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July 31, 2012

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, Northwest
Washington, D.C. 20210

Dear Secretary Solis:

We respectfully request information concerning the Office of Federal Contract Compliance Programs' (OFCCP) December 9, 2011 notice of proposed rulemaking (the proposed rule) on federal contractors' nondiscrimination and affirmative action requirements pertaining to individuals with disabilities under Section 503 of the Rehabilitation Act of 1973 (Section 503).¹ Specifically, we request information regarding the proposed rule as it relates to a recent Government Accountability Office (GAO) report.

On May 25, 2012, GAO released a report entitled "Further Action Needed to Oversee Efforts to Meet Federal Government Hiring Goals."² The report assessed the efforts of the Office of Personnel Management (OPM), the Department of Labor (the department), and other federal agencies in implementing Executive Order (EO) 13548.³ Among a number of provisions, EO 13548 requires agencies to set hiring goals for individuals with targeted disabilities. We are concerned because OFCCP issued the proposed rule—which would institute hiring goals and other requirements for federal contractors similar to EO 13548—despite the fact that GAO's report made clear federal agencies have failed to meet their hiring goals under EO 13548.

¹ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 76 Fed. Reg. 77056 (Dec. 9, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf>.

² Government Accountability Office, *Further Action Needed to Oversee Efforts to Meet Federal Government Hiring Goals*, GAO-12-568 (May 2012), available at <http://www.gao.gov/assets/600/591134.pdf> [hereinafter GAO Report].

³ Exec. Order No. 13548, 75 Fed. Reg. 45039 (July 26, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-07-30/pdf/2010-18988.pdf>.

The proposed rule would require contractors to meet an OFCCP-mandated hiring goal for individuals with disabilities of 7 percent for each job group at each establishment in a contractor's workforce, without regard for the demographics of the local workforce. OFCCP is also considering an additional sub-goal of 2 percent for individuals with targeted disabilities. To track hiring of individuals with disabilities, the proposed rule would require contractors to ask job applicants and current employees to voluntarily self-identify as having a disability using an OFCCP-prescribed form.

The proposed rule could place federal contractors in an impossible position—one even the department cannot meet. According to the Equal Employment Opportunity Commission's Annual Report on the Federal Work Force for Fiscal Year 2010, the department failed to meet the federal government's 2 percent goal for individuals with targeted disabilities, employing 1.1 percent.⁴ To underscore the difficulty of achieving a numerical benchmark in every job group in a workforce, some of the department's job groups (first level officials/managers and senior executive service employees) did not have any individuals with targeted disabilities.⁵

Despite data demonstrating the department and other federal agencies are failing to meet their hiring goals for individuals with disabilities, OFCCP proposed to mandate similar requirements for federal contractors. Moreover, OFCCP assumed in the proposed rule that self-reported disability data would provide a reliable estimate of the number of individuals with disabilities in a workforce, despite GAO findings to the contrary:

[N]early 2 years after the Executive Order 13548 on hiring individuals with disabilities was signed, the federal government is not on track to achieve its hiring goals.⁶

...

According to agency officials, accurately measuring the number of current and newly hired employees with disabilities is an ongoing challenge. While the accuracy of the [] data is unknown, agency officials and advocates for people with disabilities believe there is an undercount of employees with disabilities.⁷

...

Officials at all of the agencies GAO interviewed cited funding constraints as a potential obstacle to hiring more employees with disabilities. [Office of

⁴ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE PART II, WORK FORCE STATISTICS, FISCAL YEAR 2010, *available at* http://www.eeoc.gov/federal/reports/fsp2010_2/index.cfm.

⁵ *See id.* at "Department of Labor (DOL)," *available at* http://www.eeoc.gov/federal/reports/fsp2010_2/DOL.htm.

⁶ GAO Report, *supra* note 2, at 23.

⁷ *Id.* at 13.

Management and Budget (OMB)] officials also said that it was a challenge to identify individuals with the right skills and experience to fill their positions. For example, officials said that many of the candidates on OPM's list of Schedule A-certified individuals have entry level skills and not the more advanced skills and experience that are required for positions at OMB.⁸

...

