Transcript: What is Section 503 of the Rehabilitation Act? And How Can We Defend it?

Presented by: Claudia Center (she/her), Legal Director, Disability Rights Education and Defense Fund (DREDF), Jennifer Mathis (she/her), Deputy Director, Bazelon Center for Mental Health Law, and Taryn Mackenzie Williams (she/her), Former Assistant Secretary for Disability Employment Policy, US Department of Labor

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CLAUDIA CENTER: Welcome to our webinar. Our webinar today is called “What is Section 503 of the Rehabilitation Act and how can we defend it?”

I'm going to just pause for about 30 seconds, just to make sure everyone can join. And Ally has also shared the link to view captions separately, if that's an effective method for you.

Okay. Next slide.

Today's presenters are Jennifer Mathis, who is the Deputy Director at Bazelon Center for Mental Health Law and who has prior stints at the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice.

You have me today, Claudia Center, I'm the Legal Director with Disability Rights Education and Defense Fund.

And we're really hoping that we'll see Taryn Mackenzie Williams, have her join us, she's tentative, and she can be available for supporting us during the question and answer.

She's the former Assistant Secretary for Disability Employment Policy at the U.S. Department of Labor, which is a very important position for our topic today.

Next slide.

So I'm going to go through our agenda today. We're going to first talk about Section 503, kind of what it is and why we care about it, and we're going to talk about the 2013 Section 503 regulations, and Jennifer Mathis is going to be leading us through those slides.

Then we're going to talk about what the new rulemaking, the proposed rulemaking, from the Department of Labor says about the Section 503 regulations, and so it's the Department of Labor, but it's actually a subsection of that Department of Labor which is called OFCCP, and we'll tell you what all that is and so we're going to explain what the rulemaking says. We're going to talk about why it's important that the rules stay in place, and why the 2013 rules are important for equal employment opportunity.

And then we're going to so that will be Jennifer and me. Then we're going to talk about how to oppose the rescissions. We'll share with you some template comments that DREDF has written, which you can adapt for your own comment and we'll show you how to submit your comment on Regulations.gov. And I'll lead us through that discussion. Then we'll have questions and answers and that will be me and Jennifer and hopefully Taryn. It's possible we'll end before an hour and a half, but we'll just see how it goes.

So I'm going to say next slide, and turn it over to Jennifer.

JENNIFER MATHIS: Hi, thank you, Claudia, very happy to be here, and I am a white woman with short brown hair and glasses, and a blue jacket. So, Section 503 and the 2013 regulations is the title of this slide. 2013 was when the Federal Government, the Department of Labor, had updated its Section 503 implementing regulations for the first time in many, many years. Section 503 has been part of the Rehabilitation Act since the beginning, since 1973, and it applies to Federal contractors, and specifically to contractors with Federal contracts of a certain size, and we'll talk about this.

I just want to say at the outset that there are reasons why Section 503 is particularly important to people with disabilities. There are other disability discrimination laws that also apply to the same entities that Section 503 applies to. For example, Title I of the ADA applies to them as employers, but the importance of Section 503 is that it has affirmative action requirements that go beyond the nondiscrimination requirements of the ADA, 504, other disability discrimination laws, and Section 503 applies to a workforce, the Federal contractor workforce, that is very, very big and essentially counts for somewhere between 20 and 25% of the entire national workforce, so having Section 503's requirements applied to this very significant number of employees makes it a big deal.

So Section 503 in the statute applies, the statute, the law that Congress passed, applies to contractors with contracts of at least $10,000, OFCCP, the Office of Federal Contract Compliance Programs, they have the duty to adjust that threshold periodically under another law, so that's been adjusted to $15,000. If you have a contract of at least $15,000 with the Department of Labor, then you are covered – I'm sorry, with the Federal Government, you are covered under Section 503. As we will talk about in the regulations, the affirmative action program requirements of Section 503 have been applied to contractors with larger Federal contracts, so 50,000 or more and 50 or more employees but we'll get to that.

So Section 503 is enforced by the Department of Labor, by OFCCP. It's not enforced privately by individuals in court. It is enforced by the Department of Labor itself, through compliance reviews, audits. Through a Complaint process, people can file complaints with the Department of Labor, alleging discrimination under Section 503 or otherwise violations of its requirements, and OFCCP can act in a number of ways, including litigating when they need to do that, in an administrative process.

But mostly, they tend to work collaboratively with contractors to improve their affirmative action programs. If we can move to the next slide. Thank you.

So the goal of Section 503 is really Congress recognized that if the Federal Government is going to contract, to choose to contract, with a particular entity, then they can choose to do it in a way that they think is appropriate. It's not a privilege, I'm sorry, it's a privilege not a right to have a contract with the Federal Government, and so Congress said that if we're going to have entities contracting with the Federal Government, they need to take affirmative steps, take affirmative action, to employ in advance qualified people with disabilities in their workforces.

