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DISMANTLING SOCIAL PERCEPTIONS & EMPLOYMENT BARRIERS: IMPOSING REGULATION ON FEDERAL CONTRACTORS—A BACKDOOR APPROACH TO CHANGING AMERICA’S HIRING PRACTICES FOR INDIVIDUALS WITH DISABILITIES

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Seemingly ignored by the media, and consequently unnoticed by the American public, newly promulgated Department of Labor Regulations (the Regulations) will eventually mainstream individuals with disabilities (IWDs) into the American workforce. In years to come, the Regulations will have a profound impact on the way American companies do business. Concomitantly, societal perceptions of disability will change over time as the American workforce becomes more diverse and inclusive.

The United States Department of Labor (DOL), through its Office of Federal Contract Compliance (OFCCP), has played a major role in creating cutting edge disability law. The DOL did so in the 1970s and 1980s by direct threat of audit, court cases, and final rule promulgation that laid the foundation for the Americans with Disabilities Act (ADA). The DOL and its OFCCP are poised to have a profound impact once

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again. As more IWDs enter the workforce and their employment across varying job groups significantly increases, societal perceptions, norms, and values will likely evolve resulting in universal change and new legislation affecting all businesses.

This paper will focus on the legal requirements of the 2014 DOL Regulations, how compliance will be achieved and verified, societal implications, and what colleges and universities should be doing now to prepare for increased outreach and recruitment efforts by federal contractors and the business community at large in the future.

I. THE NEW FEDERAL REGULATIONS—THEIR PROCEDURAL & HISTORICAL CONTEXT

Recognizing the intent and purpose behind the enactment of administrative regulations is crucial to understanding how those regulations will be implemented and enforced.

In December 2011, the OFCCP published a proposed rule that required federal contractors and subcontractors (hereinafter FCs) to change, among other things, their hiring practices as they relate to IWDs. Then, Secretary of Labor, Hilda L. Solis, commented that “[t]his proposed rule represents one of the most significant advances in protecting the civil rights of workers with disabilities since the passage of the Americans with Disabilities Act.” The proposed regulatory changes detailed very specific actions FCs were required to implement in the areas of outreach, recruitment, training, record keeping, data collection, program implementation, and hiring processes. Notably, the proposed rule also set forth a 7% “hiring goal.”

Following the OFCCP’s publication of the proposed rule, a public

5. In December 2011, the Notice of Proposed Rulemaking (NPRM) was published in the Federal Register. The NPRM sought comments on the proposed changes to DOL’s long standing affirmative action regulations applicable to IWDs. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 76 Fed. Reg. 77,056 (proposed Dec. 9, 2011) (to be codified at 41 C.F.R. pt. 60).


7. Id.

8. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 76 Fed. Reg. at 77,071. But see id. at 77,068-69 (“A utilization goal is neither a hiring quota, nor a restrictive hiring ceiling. Rather, it is an equal employment opportunity objective, and an important tool for measuring the contractor’s progress toward equal employment opportunity and assessing where barriers to equal employment opportunity remain.”).
comment period ensued. Uniformly, FCs, lobbying and trade groups representing them, as well as union officials, submitted comments denouncing the proposed rule as arbitrary, overly burdensome, exceedingly costly, ineffective, and in some instances, an impermissible mandate to adhere to a hiring quota. Predictably, disability rights organizations uniformly supported the proposed rule calling it "long overdue," and needed to support and strengthen the affirmative action requirements established by Section 503 of the Rehabilitation Act of 1973 (Section 503).

Twenty months later, on August 27, 2013, after publication of the proposed rule, and after the initial comment period and an extension thereof concluded, the OFCCP officially announced the Regulations. In final form, the Regulations withdrew several provisions objected to by commentators, and were somewhat less burdensome in terms of data collection and the regulatory compliance initially proposed. The 7% hiring goal was maintained and termed a "Utilization Goal" in the Regulations.

