

# Compliance with the OFCCP's New Regulations Under VEVRAA and the Rehabilitation Act—What You Need to Be Doing NOW!

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# Presented by

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# PART II

## Noteworthy and New Rehabilitation Act (SECTION 503) Regulations

# New Scheduling Letter (published September 30, 2014)

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- Itemized Listing – Section 503

7. Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified individuals with disabilities (IWDs) as described in 41 CFR § 60-741.44(f)
8. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-741.44(h)
9. Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year
10. The utilization analysis evaluating the representation of IWDs in each job group, or, if appropriate, evaluating the representation of IWDs in the workforce as a whole, as provided in 41 CFR § 60-741.45. If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress

# Revised Regulations (effective March 24, 2014)

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- First significant changes since 1970's
- Prior regulations not sufficiently effective in improving employment opportunities for the disabled
  - Median disabled household income of \$25k vs \$59k (2011 data)
  - Mean disabled hourly wage = \$17.62 vs \$21.67
  - 28.8% of disabled were living under the poverty line vs. 12.5%
  - Unemployment rate:
    - Disabled males +7.2%
    - Disabled females +6.5%
- To conform with changes made to the 2008 amendments to ADA, “[t]he principles ... are intended to provide for generous coverage through a framework that is predictable, consistent and workable for all individuals and contractors ...” (60-741.2(z)(5))

# Applicability

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- The new Section 503 regulations apply to contracts of \$10k or more (60 – 741.1(a))

# Equal Opportunity Clause

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- New: “The contractor must, in all solicitations or advertisements for employees ... state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability.” (60-741.5(a)(7)) (No longer acceptable to use M/F/D/V; at a minimum must use “disability; see FAQ's at [http://www.dol.gov/ofccp/regs/compliance/faqs/503\\_faq.htm](http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm))
- Full Equal Opportunity Clause (1-7) need not be included verbatim in the contract. May substitute: **“This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.” (60 – 741.5(d))**



# Prohibitions

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- New: No “reverse discrimination” - that is, nothing in the regulations provides a “basis for a claim” that an individual without a disability was subject to discrimination because s/he lacked a disability (60 – 741.21(b))

# Affirmative Action Program

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- “An affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities ... [i]t institutionalizes the contractor’s commitment to equality ... and is more than a paperwork exercise... [it] is dynamic ... and includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor’s progress toward achieving equal employment opportunity for individuals with disabilities.” (emphasis added) (60-741.40(a))

# Equal Employment Opportunity is the Law Poster

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- Posting of Poster (New) –
  - Contractors must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable (60-741.5(a)(4)); see also (60-741.44(a))
  - For employees who work remotely, a contractor must post the notice in an electronic format, provided the contractor provides computers, or access to computers, or knows the employees are otherwise able to access the electronically posted notice (60-741.5(a)(4))
    - The notice must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees
  - If the contractor utilizes an electronic application process, an electronic posting must be used to notify job applicants of their rights (60-741.5(a)(4))

# Invitation to Self-Identify (New)

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- Pre-offer: On a form prescribed by the DOL, the contractor shall invite applicants to inform contractor whether the applicant believes s/he is an individual with a disability (60 – 741.42(a))
- Post-offer: After offer, but before beginning job duties, the contractor shall extend same invitation again (60-741.42(b))
- Employees: During the first year the contractor is subject to the regulations, the contractor shall invite each employee to “voluntarily” inform contractor; and, at 5 year intervals thereafter
  - At least once during the intervening years (1-5 years), the contractor must remind employees of their right to update their disability status (60 – 741.42 (c))
- All self-id information shall be kept confidential and maintained in a data analysis file (not medical files) (60 -741.42(e))

# Data Collection Analysis (New)

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- Contractors shall calculate, on an annual basis, the following data:
  - The number of self-identified, or otherwise known, disabled applicants
  - The number of job openings and number of jobs filled
  - The number of all applicants
  - The number of disabled applicants hired
  - The number of all applicants hired ( 60- 741.44(k)(1-5))
- This information shall be kept for 3 years (60 – 741.44(k))

# Reasonable Accommodations

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- If an employee with a known disability is having significant difficulty performing his/her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the disability. If employee responds affirmatively the contractor shall inquire whether the employee needs a reasonable accommodation (60 – 741.44(d)(1))
- The development and use of written procedures for processing requests for reasonable accommodation, while not mandated, is a “best practice” (60 – 741.44(d)(2))
- Electronic or online applications systems must be structured so that qualified individuals with a disability are provided equal opportunity to apply (60-741.21(a)(6)(iii))