So that's sort of the idea behind Section 503 of the Rehab Act, and it also requires some data collection about who's applying for Federal contractor jobs and who is getting them, with the idea of measuring that progress toward the goals of affirmative action to employ and advance people with disabilities.

Next slide.

So as I mentioned, in 2013, the Federal Government updated its Section 503 regulations for the first time in many, many years. We got there because there was a recognition that the existing regulations from the 1970s had not been terribly effective in ensuring that contractors were making progress in complying with Section 503 and doing affirmative action, and part of that was that there was no benchmark, there was nothing for contractors to measure their progress against, and so there was a pretty long process, this was a long rulemaking, began with an advance Notice of Proposed Rulemaking in 2010 during the Obama administration, and the advanced Notice of Proposed Rulemaking asked a bunch of questions about what people thought that the Department of Labor should do to change the to update the Section 503 regulations. That was followed by a proposed rule.

There were a good number of comments, there were 400 comments on the proposed rule, not an extraordinary number of comments. There are rules that get a lot more but this being a rule that is enforced only by the Federal Government, I think 400 comments was a significant amount of comments. There was certainly a lot of attention paid in the disability community and in the contractor community, and a lot of those comments actually reflected large groups of organizations together in the disability community.

I remember there were comments that were filed with dozens of organizations signing on, so 400 may not quite reflect the magnitude of the comments that were filed. And then this slide notes that the Department of Labor focused on the for the reason for updating the Section 503 regulations how poorly people with disabilities were faring in labor force participation and this has been a historic trend that people with disabilities are underemployed and unemployed in large numbers and typically the labor force participation rate, I tend to use that as a little bit I think it's a better benchmark than the unemployment rate in that it takes into account people who have given up looking for a job but are not in the labor force, so the labor force participation rate for people with disabilities tends to be around a third of the labor force participation rate for people without disabilities, somewhere between a third and a half and it's hovered in that range for many, many years so underemployment of people with disabilities has been a persistent problem, and Section 503 in part is designed to address that problem.

We can move to the next slide.

So there were several things that the Department of Labor did in the 2013 regulations. But I'd like to focus first on the two most important things that it did, and one of those was for large Federal contractors, those contractors with 50 employees or more, and contract of at least $50,000, the OFCCP updated its affirmative action requirements and imposed a benchmark, sometimes called a utilization goal, of 7% for people with disabilities.

And what that means is for each job group that a contractor has, and there are a set of job groups that OFCCP has, they include officials and managers, they include professionals, they include technicians, they include salespeople, they include office and clerical workers, they include skilled craft workers, etc., that gives you an idea of what a job group is, so for each job group, the Regulation requires that it imposes an aspirational goal for a contractor to have 7% of the workforce in each job group be people with disabilities.

And for smaller Federal contractors, which are contractors with 100 or fewer employees, they only have to meet a 7% benchmark well, they don't have to meet it but the aspirational goal is for their entire workforce as a whole, not job group by job group.

But that is a very significant change in the rule, and that was critical to the rule, because for the first time it provided a benchmark against which progress could be measured, so when you're trying to understand if you are doing enough to meet affirmative action obligations, how do you know what is enough unless you have some sort of benchmark to measure yourself against?

And OFCCP was very clear in the rule that it is not a quota, the 7%. It is not a requirement that will put a contractor in violation of the law if the contractor isn't meeting it, but it is a benchmark, it is an aspirational goal, and it is a way to measure progress.

So the second thing that OFCCP did that was very significant in this Regulation was to include a new requirement that contractors invite applicants and invite employees, if they choose, to voluntarily self-identify as having a disability, and they have a form that people are supposed to get. The contractors use that, describes what it is to have a disability, and lists examples, and that form, that invitation to self-identify, is given to all applicants. It is separate from the job application. It can't be part of the application itself, and it is also given it is given pre-offer, before somebody gets a conditional job offer, and it is given post-offer after an applicant has been given a job offer. It's given to employees during their first year of employment and every 5 years after that, and the information from people who do choose to voluntarily self-identify as having a disability is kept in a separate file, not in people's personnel files, and so it's not used, it's not going to hiring managers. It is used for analysis of how much progress a contractor is making in meeting affirmative action goals.

Next slide.

So some of the other things that are in the 2013 Regulation are to go along with the benchmark, the 7% utilization goal, an analysis of how the contractor is doing, what kind of progress the employer is making. So what the contractor is supposed to do is every year, supposed to do a self analysis and look at whether they are meeting the 7% goal in each job group, or for smaller contractors, just across their workforce, and if they're not meeting the 7% goal, then they're supposed to identify: What are the barriers that are preventing us from meeting those goals? And what steps can we take to try to reach those goals and to make Equal Employment Opportunity available? And they can look at things like modifying their personnel processes, or doing more outreach and recruitment efforts and those are that together is the analysis that a contractor is supposed to do every year. So that gives you a sense of why the 7% goal is important, because there's something, that's the purpose of it, there's something for the contractor to measure against. If they're not meeting that goal, then they look at what the barriers are and how they can address them.