The OFCCP justified promulgation of the Regulations by noting that a "substantial disparity in the unemployment rate [for IWDs] continues to persist despite years of technological advances that have made it possible for people with disabilities, sometimes severe, to apply for and successfully perform a broad array of jobs." The OFCCP relied on statistics showing a 44.9% disparity in workforce participation between those with disabilities and those without such disability, and a

11. The OFCCP received hundreds of comments to the proposed rule primarily from FCs and the lobby and trade groups representing them. See Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. at 58,685.
7% higher unemployment rate for working age IWDs. These statistics were buttressed by reference to income and poverty rates demonstrating an approximate $34,000 disparity in median household income for those whose head of household is disabled, and a 16.3% increase in the poverty rate for IWDs ages eighteen to sixty-four. The OFCCP further supported promulgation of the Regulations by stating that they implemented changes and requirements through the ADA Amendments Act (ADAAA), which amended the ADA and section 503 definition of disability.

The OFCCP’s position is defined and circumscribed by the notion that being a FC is not a right, but rather a privilege. There can be little doubt that the OFCCP was intent on issuing a regulation that would advance the employment of qualified individuals with disabilities. Patricia A. Shiu, Director of OFCCP, summed up the agency’s position in 2011 when the proposed regulations were first announced, stating:

16. In order to calculate, the Utilization Goal, OFCCP used data from the American Community Survey (ACS), a detailed view of U.S. households produced by the Census Bureau. OFCCP began by estimating that “5.7% of the civilian labor force has a disability.” According to OFCCP, this percentage would be higher absent discrimination on the basis of disability. OFCCP therefore compared the percent of the civilian labor force with a disability to the percent of the general population with a disability who identify as having an occupation, from which it derived what it called a “discouraged worker” effect of 1.7 percent. Adding that figure to the 5.7 percent, OFCCP arrived at 7.4 percent, which it rounded down to 7 percent in order to “avoid implying a false level of precision.”


18. The ADA Amendments Act (ADAAA): Is intended to overturn a series of Supreme Court decisions that interpreted the Americans with Disability Act of 1990 in a way that made it difficult to prove that an impairment is a “disability.” The ADAAA makes significant changes to the ADA’s definition of “disability” that broadens the scope of coverage under both the ADA and Section 503 of the Rehabilitation Act.

19. In 2010, prior to publication of the NPRM, the U.S. Department of Labor’s Bureau of Labor Statistics, issued a report evidencing its concern that its then Section 503 regulations were not sufficiently advancing employment of IWDs given the lower workforce participation rates and higher unemployment rates compared to those without disabilities. See Proposed Rulemaking Notice, 75 Fed. Reg. 43,116, 43,117 (July 23, 2010).
[f]or nearly [forty] years, the rules have said that contractors simply need to make a “good faith” effort to recruit and hire people with disabilities. Clearly, that’s not working . . . . Our proposal would define specific goals, [and] require real accountability . . . . What gets measured gets done. And we’re in the business of getting things done.20

The Regulations were published in the Federal Register on September 24, 2013.21 They became effective 180 days thereafter on March 24, 2014.22 From a practical standpoint, despite the effective date, most compliance and enforcement was to start in January 2015.23 Adherence and conformity to an Affirmative Action Plan (AAP), which is central to a FC’s compliance under the Regulations, was not mandated if the FC already had an AAP in place prior to March 24, 2014.24 In other words, if a FC already prepared its AAP for the 2014 calendar year, the OFCCP did not require any revisions thereto to incorporate IWDs.25 Thus, as a practical matter, any FC with an AAP in existence prior to March 24th could live under the terms of that AAP without modification until the year’s end.26 Moreover, it stands to reason that the OFCCP, which is headquartered in Washington D.C. and has numerous satellite offices throughout the country,27 likely needed time to disseminate information and train their employees on the new requirements imposed by the voluminous Regulations.


