilities changing?

A. OPM is changing the procedures in support of the President's "New Freedom Initiative" introduced in 2001, which encourages Federal agencies to consider

employment opportunities for people with disabilities. The regulation improves the Federal Government's ability to hire persons with these disabilities. It is designed to remove possible barriers and increase employment opportunities for persons with disabilities.

Q. What are the new changes?

A. The regulation modernizes the appointment processes in several significant ways:

- The appointing authorities for persons with disabilities (excepted service) Schedule A appointing authorities 5 CFR 213.3102(t) (mental retardation), (u) (severe physical disabilities), and (gg) (psychiatric disabilities) are combined into one streamlined authority, 5 CFR 213.3102(u).
- Agencies may accept proof of disability and certification of job readiness from an expanded number of entities, i.e., 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.
- The distinction between proof of disability and certification of job readiness is clarified (i.e., documentation of mental retardation, severe physical disability or psychiatric disability vs. certification the applicant is likely to succeed in performing the duties of the position for which he or she is applying).
- The temporary employment options for appointments under the new authority, 5 CFR 213.3102(u), are clarified. Agencies may make temporary (for positions not expected to last more than 1 year), time-limited or permanent appointments under this authority.
- The employment options for appointments under this authority are clarified. 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

Q. Why is the term "mental retardation" used in the new regulation instead of cognitive disability, develop mental disability, or intellectual disability?

A. OPM used this term in the new regulation because it is the official terminology used in the authorizing Executive Order 12125, dated March 15, 1979.

Q. Why should agencies consider using this hiring authority?

A. Agencies should use this hiring authority for a number of good reasons:

- Individuals with disabilities are a source of excellent applicants.

- No public notice is required. This may shorten the time to hire a well qualified candidate
- It can support an agency's Career Patterns initiative. Technological advances and growing emphasis on telework may dovetail with the needs of many applicants with disabilities.
- Agencies don't have to clear surplus employee lists prior to using the appointing authority.

Application Procedures

Q. How does a person with mental retardation, severe physical disability or psychiatric disability apply for Federal jobs the new regulations?

A. Individuals with disabilities may be considered for excepted service positions under the 213.3102(u) appointment authority by reviewing vacancy announcements posted on www.usajobs.opm.gov and submitting resumes for positions that are of interest to the applicant, or they may contact agency Special Placement Coordinator(s) in the agency for which they wish to work. (Special Placement Coordinators are involved with the hiring, placement, and advancement of individuals with disabilities at their agency; a list of these coordinators can be found at http://apps.opm.gov/sppc_directory/). Because appointments under 5 CFR 213.3102(u) are excepted service appointments, agencies may accept resumes without posting job notices. Applicants should indicate "5 CFR 213.3102(u)" on their resumes for both application methods.

Q. In what other ways may a person with disabilities apply for Federal jobs?

A. OPM provides information about the application process at www.opm.gov/disability/appempl_3-11.asp. There are several other application options available to applicants with disabilities. For example:

- Competitive Appointments. Many applicants with disabilities find employment through standard competitive procedures in the same manner as individuals without disabilities. (www.usajobs.opm.gov)
- Student Employment Programs. This program helps Federal employers find the right people to fill current and future hiring needs. It also gives students the opportunity to get hands-on experience. This program has two major components – the Student Temporary Employment Program (STEP) and the Student Career Experience Program (SCEP). (www.usajobs.opm.gov/students.asp)
- Federal Career Intern Program. This program is designed to help agencies recruit and attract exceptional individuals into a variety of occupations. It was created under [Executive Order 13162](#), and is intended for positions at grade levels GS-5, 7, and 9. In general, individuals are appointed to a 2-year internship. Upon successful completion of the internships, the interns may

be eligible for permanent placement within an agency.

(www.opm.gov/careerintern/)

- Veterans Appointments. There are a number of authorities available to assist veterans who are seeking, or wish to change, Federal employment including, Veterans Recruitment Appointment (VRA), 30% or More Disabled Veterans Program, and Veterans Employment Opportunity Act (VEOA) appointments. See OPM's VetGuide at <http://www.opm.gov/veterans/vetguide.pdf>

Proof of Disability/Certification of Job Readiness

Q. What is proof of disability documentation?

A. The following is a list of some examples of documents agencies may accept as proof of mental retardation, a severe physical disability or a psychiatric disability. Ultimately, it is the agency's choice what type(s) of documentation will be acceptable:

- Statements or letters on a physician's/medical professional's letterhead stationary.
- Statements, records or letters from a Federal Government agency that issues or provides disability benefits.
- Statements, records or letters from a State Vocational Rehabilitation Agency counselor.
- Certification from a private Vocational Rehabilitation or other Counselor that issues or provides disability benefits.

As the regulation is implemented and used by agencies, this list may grow to include other types of certification. OPM will issue additional guidance to agencies on what constitutes "appropriate documentation" on an "as needed" basis.