Next slide.

And I should say also that 7% was a fairly modest goal. There were the ADA Amendments Act had passed in intervening years, in 2008, and made clear that Congress meant that the definition of disability to be applied very broadly, and so given the percent of people with disabilities in the country, the numbers of people with disabilities in the country, 7% was a modest goal. It was based on census data, with a calculation to try to account for people who were discouraged from seeking employment in the workforce, and determined that 7% should be the goal. Notably we'll talk about this later but the EEOC has a parallel Regulation under Section 501 of the Rehab Act for Federal agency employers, and they imposed a significantly higher goal of 12%.

So 7% was certainly a modest goal. OFCCP is supposed to have the ability to adjust it over time, as needed. So this slide is about the elements of an affirmative action program. Elements of an affirmative action program have been in the Regulation for quite some time. The 2013 rule made some updates to it, but generally, an affirmative action program is supposed to include an equal opportunity statement that is from somebody high up in the company and the employer, evincing the commitment to affirmative action and expressing support for the affirmative action program explaining people's rights against retaliation from taking certain actions, filing a Complaint, etc. and explaining the nondiscrimination and affirmative action requirements, so that has been in the rules for a long time.

There is also a requirement that a contractor do periodic reviews of their personnel processes to avoid discrimination, avoid stereotypes, ensure accessibility. It talks about encouraging contractors to have accessible information communication technology, to provide reasonable accommodations, to avoid qualification standards that tend to screen people out based on disability, etc., so all that's supposed to be part of the affirmative action program, and then appropriate outreach and recruitment activities are supposed to be part of the program.

And the 2013 Regulations made some updates there, and they had a long list of suggested activities that contractors can do to do outreach and recruitment for getting folks with disabilities to apply for Federal contractor jobs, enlisting the help of Vocational Rehab, One Stops, American Job Centers, VA Regional Offices, employment networks, Independent Living Centers, etc.

And one of the things that was added in 2013 to the Regulation for affirmative action programs is having a data collection and analysis, so employers, contractors, are supposed to record the number of applicants they had total, the number of those applicants who had disabilities, at least who identified voluntarily as such, the number of job openings and jobs filled, and the total number of applicants that were hired and those who were hired who had disabilities.

And so that data collection enables an analysis, enables a look at sort of what kind of progress is being made overall. Are you taking a pool of applicants with high disabilities or taking a much smaller number, or vice versa so that's part of the affirmative action plan.

And then I think I have one more slide?

If we can, yes. So we have here a couple of quotes, one is a very old quote: When you can measure what you're speaking about and express it in numbers, you know something about it and then that was from Lord Kelvin in 1889 but then from Pat Shiu, who was the Director of OFCCP at the time that the Regulation was adopted in 2013 or updated: What gets measured gets done and that is to say that if we don't have a benchmark, we don't have a way to look at what is being done, and what progress there is, and contractors don't have any guide for what to do, if they don't know what they're aiming for.

So that is why OFCCP but in a measurement and put in some data collection requirements to ensure that there was a useful analysis that was done to look at progress being made.

Now I'm going to turn it back over to Claudia, to talk about the impact of the 503 Rule in 2013.

CLAUDIA CENTER: Thank you. Next slide. So we're going to talk a little bit about the impact of the 2013 Regulations that Jennifer just reviewed. Next slide.

One of the things that's a little tricky about contractor workforce data is that these are private companies, so their workforce data is not subject typically to any kind of Public Record Act requests or FOIA requests, so it's not transparent exactly what the workforce data is at this time. So we have to look at what researchers have found through their own surveys and through consultations with OFCCP about those compliance reviews that Jennifer mentioned before.

There are periodic compliance reviews that OFCCP does, but because there are so many contractors, estimated 200,000, those are only going to be a small percentage of Federal contractors, but what we do see is a very well designed survey by Cornell University, and some of you may know Cornell has an expertise in employment research, and so Cornell did a survey in 2017 of more than 200 Federal contractors, and they found that most of the contractors had changed their affirmative action goals in response to the Regulations, and that large majorities reported that they are using or planning to use their data, this data collection, as a way to measure their progress towards the 7% utilization goal, to assess their outreach and recruitment, to assess their progress in hiring, in retention and in advancement.

So we don't have clear outcomes yet about actual improvements in the percentage of people with disabilities in the workforce, but we do know that large majorities of contractors as of 2017, which was when those rules were very young in the history of the rules, had already made a lot of changes to their internal approach, so that was a positive.

At that time, the contractors surveyed only 15% said they had already reached the 7% goal, and we just don't know in the 8 years since then what the numbers look like. Next slide.

We do know from an NCD report, the NCD reached out to the OFCCP, the National Council on Disability, lots of acronyms, and looked at some of the data that OFCCP could provide.