# Accommodation Resources - askjan.org/empl/index.htm#pri

The screenshot shows the JAN (Job Accommodation Network) website interface. At the top left is the JAN logo with the tagline "Job Accommodation Network". To the right is a navigation menu with links for "ABOUT JAN", "FREQUENTLY ASKED QUESTIONS", "TRAINING", "HOT TOPICS", and "NEWS". Below this is a search bar with a "Search" button, a "JAN en Español" link, and a "Print this Page" option. A secondary navigation bar includes links for "For Employers", "For Individuals", "For Others", "ADA Library", "Accommodation Search", "A - Z of Disabilities", "Publications", and "Resources". The main content area is titled "JAN: For Employers" and lists several categories: "Private Businesses", "Federal Employers", "State and Local Government Employers", "Federal, State, and Local Resources", and "Other Resources". A photograph of five business professionals in a meeting is positioned to the right of these links. Below the "Private Businesses" link, there is a detailed paragraph about the services provided and a bulleted list of access methods: Telephone, E-Mail, Online Tools (including SOAR, JAN on Demand, and the ADA Practical Guide), and Publications (including Accommodation Ideas, Products and Services, and the ADA Library).

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## JAN: For Employers


**Private Businesses**

**Federal Employers**

**State and Local Government Employers**

**Federal, State, and Local Resources**

**Other Resources**



**Private Businesses**

JAN provides free consulting services for all employers, regardless of the size of an employer's workforce. Services include one-on-one consultation about all aspects of job accommodations, including the accommodation process, accommodation ideas, product vendors, referral to other resources, and ADA compliance assistance. Private businesses can access JAN services in a variety of ways:

- Telephone
- E-Mail
- Online Tools
  - SOAR (Searchable Online Accommodation Resource)
  - JAN on Demand
  - Employers' Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act (ADA)
- Publications
  - Accommodation Ideas
  - Products and Services
  - ADA Library


# External Dissemination of Policy, Outreach and Positive Recruitment

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- The contractor must send written notification of company policy on affirmative action to all subcontractors, requesting appropriate action on their part (60 – 741.44(f)(1)(ii))
- On an annual basis the contractor shall review and evaluate the effectiveness of the outreach and recruitment efforts taken over the past 12 months. The contractor shall document each evaluation, including the criteria used to evaluate the effectiveness of each effort and its conclusion as to whether each effort were effective (60 – 741.44(f)(3))
- All contractor efforts of external dissemination, outreach and positive recruitment shall be documented, and retain the documents for three years (60 – 741.44(f)(4))



# Outreach - [www.dol.gov/ofccp/regs/compliance/resources\\_recruit\\_disability.htm](http://www.dol.gov/ofccp/regs/compliance/resources_recruit_disability.htm)



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## Office of Federal Contract Compliance Programs (OFCCP)

### Resources for Federal Contractors Section 503 and VEVRAA

#### Recruitment and Hiring of Qualified Individuals with Disabilities

[American Job Center](#)

The American Job Center connects businesses to individuals seeking employment through local American Job Centers. As an employer you can post jobs in the Veterans Job Bank, the central source for identifying Veteran-committed employment opportunities and helping employers hire qualified Veterans, as well as connect with your local labor exchange and state job bank to reach jobseekers locally and around the country.

[Autistic Self Advocacy Network \(ASAN\)](#)

The ASAN provides consulting services to assist companies and agencies with including autistic individuals in diversity employment programs and providing workplace accommodations.

[Career Opportunities for Students with Disabilities \(COSD\)](#)

The COSD is a national professional association comprised of more than 600 colleges and universities and over 500 major national employers. Its Career Gateway program offers a nationwide online job posting and college students resume database system for students with disabilities. For employers committed to including disability as part of their diversity efforts, COSD Career Gateway is a vital pipeline to future members of the workforce.

[DisABLEDperson](#)

DisABLEDperson is a nonprofit public foundation that provides an online employment recruitment service for individuals and veterans with disabilities. They work closely with employers to make their job openings available to individuals with disabilities, and with disability rights organizations and State Vocational Rehabilitation agencies from across the country. Employers and individuals create an online account to post jobs and to search for current job openings.