To track and measure progress towards meeting hiring goals, [OPM] relies on employees to voluntarily disclose a disability. Yet, agency officials, including OPM's, are concerned about the quality of the data. Agency officials noted that people may not disclose their disability due to concerns about how the information may be used. OPM noted that under-reporting has historically occurred in both the federal government and private sector. Without quality data, agencies may be challenged to effectively implement and assess the impact of their disability hiring plans.⁹

Commenters on OFCCP's proposed rule expressed similar concerns about the accuracy, quality, and utility of data collected via the self-identification process. A number of groups representing individuals with disabilities expressed concern about the ability of individuals to understand and respond correctly to the proposed language in the prescribed self-identification form. Commenters on the proposed rule also noted responses to the self-identification invitation would be unverified, and as a result, unreliable.

In prior correspondence with the department, we expressed concern with OFCCP's legal authority under Section 503 to mandate a hiring goal, which would, in effect, institute a quota.¹⁰ Further, we expressed concern that requiring contractors to ask job applicants to self-identify as disabled violates the Americans with Disabilities Act (ADA), which prohibits employers from asking disability-related questions prior to an offer of employment.¹¹

Now, GAO's report makes clear contractors would also encounter substantial uncertainty concerning the accurate measurement of individuals with disabilities in their workforce. Thus, failing to meet a hiring goal could result in a de facto quota violation, asking a job applicant to self-identify as disabled could result in a violation of the ADA, *and* the data underlying a contractor's compliance with Section 503 could be inherently inaccurate.

⁸ *Id.* at 18.

⁹ *Id.* at "What GAO Found."

¹⁰ See Letter from the Honorable John Kline, Chairman, House Committee on Education and the Workforce, and the Honorable Phil Roe, Chairman, House Subcommittee on Health, Employment, Labor, and Pensions, to the Honorable Hilda L. Solis, Secretary, U.S. Dep't of Labor (Feb. 17, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0344>.

¹¹ See *id.* Indeed, we have called on OFCCP to withdraw the proposed rule's hiring goals and self-identification proposals. See *id.*

This type of regulation, which subjects economic decision-making to arbitrary governmental scrutiny, would only perpetuate the current economic environment of uncertainty, anemic growth, and high unemployment. It would further inhibit contractors from confidently making the long-term investment decisions that spur innovation and sustainable economic growth. As a result, it would be counter-productive to much-needed job creation and new hiring—not only for individuals with disabilities, but for all workers.

Please respond to the following inquiries **no later than August 14, 2012**.¹² Please also provide all documents and communications received by, or from, OFCCP, or any other agency within the department related to the GAO report and the inquiries below.

1. When did GAO interview, meet, or correspond with the department's staff, including OFCCP's, for the May 25, 2012, report? As part of your response, identify which departmental staff, including OFCCP's, GAO interviewed, met, or corresponded with.
2. Was OFCCP aware of the self-identification issues highlighted in GAO's report while it was preparing the December 9, 2011, proposed rule?
3. Was the department aware of the self-identification issues highlighted in GAO's report, or its own difficulties in meeting its EO 13548 hiring goals, while it was reviewing OFCCP's proposed rule prior to its submission to OMB?
4. Did the department or OFCCP examine the department's own difficulties in complying with EO 13548 before proposing similar requirements for federal contractors? Did the department or OFCCP assess other federal agencies' difficulties in complying with EO 13548? If so, explain how; if not, explain why.
5. Explain how OFCCP has examined, is examining, or intends to examine GAO's report, and the issues it raised as part of any ongoing consideration of the proposed rule.
6. We understand a number of parties interested in the proposed rule recently requested that OFCCP re-engage with stakeholders to work toward a true consensus on how the proposed rule could achieve the goals of Section 503, and OFCCP refused the request.¹³¹⁴ Please explain why OFCCP refused a good faith effort to re-engage with interested parties on this important issue. Also, in light of the issues raised in GAO's report, explain whether and how OFCCP will now re-engage with stakeholders on the proposed rule.

¹² If OFCCP is unable to provide the requested information by said date, please inform the committee in writing why the deadline cannot be met and the date by which OFCCP will provide the requested information.

¹³ See Kevin P. McGowan, *Business Groups Urge DOL Secretary Solis to Modify Approach to Rehab Act Proposal*, BloombergBNA, May 24, 2012.

¹⁴ See Tom Gilroy, *OFCCP Took Employer Concerns to Heart in Regulations on Workers With Disabilities*, BloombergBNA, June 7, 2012.

The Honorable Hilda L. Solis
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If you have questions, please contact Donald McIntosh or Molly Conway of the committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



PHIL ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, House Committee on
Education and the Workforce
The Honorable Robert Andrews, Senior Democratic Member, House Subcommittee on
Health, Employment, Labor, and Pensions