We do know that between 2015 and 2020, contractors subject to the OFCCP reported over 10,000 hires of people with disabilities. Again, we think this is probably the small percentage of people who were interacting with OFCCP through a compliance review, or through another method.

We also know that over a little less than 2 years, the number of Federal contractors that reported to OFCCP that they had met the 7% increased substantially. We don't exactly know the denominator for these numbers, but we believe that it's probably related to those periodic compliance reviews.

So I'm going to turn it back to Jennifer. Next slide. Who's going to talk a little bit about the Federal Government experience, which is we believe an analogous example.

JENNIFER MATHIS: Thanks, Claudia, so as I mentioned before, the Equal Employment Opportunity Commission, or EEOC, has issued parallel Regulations under Section 501 of the Rehabilitation Act and like Section 503, Section 501 has an affirmative action requirement as well and so several years after DOL, the Department of Labor, issued its updated Section 503 rule, the EEOC issued its own Section 501 update to those rules. And they followed the approach of the Department of Labor in setting a benchmark so they set the benchmark for affirmative action obligations for Federal agencies and 501 applies to Federal agencies, Federal Executive branch agencies and it also requires affirmative action in employing and advancing people with disabilities, so they set the benchmark at 12% of the workforce for Federal agencies, and they also set what is sometimes called a subgoal, specifically for people with targeted disabilities, and that is a separate list which is primarily people with the types of disabilities where people have been historically excluded from the workforce in particularly large numbers people with intellectual disabilities, people who are Deaf, people who are blind or low vision and there's a list of targeted disabilities.

So in addition to setting a 12% benchmark for people with disabilities generally, EEOC set a separate 2% benchmark for people with that specific set of targeted disabilities, and what they found when they collected data within a couple of years, those benchmarks seemed to make a significant difference. There was a goal that was set by an Executive Order at the time of having the Federal Government hire 100,000 people with disabilities between 2011 and 2015. The Federal Government exceeded that goal, hired 143,600 people with disabilities, and during 2016 to 2018, shortly after the Regulation was promulgated in 2017, was issued, the Federal Government was meeting on average was meeting that goal of 12%, and by 2018, they were also on average meeting the 2% goal for people with targeted disabilities.

Not every agency was meeting those goals, but across the average of the Federal Government, those goals were met, showing that certainly compared to the 7% modest goal set by the Labor Department for Federal contractors, it was doable to hire people with disabilities at a rate that was sufficient that they would meet a 12% goal across the Federal Government.

And I'm going to turn it back over to Claudia.

CLAUDIA CENTER: Thank you. Next slide.

Okay, so now we're going to talk about the proposed rescissions to the Section 503 Regulations. Next slide. So this is probably unsurprising, but basically, all of the strengthenings of the Section 503 Regulations that Jennifer just reviewed are proposed to be deleted, so all references to the 7% goal or benchmark for the employment of people with disabilities is proposed to be deleted.

The agency proposes to delete all references to the invitation to self-identify as a person with a disability. It proposes to delete all references to the data collection related to people with disabilities, and it proposes to delete all references to the analysis of the data collected about people with disabilities that comparison to the 7% benchmark, and the idea of identifying problem areas and coming up with an action oriented response to try and address those problem areas.

So really, just deleting everything that we just talked about that was added in 2013.

There's also a long passage in the proposal that adds procedural Regulations for the Department of Labor to follow in Section 503 matters, including complaints, and the reason that exists there is because the DOL proposes to delete all of the existing procedures that cover all types of issues around race, sex, and disability, so they're deleting the existing procedures related to the Administration's Executive Order rescinding this is so confusing rescinding President Johnson's 1964era Executive Order 11246. So basically after the Civil Rights act of 1964, President Johnson issued an Executive Order directing certain steps, including for Federal contractors, to ensure Equal Employment Opportunity based on race and then based on sex and then the Regulations added disability.

Those Regulations are now proposed to be deleted, so because Section 503 is in the U.S. Code, the Department of Labor can't delete it, but they are moving the procedural Regulations essentially into a special Section just for 503.

Next slide.

Okay, so how to oppose the proposed this is a tonguetwister how to defend Section 503, and how to submit a comment that opposes the proposed rules that would rescind these important provisions? Next slide.

Okay, so first step is you have to know the deadline. The deadline is Tuesday, September 2, 2025, at 11:59 p.m. Eastern time, 8:59 p.m. Pacific time so you want to make sure you know the deadline, and make a plan for submitting your comment.

So that's really important, because they will – they shut off the portal right at that time. So you've got to make sure you build in time to submit your comment.

Second, you want to write your comment to the OFCCP about the Section 503 rules. The most important thing is for you to kind of tell OFCCP a little bit about yourself, or a little bit about your organization, or both, and to say why you care about the employment of people with disabilities, and why you care about affirmative action for people with disabilities in employment.

You want to say why OFCCP should not get rid of all of the rules about looking at the data and making a plan to reach the 7% goal. Ally's going to put in some links in the chat to some template letters that DREDF has written that you can download and edit to make your own.