Q. Must applicants with disabilities provide proof of his/her disability?

A. Yes, proof of the disability is required for appointments of persons with mental retardation, severe physical disabilities, or psychiatric disabilities. This 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 an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

Q. What is certification of job readiness?

A. The certification of job readiness is a determination that applicants with disabilities are 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 unless the hiring agency appoints the individual to a temporary appointment in lieu of the job readiness certification (see following Q & A). The same entities that may provide proof of disability may also certify an individual's job readiness.

Q. Who may certify disability and job readiness?

A. OPM expanded the types of entities from which an agency may accept proof of disability and certification of an applicant's job readiness. 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.

Q. Can a person with a disability submit the same documentation or certification more than once when applying for a position under this authority? Must the documentation be dated within a specific timeframe?

A. Provided the information is accurate, there are no OPM imposed limitations on the number of times an applicant may submit such documentation or requirements concerning the timeframe, which the documentation must be dated.

Eligibility Requirements

Q. What are the eligibility requirements for an applicant to be appointed under 5 CFR 213.3102(u)?

A. Applicants with disabilities must have mental retardation, a severe physical disability or a psychiatric disability; have proof of the disability; certification of job readiness (if not hired on a temporary appointment in lieu of the job readiness certification); and meet all required qualifications for the position.

Q. Do the new rules apply to all applicants with disabilities?

A. No, the new rules apply only to those individuals with mental retardation, severe physical disabilities, or psychiatric disabilities. (References: Executive Orders 12125 and 13124)

Q. Why do the changes apply only to those with mental retardation, severe physical disabilities, or psychiatric disabilities?

A. The Executive Orders authorizing these appointments are limited to people with mental retardation, severe physical disabilities, and psychiatric disabilities. Executive Order 12125 dated March 15, 1979, and Executive Order 13124 dated

June 4, 1999, permit individuals with mental retardation, severe physical disabilities, or psychiatric disabilities to obtain competitive status after two years of satisfactory service in an excepted service position. These Executive Orders were established to assist these individuals with disabilities and to build a Federal workforce that draws from the strength of America's diversity.

Q. Is there a comprehensive list of the specific disabilities that are included (or excluded) under the new rules?

A. This regulation covers individuals with mental retardation, severe physical disabilities, or psychiatric disabilities. The new rules do not specifically include or exclude any one particular type of disability under these three classes of disability. Different Federal programs use different operational definitions of disability, as do researchers, advocacy groups, and other interested parties. Variations occur because many groups define disability for different purposes. Determinations whether a specific disability is included or excluded under the new rules for the purposes of appointment under 5 CFR 213.3102(u) are made by the expanded entities previously identified in this document. Hiring agencies may also consult the Americans with Disabilities Act, the Rehabilitation Act of 1973, agencies such as the Department of Veterans Affairs, and State Vocational Rehabilitative Services offices for additional guidance regarding particular medical conditions.

Selection of Applicants with Disabilities

Q. How many times can an individual be appointed under this authority?

A. There is no limit on the number of times an individual may be appointed as long as he/she meets the regulatory requirements for appointment.

Q. Do the new rules create a hiring priority for individuals with disabilities?

A. No, the new regulation does not provide for priority in Federal hiring. The regulation applies to excepted service appointments.

Appointment Type

Q. What is the appointment authority for people with disabilities under this regulation?

A. People with disabilities are appointed under 5 CFR 213.3102(u).

Q. What is the Federal agency's process to convert employees currently under 5 CFR 213.3102(t) and 5 CFR 213.3102(gg) appointments to the new single authority, 5 CFR 213.3102(u) authority?

A. Agency Human Resources Offices will process Standard Form 50's, Notification of Personnel Actions, in accordance with OPM's Guide to Processing Personnel Actions. This Guide will be updated with the appropriate codes for use when converting current employees on the (t) or (gg) authorities to (u). OPM will issue official guidance concerning correct coding procedures.

Temporary Appointments

Q. May agencies appoint individuals to temporary appointments in lieu of a job readiness certification?

A. Yes, at agency discretion, an individual may be appointed to a temporary position under the 5 CFR 213.3102(u) authority in lieu of a job readiness certification. The hiring agency may then convert the individual to a time-limited or permanent appointment, again under 5 CFR 213.3102(u), at any time during the temporary appointment. (The beginning date of creditable service, for conversion to career/career conditional conversion purposes, is the effective date of the conversion to the excepted appointment). 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.