22. Id. Once a regulation is published in the Federal Register, a waiting period ensues before it becomes effective, herein 180 days. See id at 58,685. Regulations that contain required forms must also become “paperwork compliant” which occurs after the Office of Management and Budget (OMB) reviews the proposed forms and approves the same through issuing a control number. See 44 U.S.C. § 3507(a)(1)-(3) (2012); 5 C.F.R. § 1320.5(a)(1)-(3) (2015). The OMB passed on the required paperwork and thus the Regulations are both legally effective and paperwork compliant. Agency Information Collection Activities; Announcement of OMB Approval, 79 Fed. Reg. 58,807, 50,807 (Sept. 30, 2014).


24. Id. AAPs are generally on a standard twelve month review and updating cycle. Id.

25. See id.

26. See id.

II. WHO ARE FCs & WHAT OBLIGATIONS DO THE REGULATIONS IMPOSE?

In layman’s terms, FCs are those that provide goods and/or services to the federal government. It is noteworthy that the federal government is often referred to as the largest consumer of goods and services in the world. Consequently, the number of FCs is staggering. Approximately $440 billion was spent by the federal government on contracts in the 2014 fiscal year.

The Regulations define a FC as a prime or subcontractor “holding a contract in excess of $10,000.” All FCs so defined must abide by the anti-discriminatory prohibitions of the Regulations. However, the Regulations’ affirmative action requirements are only applicable to FCs with “[fifty] or more employees and a contract of $50,000 or more.” Moreover, the classification used to measure the 7% Utilization Goal differs depending on the FC’s total workforce. FCs with 100 or fewer employees can measure the representation of IWDs employed based on their total workforce, whereas FCs with more than 100 employees must measure representation across job groups. When a FC is required to measure its 7% Utilization Goal across job groups, it must use the same job groups established under Executive Order 11246.

The Regulations have a tiered applicability approach. In the first instance, the general and nondiscriminatory provisions are applicable to all FCs with contracts in excess of $10,000. In the second instance, substantial affirmative action compliance and program initiation is

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31. Id. § 60-741.1(a)-(b).
32. Id. § 60-741.40(b)(1).
33. Id. § 60-741.45(a), (d).
34. See id. § 60-741.45(d).
36. 41 C.F.R. § 60-741.1(b).
required of FCs with "[fifty] or more employees and a [federal] contract of $50,000 or more." In the third instance, the Regulations draw a distinction between those that have more than 100 employees, and those that employ 100 or less, as to how Utilization Goal performance is achieved and measured. That distinction lies in whether the number of IWDs is measured as a percentage of the total workforce (100 or less employees) or as a percentage of those within each job category (101 or more employees). Common sense dictates that a FC with a total workforce of 100 people will likely have an easier time demonstrating that seven (7) employees (or 7% of its total workforce) have a disability, than a FC who may have 101 employees and several job categories, who is now required to show that it has employees with disabilities in each of the ten (10) EEO-1 job groups.

III. THE DEFINITION OF DISABILITY

A disability is defined in the Regulations as: (1) "[a] physical or mental impairment that substantially limits one or more major life activities," (2) having "[a] record of such impairment," or (3) an individual "regarded as having such an impairment." Major life activities are defined broadly in the Regulations and include, inter alia, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, learning, bending . . . reading, concentrating, thinking, communicating,

37. See id. § 60-741.40(b)(1).
38. See id. § 60-741.45(d)(2)(i).
39. See id.
41. "An impairment that substantially limits one [or more] major life activity[ies] need not limit other major life activities in order to be considered a disability." 41 C.F.R. § 60-741.2(g)(3). In addition, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Id. § 60-741.2(g)(4).

An individual is regarded as having . . . an impairment if the individual is subjected to an action prohibited under subpart B . . . because of an actual or perceived physical or mental impairment, whether or not the impairment does in fact substantially limit or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion . . . termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

Id. § 60-741.2(v).
interacting with others, and working." Major life activities also include the operation of major bodily functions such as "the immune system, special sense organs... normal cell growth, digestive, genitourinary, bowel, bladder... endocrine, hemic, lymphatic, musculoskeletal systems, and reproductive functions... [And][t]he operation of an individual organ within the body system."