There's one that is in sort of standard English, and then there's one that's in plainer English, plainer language. As usually happens, the plainer language ones always seems better to me once we have both versions and you can download these and edit them and make them your own.

By around tomorrow, we'll have all of these up on our website, along with the video for this Webinar but if you're feeling like you want to jump on this today, we are including the links in the chat. And again, the most important part is to tell OFCCP some details about yourself and your organization, and say why you care about the employment of people with disabilities by Federal contractors, and as Jennifer said, that's 25% of our workforce.

And you want to try and edit it as much as possible, because we hear that they're trying to look at comments and disregard comments that they think are template comments, so try and individualize it, if you can.

And next slide.

Okay, so now we're going to show you how the Regulations.gov portal works, so the third step of opposing these changes is to file your comment online.

So you're going to go to this link on Regulations.gov, and this link is called modifications to the Regulations implementing Section 503 of the Rehabilitation Act. If for some reason you lose access to our slides and you can't find the link, just go to Regulations.gov, and type 503 into the search bar and it will pop up.

So then you're going to want to select that blue comment button. It's a blue rectangle, it says "comment" in the image on this slide, it's on the left side about 2/3 of the way up. You'll click on that.

Next slide. So the next screen is going to start at the beginning to say: You are commenting on a rule by the Office of Federal Contract Compliance Program. So that's the long name for OFCCP. And so the first field just says "comment." It's a required field so you can write your comment right in that comment box if you want to. That might be the easiest to you.

To fit, your comment has to be less than 5,000 characters. Right now, our plainer language template is way below 5,000 characters. Our standard language comment template is not. But if you are able to stay within 5,000 characters, I'm pretty sure it includes spaces, you can write it right in that comment box.

Next slide.

You can also write your comments in a document like a Word document or a PDF file. And so if you do this, the document can be as long as you want. It can be longer than 5,000 characters. Then you have to attach the file with your comments. So the comment field, which you can see in this picture, the comment field has a star next to it, meaning it's a required field, so you have to write something in there, like "see attached file."

And then you're going to basically upload your comment file in the next field, which says "attach files."

Next slide.

So assuming you've so now you've either attached your file with your comments, or you've written your comments in that 5,000character field. And now you have to fill out the rest of the fields, so that includes your name, your email address, that's optional, whether you're an individual, organization, or anonymous.

So here we've shown it with the organization highlighted, as though the commenter has selected organization. If you're filing for an organization, there's a dropdown menu for your organization type. In this picture, we've selected "organization," which is kind of a funny pulldown for organization type, and then you type in the organization name.

Next slide.

So this slide shows what the portal looks like if you select "individual." And if you select "individual," you fill in your first and last name, and then optionally you fill in city, state, ZIP Code, country, and phone number. Those are optional. Next slide.

Then there's a reCAPTCHA that's required, where you click on the button to say you're not a robot, and then you click on the blue submit comment button.

Next slide.

So I know it can be a challenging time to be someone who cares about the rights of our communities, and we want to reinforce that we all still have rights under our statutes. The OFCCP cannot change the statutes enacted by Congress and by our State Legislatures. We can still watch out for and complain about disability discrimination by Federal contractors. We can still ask for accommodations at work. We can still file discrimination complaints with Federal agencies, with State agencies. We can still file cases in State or Federal courts.

We can still consult an attorney to assist us with any of these. Next slide.

We can make our voices heard. Jennifer talked about how in the 2013 comment cycle, there were 400 comments. I'm hoping that we exceed this by several factors, if possible. I looked this morning and there's already 144 comments submitted but I'd love us to have many more to show the Administration, including the Department of Labor, that the disability community is watching, and that we care about Equal Employment Opportunity for people with disabilities.

Next slide.

Okay, this is a slide that says "nothing about us without us," a photo by Disabled and Here, with a picture of a bearded Black man wearing glasses, overalls with a sign that says: Nothing about us without us, and of course that's an important principle of the Disability Rights movement and many other rights movements.

Next slide.

Okay, we're now at the question and answer period. We have plenty of time for questions and answers. We also have Taryn who's joined us who can type answers in the Q&A so I know I saw one in the chat so I'm going to read it out loud, and I will ask either Jennifer to answer it, because I don't know the answer, or for Taryn to type it in the chat and then I'll read it out loud. Here's the question: Several Federal agencies count hires under targeted and nontargeted in both categories, i.e., I am an individual with a targeted disability and I am a person with a disability. Therefore, I'm counted twice.

As to the goal of 100,000, the Federal Government counted not only new hires, i.e., the person who never worked in the government, they also counted the Federal employee who moved from one agency to another agency. Therefore it was not a true statistic. It was to be 100,000 new hires, not 100,000 mix of new hires and moving from the agency to agency. That statistic is very skewed.

Jennifer, do you know about that one?

