December 3, 2013

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Chair, Subcommittee on Workforce Protections
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Washington DC 20515

Hon. Joe Courtney
Ranking Member, Subcommittee on Workforce Protections
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Hon. John Kline
Chair, Committee on Education and the Workforce
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Hon. George Miller
Senior Democratic Member, Committee on Education and the Workforce
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Representatives Walberg, Courtney, Kline and Miller:

The Consortium of Disabilities (CCD) Task Forces on Rights, Veterans and Military Families, and Employment and Training submit this written testimony for the December 4, 2013 subcommittee hearing, "Examining Recent Actions by the Office of Federal Contract Compliance Programs." CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We applaud the Department of Labor's efforts to ensure that the affirmative action requirements of Section 503 and VEVRAA include a utilization goal for employment of people with disabilities and a hiring benchmark for protected veterans by contractors receiving large federal contracts. Goals or benchmarks have long been needed to make implementation of Section 503's and VEVRAA's affirmative action requirements meaningful and to more closely align these requirements with federal contractors' affirmative action obligations relating to race, ethnicity and gender. It is also critical that the new Section 503 and VEVRAA regulations require the collection of data that will help contractors and the Labor Department determine whether contractors' affirmative action efforts to recruit, hire and retain employees with disabilities and protected veterans are effective. Affirmative action efforts are of limited value if they do not include any analysis of data to determine whether these efforts are actually having success.

These updates to the Section 503 and VEVRAA regulations are extraordinarily important to ensure that people with disabilities and protected veterans are afforded meaningful opportunities to work. The employment rates for people with disabilities remain far below those of any other group tracked by the Bureau of Labor Statistics, and working-age people with significant disabilities participate in the workforce at less than one-third of the rate of the general population. The workforce participation rate of veterans with disabilities is also well below that of the general population. The Labor Department's new rules make clear that the failure to meet the utilization goals in Section 503 and the hiring benchmarks in VEVRAA is not sufficient to prompt an enforcement action and that contractors that take the steps required by the regulations do not violate the law, even if they do not meet these goals or benchmarks. Having a goal or benchmark, however, is an important mechanism to create some accountability and help ensure that progress is actually achieved.

The Committee and Subcommittee leadership have questioned whether the Department of Labor has the authority to impose a utilization goal for employment of individuals with disabilities and a benchmark for protected veterans, and to require contractors to invite job applicants to self-identify as having a disability for purposes of affirmative action. Litigation recently instituted against the Department by a construction firm trade association also challenges the Department's authority to set a utilization goal and to require the collection of data concerning the hiring and employment of people with disabilities.

We strongly disagree with the assertion that the Department lacks the authority to (1) impose a utilization goal or a benchmark, (2) require the collection of information related to the hiring and employment of people with disabilities, and (3) invite applicants to self-identify as having disabilities. Having a goal or benchmark and requiring the collection of data to determine whether a contractor's efforts to employ people with disabilities and protected veterans are *actually working* are well within the scope of the agency's authority in enforcing laws that direct contractors receiving large federal contracts to maintain and implement affirmative action programs to improve employment of people with disabilities and protected veterans. Indeed, the agency imposed these requirements only after concluding that little improvement in the employment of these groups had occurred during the several decades during which the prior regulations were in effect. As the agency noted, it "determined that affirmative action process requirements, without a quantifiable means of assessing whether progress toward equal employment opportunity is occurring, are insufficient."[1]

Moreover, the Department's requirement that contractors invite applicants to voluntarily self-identify as an individual with a disability is perfectly consistent with the Americans with

[1] U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities; Final Rule, 78 Fed. Reg. 58682, 58703 (Sept. 24, 2013), http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf.

Disabilities Act (ADA). The U.S. Equal Employment Opportunity Commission (EEOC), charged with enforcing and interpreting the ADA's requirements with respect to employment discrimination, has *always* maintained that disability-related inquiries are permitted of applicants as part of a voluntary affirmative action program. *See, e.g.*, 29 C.F.R. Part 1630 App. § 1630.14(a), *Medical Examinations and Inquiries Specifically Permitted* ("As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by [the ADA's provisions concerning pre-employment inquiries]"). In fact, the EEOC issued a letter specifically clarifying that the Labor Department's regulations inviting individuals to voluntarily self-identify as having a disability are consistent with the ADA.[2]

We think that the Department of Labor was not only well within its authority in issuing the regulations implementing Section 503 and VEVRAA, but could have gone further. In response to the concerns expressed by contractors, the Department made numerous concessions to contractors in its final regulations. For example, the Department:

- declined to impose a separate subgoal to ensure that individuals with significant disabilities are being employed

- eliminated its proposed requirements that contractors maintain linkage agreements with specified entities to assist with recruitment of individuals with disabilities and protected veterans

- eliminated its proposed requirement that contractors ensure that their online applications are accessible to individuals with disabilities

- eliminated its requirement that contractors have written procedures outlining how individuals with disabilities may request reasonable accommodations and how such requests will be processed

- eliminated its proposed requirement that contractors review annually the physical and mental qualification requirements for their jobs to ensure that they do not needlessly screen out individuals with disabilities (the final rule simply requires that the contractor follow a "schedule" for doing such a review)

- eliminated its proposed requirement that training of relevant personnel concerning Section 503's and VEVRAA's requirements include specific topics and its proposed requirement that contractors make and maintain specific records

[2] Letter from Peggy R. Mastroianni, Legal Counsel, EEOC, to Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs (Aug. 8, 2013), http://www.dol.gov/ofccp/regs/compliance/sec503/OLC_letter_to_OFCCP_8-8-2013_508c.pdf

- eliminated its proposed requirement that contractors document and update data including the "applicant ratio" of applicants with known disabilities to total applicants, the "hiring ratio" of individuals with known disabilities to the total number of individuals hired, and the "job fill ratio" of job openings to job openings filled (the final rule only requires contractors to collect raw data)

- exempted contractors with fewer than 100 employees from the Section 503 requirement that the 7% goal be at the job group level (the final rule requires that, for these employers, the 7% goal applies only at the level of the entire workforce)

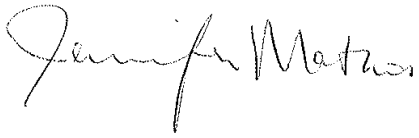
- changed the requirement that contractors annually invite employees to self-identify as individuals with disabilities to a requirement to invite employees to do this once every five years

- included language allowing the Department of Labor to waive compliance with the equal opportunity provisions for any federal contract or group of contracts when it deems this "in the national interest"

Many of these concessions disappointed individuals with disabilities and protected veterans who believed that the agency should have required more of contractors who benefit from significant federal contracts. Nonetheless, we support the final regulations implementing Section 503 and VEVRAA and believe that they provide a necessary foundation for increasing employment opportunities for individuals with disabilities and protected veterans.

Thank you for considering our comments.

Sincerely,



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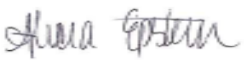

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