Noteworthy is 41 C.F.R. § 60-741.2(m)(3) of the Regulations which seeks to further expand the definition of disability by expressly articulating an interpretive standard. Section 60-741.2(m)(3) provides that "the term ‘major’ shall not be interpreted strictly to create a demanding standing for disability. Whether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’" The Regulations further provide that "substantially limits" is to be "construed broadly in favor of expansive coverage, to the maximum extent permitted by law.... [It] is not meant to be a demanding standard and should not demand extensive analysis."

Upon initial consideration, this broad definition, coupled with administrative directives as to how the Regulations’ language is to be interpreted, would appear advantageous to IWDs. Utilizing a comprehensively broad definition and interpretation of disability will necessarily have the effect of creating a more inclusive class of IWDs and, concomitantly, advance employment opportunities for them. However, upon closer examination, it can be reasonably argued and anticipated that a definition of disability that is not meant to create a "demanding standard"; that does not have to be of "central importance to..."
daily life”; that can be “episodic”; that defines a major life activity as lifting, sleeping, reading, concentrating, thinking or simply working; and that requires construction broadly to provide for “expansive coverage”; has so watered down the definition of disability that a significant number of applicants and current employees could be classified as disabled. While it is doubtful this was the OFCCP’s intent, the language it utilized will likely have that effect as FCs and their lawyers work to bring themselves within the ambit of the Regulations and demonstrate compliance therewith.

Where the 7% Utilization Goal is applicable to a FC, be it measured against its entire workforce, or via job groups, an overly broad definition and interpretation of disability may allow a FC to meet the Utilization Goal with its existing pool of employees and/or hire those that fall within the broad definition, but who would not in the ordinary course be perceived by societal standards as disabled. By way of illustration, an individual with manageable Type 2 Diabetes could be considered an IWD. As too, could a woman currently experiencing certain common side effects of menopause or, an individual who has lost his or her sense of smell, since the definition of a major life activity includes the functioning of a special sense organ.

The Regulations further provide that “[i]n determining whether an individual is substantially limited the focus is on how a major life

48. See 41 C.F.R. § 60-741.2(g), (m), (z) (emphasis added).
49. See id. § 60-741.45(a), (d)(2)(ii).
50. Id. § 60-741.2(g), (m), (z).
52. One of the common symptoms of menopause is the disruption of sleep often resulting from “night sweats” and can cause an individual to wake several times throughout the night. See Menopause and Hot Flashes, WEBMD, http://www.webmd.com/menopause/guide/menopause-hot-flashes (last visited Sept. 19, 2015). Thus, menopause could be viewed as “substantially limiting” the major life activity of sleeping because, according to the Regulations, “substantially limiting” is a term to be broadly construed, not demanding or requiring extensive analysis. 41 C.F.R. § 60-741.2(g)(2). Since a major life activity does not have to be “central to daily life,” an individual with menopause who can function well throughout the day could nevertheless be considered disabled based upon the Regulations’ language. See id. § 60-741.2(m)(3). Taken to an extreme, Erectile Dysfunction might even be viewed as a disability under the Regulations because such a condition can substantially limit the reproductive function, which is considered a major life activity. See id. § 60-741.2(m)(2); Erectile Dysfunction, ED a Common Cause of Male Infertility, can be Caused by both Physical and Emotional Issues, REPROD. INST. SOUTH TEX., http://www.conceiveababy.com/male-infertility/male-infertility-erectile-dysfunction.php (last visited Oct. 31, 2015).
activity is substantially limited, and not on the outcomes an individual
can achieve.53 Continually, the Regulations and the several pages
devoted to the definition of disability, suggest a comparison to "most
people in the general population."54 The language of the Regulations is
quite clear in that the definition of disability is "intended to provide for
generous coverage" and determinations as to a substantial limitation of a
major life activity are to be made by individualized assessment.55