JENNIFER MATHIS: Yeah, I would just say, there may be issues with how EEOC counts and how OFCCP counts but I think our point in highlighting what happened with the EEOC's parallel rule under Section 501 was really just to show that having a benchmark can make a difference and that it really seemed to make a significant difference under Section 501. There's more publicly available data under Section 501 than there is under Section 503, which is why in addition to looking at the little tiny bits of data that we could find about what happened with the 503 benchmark and what the impact of it was, we can also I think draw some inferences from what happened with the parallel benchmarks under Section 501, and that they made a difference and that's really our point.

So, yes, there may be I think some things that are imperfections and problems with how data is counted, generally, but that was really the point.

CLAUDIA CENTER: Thanks, Jennifer. Here's another question that's in our Q&A box .

How will a Federal agency obtain disability information without violating an employee's right to confidentiality and the right not to self-report? Even asking someone to selfidentify seems to put employees in a difficult position, and intimidation to answer if the question comes up in the application process.

Are the agencies going to mainly rely on accommodation requests to identify individuals with disabilities working for the agency?

So I don't know, Jennifer, if you want to – well, this is about Federal agency but I assume they also mean Federal contractor. Jennifer, if you want to start, and then

JENNIFER MATHIS: Yeah. So that's a great question. I saw it in the chat and I thought it was better to answer it just live, because it's an important question that's complicated, and contractors raised this issue with the original with the 503 rulemaking in 2013, and said: Hey, how can you require us to invite people to self-identify as having a disability when the ADA says, particularly before you've given anybody a conditional job offer, when the ADA says that you can't ask people anything that would elicit information about a disability, you can't ask people whether they have a disability before you've given them a conditional job offer.

And so aren't we violating the ADA if we do that? And at that time, the Labor Department put into the rulemaking an explanation of why it did not violate the ADA to do that, and they had actually an opinion letter from the EEOC explaining the EEOC's longstanding position over many years, which was in its Regulations and in its guidance, and it basically explained, it was from the EEOC's legal counsel at the time, Peggy Mastroianni had been there many, many years and explained number one the EEOC's Regulations have always provided that employers are not liable for a violation of the ADA, for an action that is required by another Federal law or another Federal Regulation, and in fact, the Regulations in their Appendix actually talked about Section 503, it talked about how of course if contractors were required by Section 503 to ask people, to invite people, to self-identify, that they would not be violating the ADA by doing that.

So there's specific discussion about that in the EEOC's Regulations and then also the EEOC had said, it is it's in our guidance that we interpret the ADA to not prohibit preemployment questions about disability if it's part of a voluntary affirmative action program, and then finally, the EEOC said that it has always been part of the EEOC Regulations that employers can comply with another law that affords people with disabilities equal or greater rights, and so if Section 503 affords people greater rights by having an affirmative action program then it wouldn't violate the ADA to have a contractor do what the Section 503 Regulation did.

So that is basically the explanation. Currently, the Department of Labor is saying: Well, we don't agree with that anymore, and that was just one person at the EEOC at that time. It was a long time ago, it was more than 10 years ago. I would just say, it wasn't just a random person. It was the EEOC's legal counsel who had been there for decades and basically played a leading role in every part of that agency, and was the EEOC's longstanding position in its Regulations, in its guidance, and there were multiple rationales, and so for the Department of Labor now to say, this was just some random person at some random time seems a little disingenuous.

CLAUDIA CENTER: This is Claudia, I'm just going to read some items in the chat. We will get to everyone's questions either in the Q&A or in the chat, but I'm going to focus on the ones right now that are about the disability inquiries. From one of our attendees writes, the NPRM says inviting disability disclosure violates the preemployment inquiry of the ADA. This doesn't seem right. Has there been any court decisions addressing this issue? I don't know, Jennifer, if you want to talk about the Contractors vs. Shiu or maybe Taryn wants to type about that.

JENNIFER MATHIS: Well, the Contractors vs. Shiu case was more about just the challenge to the benchmark, right? Because the Contractors Trade Association, ABC, I think Associated Builders and Contractors, argued that they challenged the 7% utilization goal saying that they didn't think that people with disabilities could do construction jobs, I'm sorry I shouldn't have said Contractors Trade Association, I meant to say Construction Contractors Trade Association. They said these jobs are particularly dangerous and difficult and so we don't think that it's fair to hold us to a benchmark for people with disabilities when we don't think they could do these jobs. There's a lot of evidence in that case that very similar jobs were done by people with disabilities in the Federal Government successfully and so the Court ended up rejecting that challenge but as to the question about preemployment inquiries, that is what we just talked about with EEOC making very clear in 2013 why inviting contractors, I'm sorry, inviting job applicants to voluntarily self-identify does not violate the ADA, and the EEOC was the agency charged with enforcing and implementing that part of the ADA, and they were very clear over many, many years that it would not violate the ADA to invite somebody to self-identify as part of voluntarily affirmative action program including Section 503.