[Disability.gov](#)

Disability.gov is the Federal Government Web site for comprehensive information about disability-related programs, services, policies, laws and regulations. The site links to thousands of resources for employers and jobseekers from many different federal government agencies, as well as state and local governments and nonprofit organizations across the country. The site has an "Employment" page with resources for recruiting and hiring individuals with disabilities, a link to State vocational rehabilitation agencies across the country, information on reasonable accommodation and job support, job boards connecting employers to jobseekers with disabilities, and other pertinent information.

★ Was this page helpful?

# National Disability Employment Awareness Month

- National Disability Employment Awareness Month (NDEAM) is a national campaign held each October - [www.dol.gov/odep/topics/ndeam/index-2014.htm](http://www.dol.gov/odep/topics/ndeam/index-2014.htm)
- Raises awareness about disability employment issues
- Celebrates the many and varied contributions of America's workers with disabilities



# Outreach - [www.dol.gov/odep/topics/ndeam/employers.htm](http://www.dol.gov/odep/topics/ndeam/employers.htm)



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Office of Disability Employment Policy

DOL Home > ODEP > All Topics > National Disability Employment Awareness Month (NDEAM) > Ideas for Employers and Employees

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## National Disability Employment Awareness Month

### Ideas for Employers and Employees

Activities conducted by individual employers and their employees are an important part of National Disability Employment Awareness Month (NDEAM). The ideas below are just a few ways they can participate.

- **Review policies** — NDEAM is an opportune time to review your company's policies to ensure they convey a commitment to an inclusive workplace culture. For assistance in doing so, read [Business Strategies that Work: A Framework for Disability Inclusion](#) (see in particular the first section, "Lead the Way: Inclusive Business Culture").
- **Establish an ERG** — NDEAM is a perfect time to launch a disability Employee Resource Group (ERG). Sometimes referred to as Employee Networks or Affinity Groups, ERGs offer employees an opportunity to connect and receive support from others with similar backgrounds or interests. For more information, see [A Toolkit for Establishing and Maintaining Successful Employee Resource Groups](#). If your company already has a disability ERG, consider using NDEAM to remind employees about it through displays, information tables or other communication channels.
- **Create a display** — NDEAM is a great time to freshen up bulletin boards in break areas or other locations that employees frequent by posting positive messages about your company's commitment to a disability inclusive workforce. Start by putting up this year's [NDEAM poster](#), which is available in both English and Spanish. Additional display materials include the "[What Can YOU Do?](#)" poster series.
- **Train supervisors** — Supervisors are the individuals closest to an organization's workforce. As part of NDEAM, consider conducting training to ensure they understand their role in fostering an inclusive workplace culture. Such training may include a review of relevant policies, including the process for providing reasonable accommodations. One easy way to provide such training is to make use of available "turn-key" [training modules](#) and available materials, such as the [Building an Inclusive Workforce](#) tabletop desk guide.
- **Educate employees** — It is critical that companies committed to disability inclusion effectively and regularly reinforce that commitment to employees. NDEAM offers an opportunity to do this through disability training or informal educational events such as brown-bag lunch discussions. Several ready-to-use resources can assist in facilitating such activities, such as [disability etiquette materials](#) and the "[I Can](#)" [public service announcement and accompanying workplace discussion guide](#). Another option is to contact local disability organizations to see if they offer workplace training programs.
- **Publish articles** — NDEAM offers timely and fresh content for an employee newsletter or internal website. Articles could address a range of topics, such as general information about the company's commitment to an inclusive workplace, the process for requesting reasonable accommodations, or perhaps recognizing the contributions of employees with disabilities — either in general or on an individual level. Alternatively, or in addition, your company's top executive could issue a message to all employees recognizing NDEAM.

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# Internal Dissemination of Policy

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- The contractor's policy to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities shall be included in the contractor's policy manual or otherwise be made available to employees (60 – 741.44(g)(2)(i))
- If unionized, contractors shall notify union of the policy and request their cooperation (60 – 741.44 (g)(2)(ii))

# Audit and Reporting System

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- The contractor shall design and implement an audit and reporting system that will:
  - Measure the effectiveness of the program
  - Indicate the need for remedial action
  - Determine the degree to which the objectives have been attained
  - Determine whether known disabled individuals have had the opportunity to participate in all company sponsored educational, training, recreational and social activities
  - Measure the contractor's compliance with the program's specific obligations
  - Document such obligations (60 -741.44(h)(1)(i-vi))
- Such reports shall be kept for 2 years (1 year if fewer than 150 employees or government contract of \$150k or less) (60 – 741.44(h)(1)(vi)) and 60 – 741.80)