Q. What are the temporary appointment options under the new regulation?

A. Under the new 5 CFR 213.3102(u) appointing authority, a hiring agency may make:

- A temporary appointment for an individual who has the proof of disability but not the certification of job readiness. Using some type of temporary appointment in lieu of certification of job readiness has long been available to agencies. OPM is continuing this practice but clarifying it in the context of the revised appointing authority. The individual may work under the 5 CFR 213.3102(u) appointment until the agency determines that the individual is able to perform the duties of the position, or he/she gains the certification from one of the entities listed in this document. Once certification is obtained, the agency may then appoint the individual to a time-limited or permanent appointment under the 5 CFR 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. (Refer to 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 of job readiness, when the duties of the position do not require it to be filled on a permanent basis. (Refer to 5 CFR 213.104 for the definition of temporary appointment)

Non-temporary Appointments

Q. What are other appointment options under the new appointing authority?

A. Under the new 5 CFR 213.3102(u) appointing authority, a hiring agency may also, in addition to the temporary appointments identified in the question above, make:

- A time-limited appointment of an individual who provides proof of disability and certification of job readiness, when the duties of the position do not require it to be filled on a permanent basis. (Refer to 5 CFR 213.104 for the definition of time-limited appointment.)
- A permanent appointment of an individual who provides proof of disability and certification of job readiness. Note to hiring agencies: the intent of Executive Orders 12125 and 13124 is to permit these deserving individuals (upon meeting the requirements) to obtain civil service competitive status which is obtained through conversion to the competitive service rather than remaining in the excepted service.

Reduction-in-Force

Q. What is the impact of the consolidation of the three appointing authorities in a Reduction-in-Force (RIF)?

A. The final regulations establish a new 5 CFR appointing authority (5 CFR 213.3102(u)) that consolidates multiple excepted appointing authorities into one expanded excepted appointing authority. Impact will depend on the actual circumstances of the restructuring, and how an agency decides to effect the RIF. Agencies have discretion in determining which positions to abolish, as well as discretion to provide affected competing excepted service employees with certain assignment rights. Therefore, impact (positive, neutral, or negative) depends on the implementation of a RIF by the agency.

Safeguarding Confidential Information

Q. How will agencies safeguard confidential medical information?

A. There are no changes to the current procedures. Per OPM's Guide to Personnel Record keeping (<http://www.opm.gov/feddata/recguide.pdf>) the employing agency

must maintain any authoritative medical documentation, certificate of disability, statement of employability, etc., in a separate, confidential folder, rather than in the person's Official Personnel Folder (OPF). The information must be treated as confidential medical records with access limited only to those whose official duties require such access. OPM encourages agencies to develop written policies to further ensure that the confidentiality and security of private information is maintained.

Conversion - Temporary 5 CFR 213.3102(u) Appointment to Permanent 5 CFR 213.3102(u) Appointment

Q. Does an individual's work experience, while on a temporary appointment, count towards the 2 year time period required for noncompetitive conversion to career-conditional employment if that individual is subsequently converted to a non-temporary 5 CFR appointment?

A. Yes.

Conversion - Permanent 5 CFR 213.3102(u) Appointment to Career or Career-Conditional Appointment

Q. How can applicants with disabilities appointed under 5 CFR 213.3102(u) receive a career or career-conditional appointment under these regulations?

A. An agency may noncompetitively convert to a career or career-conditional appointment in the competitive service an employee who has completed 2 years of satisfactory service under this authority. Satisfactory service is service that begins with a non-temporary (e.g., permanent or indefinite) 5 CFR 213.3102(u) appointment. (Refer to 5 CFR 315.709)

Q. Is conversion to a career or career-conditional appointment mandatory after 2 years on a 5 CFR 213.3102(u) appointment?

A. No, conversion to a career or career-conditional appointment is not mandatory. The hiring agency maintains the discretion to determine whether an employee is ready for placement in the permanent career workforce. The agency is not required to convert an individual on the 5 CFR 213.3102(u) appointing authority; however, 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.

Q. Are individuals with disabilities eligible for noncompetitive conversion to a career or career-conditional appointment only in the agency where he or she worked prior to completion of the 2-year period?

A. No, individuals with disabilities are eligible to be noncompetitively converted in any Federal agency. Agency selective placement coordinators are urged to try and place disabled people with other agencies, if placement in their own agency is not possible. Checking the job listings on the OPM USAJOBS (www.usajobs.opm.gov) is one way to locate appropriate positions for these individuals.

Q. If an agency wants to hire a person with a disability converting from a 5 CFR 213.3102(u) appointment who worked, while on the appointment, with another agency, does the gaining agency have to clear the Reemployment Priorities List (RPL)?

A. Yes, if the individual is from a different agency. However, if the person is going from one location/activity/component to another location/activity/component in the same agency, the agency would not have to clear the RPL. For purposes of the RPL, all DOD agencies are considered the same agency. DOD agencies (e.g., Defense Logistics Agency, Defense Investigative Service) and the Departments of Army, Navy, and Air Force are all considered DoD.

Q. Are candidates subject to a new 2-year conversion period if they move from one position to another position?

A. No, in a case of a 5 CFR 213.3102(u) appointee transferring from one agency to another, time previously spent under a Schedule A appointment counts toward the completion of the 2-year period if the person is reappointed without a break in service.