CLAUDIA CENTER: And Jennifer, I should have done this before, but do you want to tell people what's a pre-offer inquiry and what's post-offer?

JENNIFER MATHIS: Yeah, so sorry, it's a little bit complicated but under the ADA, there's sort of a two-part process in job applications, designed so that there is confidentiality, there is privacy, that if you have a disability, the employer is during this pre-offer phase, before they give you a conditional job offer, saying you're hired, subject to X, Y, and Z, they cannot ask about a person's disability generally, and there are exceptions, including what we just talked about.

But generally during that process, they can't ask about disability before they give you a conditional job offer. They can ask you if you can do the essential functions of the job, but they can't say, "do you have a disability that would prevent you from doing that," but then after they give you a conditional job offer, then the employer can ask about disability. At that point they can't deny you a job based on your disability unless they can show that it means you can't do the job, it means you can't do the essential functions of the job, but having that process split up into two parts, enables people to then know if it was their disability that was the reason they didn't get the job.

And so that is what the pre-offer and post-offer phases are for Federal contractors. They still have to do that pre and post-offer thing, and give people a conditional job offer, but they are allowed, unlike most employers, if they're covered by Section 503, they are allowed to do that invitation to voluntarily self-identify.

CLAUDIA CENTER: And there are two other legal principles, this is Claudia that I might mention. There is the principle that inquiries about disability are permitted if they're jobrelated and consistent with business necessity, so that is one way that the employer could say well, we need to make she's inquiries due to our affirmative action plan, it's necessary, and it's voluntary, so you don't have to answer if you don't want to.

There's also a case that the AARP brought when the EEOC adopted wellness Regulations that the disability community hated, these were Regulations that allowed workplaces to offer wellness programs that included sort of big deductions or denial of deductions in your health care costs based on things like weight loss or blood pressure or did you do preventive health care, and so on. And so the Court, I think it was the D.C. District Court, ruled that the Regulations encompassed practices that weren't voluntary, because the monetary and other costs were so great to the employees.

So this is quite different from that, in that it really is just, you can either fill it out or you don't have to fill it out. There's no requirement to fill out the form. I mean, it's a little more complicated than that but I just wanted to cite those two legal principles.

There's another comment about the confidentiality question that says the Federal Government can require you to complete SF256 if you are hired under Schedule A, and so then there's a citation for Schedule A, or if you are hired competitively, yet are requesting a reasonable accommodation. All documents should be held only by the agency's EEO and HR departments so I think I'll let Jennifer or Taryn add but I think that's just saying that this is a common practice with the Federal Government.

JENNIFER MATHIS: Yeah, and right, there's an applicant flow form and there's a SF256 is where you self-identify as having a disability, for 501 purposes so it's very similar, the idea is that you and the Federal Government also have a voluntary affirmative action program so ADA doesn't apply to the Federal Government. Section 504 and 501 do, and you can ask pre-offer for purposes of voluntary affirmative action under Section 501.

CLAUDIA CENTER: Thanks. Okay, so there's another question about 503, which says under 503 Federal contractors, what monitoring, if any, is done to ensure that the contractor is not double dipping by counting a disabled Veteran in two categories, basically disabled Veteran and individual with a disability?

Then it says: Under the Schedule A hiring authority, the Regulation still mandates the person to be under a mandatory two-year probationary period. Sorry, I just lost my place. Whereas a 30% or greater disabled Veteran who may be hired for the exact same job series and grade as well as the same Federal agency can be converted after one full pay period. Seems like more than one question but I don't know the details of the Veterans affirmative action.

JENNIFER MATHIS: Yeah, and the Veterans affirmative action program is under VEVRAA, the Vietnam Era Veterans something and something Act, reauthorization Act, but I don't know whether contractors or employers can count somebody toward both goals, both the VEVRAA benchmark as well as the 503 benchmark, but I would just say they're kind of separate obligations so even if they did count the same person twice, they do have an obligation under this law and they have an obligation under that law, but regardless of that, people should comment on the 503 rules, and the proposed deletion.

CLAUDIA CENTER: And I'm going to read Taryn's additions to these. As far as I know there's no rule against counting a disabled Veteran in both categories, but – and Jennifer is nodding her head in agreement. Taryn also writes it's correct the Federal agencies commonly do collect all these data, and, yes, the probationary period is different for Schedule A and I think that means compared to the Veterans pathway, and has been subject to criticism because of the two-year period.

Okay, our next question is will the proposed amendments affect the availability of disparate impact disability discrimination theories?

JENNIFER MATHIS: That's an interesting question, disparate impact disability discrimination obviously depends on, or proving such a claim depends on having data about the numbers of people with disabilities that are affected by a policy, and the more data that there is about people with disabilities in the workforce, I think the more useful.

I think it's a hard question. I think in the abstract it may depend on what kind of disparate impact claim it would be, but generally I think it is easier, the more data that you have and certainly with less data, because there would be no more invitation for people to selfidentify, it is probably harder.