# Responsibility for Implementation

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- An official of the contractor shall be responsible for implementation of the affirmative action activities and his/her identity shall appear on all internal/external communications regarding the program (60 – 741.44(i))

# Training

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- All personnel involved in recruiting, screening, selection, promotion, discipline, etc. shall be trained to ensure implementation of the program (60 – 741.44(j))

# Utilization Goals (New)

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- The OFCCP has established a utilization goal of 7% for employment of qualified individuals with disabilities within each job group. If 100 or less employees, option provided to use entire workforce (60 – 741.45 (d)(2)(i))
- Addressed as a “benchmark” or “objective,” not a quota
- If utilization is less than 7%, then contractor must take steps to determine whether and where impediments exist (“identification of problem areas”) (60 – 741.45(c)) and develop “action oriented programs” designed to correct problem areas (60 – 741.45(f))



# Availability of Affirmative Action Program

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- “The full affirmative action program, absent the data metrics ... shall be available to any employee or applicant ... for inspection upon request.” (emphasis added) (60 – 741.41)

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## OIG Warns Pharmaceutical Manufacturers of Improper Part D Beneficiary Coupon Use

## Whistleblowers Rewarded Again by SEC and the Judiciary

by Constance Wilkinson, Alan Arville, and Benjamin Zegarelli

By Stuart M. Gerson; Frank C. Morris, Jr.; and Meghan F. Chapman\*

September 10, 2014

October 2014

On August 29, 2014, two whistleblower developments of particular interest to health care and life science entities emerged from the Securities and Exchange Commission respectively. The SEC, through its 10 to a compliance professional who that led to an enforcement action to the first time that the agency has a compliance professional.

The July 2014 issue of *Take 5*, "Five Labor and Employment Issues Faced by Health Care Employers," was written by Michael F. McGahan, a Member of the Firm, and associates D. Martin Stanberry and Daniel J. Green.



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ACT NOW ADVISORY

## Massachusetts Now Requires Employers to Provide Domestic Violence Leave

September 18, 2014

By Barry A. Guryan and Kate B. Rhodes

On September 19, 2014, Inspector General ("OIG") safeguards to prevent IV coupons may not be comp 30 pharmaceutical comp and the pharmacy claims study found that these s written disclaimers and w pharmacy, and (2) while i manufacturers use inaccur

Simultaneously with the is stating that manufacture programs do not induce f drugs over generics.<sup>2</sup> The identified deficiencies in f

Massachusetts has enacted a law requiring employers with 50 or more employees to grant employees "domestic violence leave." The law, entitled "[An Act \[R\]elative to \[D\]omestic \[V\]iolence](#)," was approved by Governor Deval Patrick on August 8, 2014, and took effect immediately.

Under this new law, employers with 50 or more employees must provide employees with up to 15 days of paid or unpaid leave in any 12-month period if:

- the employee, or a family member of the employee, is a victim of "abusive behavior";
- the employee is not the perpetrator of the abusive behavior against the employee's abused family member; and
- the employee is using the leave from work to do any of the following:
  - seek or obtain medical attention, counseling, victim services, or legal assistance;

Planned Parenth a violation of the agedly fraudulent i complaints for all s area that alread rment contractor: ements to whistlet encies and courts i Acting As Whist i through regulati Protection Act. Th ent of the money

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immigration

CLIENT ALERT

## September 2014 Immigration Alert

[Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs](#)

[USCIS Expands H-1B Eligibility for Nurses](#)

[Obama Administration Warns ACA Sign-Ups to Provide Proof of Legal Status](#)

[California Supreme Court Expands Rights of Immigrants Working in that State](#)

[OSC Issues Technical Assistance Regarding Employer's Receipt of Excess Documentation During the Form I-9 Process](#)

[OSC Settles Immigration-Related Discrimination Claims Against Staffing Agency](#)

[Colorado Employers Must Use New Affirmation Form Starting October 1, 2014](#)

[Silicon Valley Man Receives 10-Month Sentence for H-1B Fraud](#)

[DOS Issues October 2014 Visa Bulletin](#)

### I. Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

On August 20, 2014, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Kutty v. U.S. Department of Labor*, No. 11-6120 (6th Cir. 2014) ("*Kutty*"). In *Kutty*, several foreign physicians sued the

standing for health employment in the month's *Take 5* employers in the

Approval of risk of Union

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# Q & A

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