CLAUDIA CENTER: This is Claudia, I'll just add: So in the context of disparate impact claims for under ADA laws, there is not a requirement that disability statistics be provided. There's not a requirement that there be a statistical analysis such as you would have under Title VII for example, related to sex or race discrimination and there's a number of reasons for that. One of those reasons is that sometimes disparate impact discrimination happens and the causation can be proved in a more mechanical way than for when you're proving it with a more indirect causation so for example if the employment practices that everybody who drives a package van, and this is the UPS vs. Bates fact pattern, has to pass a hearing test, you don't have to have statistics about how many hard of hearing people or deaf people fail the hearing test because it's obviously sort of mechanically screening out people who are deaf and hard of hearing, so the causation can be really different in disability context, so you're not always providing disability data in disparate impact cases brought under disability rules, laws. But yes if you were doing an employment disparate impact case with a Federal contractor, it's certainly very useful to be able to, in discovery, request all of those forms. I mean, they have to be redacted, but all of those forms to see what you find out from that data.

So just wanted to add a little more nuance to that question. Let me just check and make sure that okay, nothing more from Taryn. Okay, we answered that live. Is any of the data OFCCP collected over the years available? And if so, where do we find it?

JENNIFER MATHIS: That's a good question, Ken.

[Laughter]

Most of it is not available. We have been working very hard to try to find whatever is available. I think there's some information available through secondhand sources so there is a National Council on Disability report that has a little bit of information in it that is useful. I don't know if we can send these links to people, maybe. There's a study that was done of the impact of Section 503 rules that has some information, and there's not a whole lot of other stuff that we found.

CLAUDIA CENTER: Yes, we can put links on our – when we post the video for this website, we can post the link. Some of the links are in the longer template letter but not all of them.

Yeah, it's not transparent, like, not that the Federal Government is completely transparent but that data is much more accessible for researchers.

And then Taryn writes: A great question. Most data are not available despite efforts from agencies and advocates to compel OFCCP to release it. Yes, very true.

And I know that the Cornell research, and there were two or three reports that came out of that research that was done kind of between 2017 and 2020, they were able to convince OFCCP to share some information with them, but it was quite limited.

Anything more to say to Ken's question?

JENNIFER MATHIS: I would just say: That is why we talked about the experience with Section 501 and the parallel benchmarks that are used in those rules, the impact that they had, because I think to some extent, given that there's much more information available about Section 501, one can infer some things from that, and so it's not like the Federal contractor workforce is exceedingly different from the Federal agency workforce. In fact, that construction contractor's case showed that they were not the same types of job exist in both workforces, so I think sometimes the best we can do is to extrapolate from something parallel, and we have to do some of that here.

CLAUDIA CENTER: And then the last question I think is: What is the most persuasive response to DOL's argument that the utilization goals especially for job groups no longer apply due to rescission of the earlier EO, I think that probably means the President Johnson era EO.

I'll start an answer: I think that the 2013 rulemaking made clear that they wanted the larger contractors with more than 100 employees, to analyze the 7% benchmark against job groups, because that's really the most effective way to understand whether you're making progress in hiring, retention and promotion, and to look at job groups. If you just look across your company, you could be missing a great deal of many gaps in employment.

Jennifer?

JENNIFER MATHIS: Yeah, and I mean, the fact that Section 11246, rather Executive Order 11246 was rescinded, you know, and therefore the job groups were rescinded, I mean, that doesn't impact Section 503 in the sense that Section 503's analysis could continue regardless. It's a statute, it's not an Executive Order. It can't be rescinded by the President. The rule can change but one could still do the job groups analysis with those job groups, those job groups were just made up by OFCCP, as I understand it.

CLAUDIA CENTER: There was one more request for a sigh case for the ABC vs. Shiu case, which I've put in the chat.

Can't remember if it's in the NPRM or not, but in any event, it's in the chat for people who want it.

Well, as promised, we did not take the full hour and a half, or as not promised but as suggested might happen. I really thank you for your attention and your good questions. I really hope that we have a robust showing in this comment period. I really do think that our participation even if it can feel challenging right now, I think our participation can matter. They know that we're watching, that we're participating, that we're opposing what they're doing. Please reach out to me, and I'll make sure that you get any resource you need to file comments or to share the comment opportunity with other people.

We should be posting this Webinar tomorrow, maybe Thursday morning, and we'll have up there all the templates and the other links that we talked about today.

So onward. We've got to stay together. Jennifer, any closing words from you?

JENNIFER MATHIS: Just submit comments.

It's important. Exercise your rights to be part of the rulemaking process.

CLAUDIA CENTER: If we all submit comments and get one other group to submit comments, we'll have way more comments, so thank you.

Oh, and Taryn writes: Please make your voices heard! It does matter. Thank you, Taryn.

All right, I think we're done.

Ally, you can shut us down.

[End of Transcript]