Perhaps the most telling example of the OFCCP's desire to provide
an all encompassing definition that would, in the majority of cases,
result in a finding of disability, is the section of the Regulations entitled
"Predictable Assessments."56 Therein, the Regulations provide that:

The determination of whether an impairment substantially limits a
major life activity requires an individualized assessment.... [T]he
individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under
paragraph (g)(1)(i) or (ii) of this section. Given their inherent nature,
these types of impairments will, as a factual matter, virtually always
be found to impose a substantial limitation on a major life activity....
[T]he necessary individualized assessment should be particularly
simple and straightforward.57

It is difficult to conceive of any reasonably stronger language that
the OFCCP could have used to convey their position. Clearly, it was the
OFCCP's desire to have individuals who perceive themselves as
disabled be protected and their employment opportunities advanced.58
While it is certainly a laudable and worthwhile goal to advance
employment opportunities for IWDs, however unintentionally, the
OFCCP has opened the door for FCs and their creative lawyers to
circumvent the intent of the Regulations by strict adherence to the
Regulations' unambiguous, clearly delineated language. Utilization
Goals may very well be met by hiring those that most lay people would
not characterize as disabled, while bypassing others that society would

53. 41 C.F.R. § 60-741.2(z)(4) ("For example, someone with a learning disability may
achieve a high level of academic success, but may nevertheless be substantially limited in the major
life activity of learning because of the additional time or effort he or she must spend to read, write,
or learn compared to most people in the general population.").
54. See, e.g., id. § 60-741.2(t), (z)(1)(i)-(iii), (z)(4).
55. Id. § 60-741.2(z)(5).
56. Id.
57. Id. (emphasis added). 41 C.F.R. § 60-741.2(z)(5)(i) provides examples to what "types of
impairments" might be. Id.
58. See id. § 60-741.1(a).
readily perceive as so.

The OFCCP did provide six exceptions to the definition of disability. Those few exceptions are: (1) current illegal drug use (including psychoactive substance use disorders attributable thereto); (2) alcoholics, provided current alcohol use prevents performance of essential job functions or constitutes “a direct threat to property or the health [and] safety of the individual or others”; (3) having a currently contagious disease or infection; (4) certain sexual behaviors such as pedophilia, exhibitionism, transvestitism, etc.; (5) compulsive gambling, kleptomania, and pyromania; and (6) homosexuality and bisexuality.

IV. THE REGULATIONS’ REQUIREMENTS

A. Generally

The Regulations specifically prohibit discrimination in all terms and conditions, or privileges of employment, including, but not limited to: recruitment, advertising, job application procedures, hiring, promotion, demotion, transfer, layoff, termination, rehiring, compensation, job assignment, job classification, leave, fringe benefits, selection, training support, etc. Prohibited discrimination may include activities such as placing an IWD employee into a separate work area, failing to provide part time or modified work schedules, job restructuring, failing to reassign to a vacant position, or failing in any way to provide a reasonable accommodation.

59. Id. § 60-741.3.

60. Id.

61. Although sexual orientation has not been classified as a disability under the Regulations, id., on July 21, 2014 President Obama signed Executive Order 13672, amending Executive Order 11246, prohibiting FCs from discriminating on the basis of sexual orientation or gender identity. Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971-72 (July 23, 2014). Executive Order 13672 directed the DOL Secretary to prepare regulations to implement the new federal policy. Amended Regulations: Executive Order 11246 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity, U.S. DEP’T LAB., http://www.dol.gov/ofccp/LGBT.html (last visited Sept. 19, 2015). OFCCP’s sexual orientation/gender identity regulations were published on December 9, 2014. Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985, 72,985 (Dec. 9, 2014) (to be codified at 41 C.F.R. pt. 60). They became effective on April 8, 2015 and now require FCs to treat applicants and employees “without regard to their sexual orientation or gender identity.” Id. at 72,985-86. These regulations do not require FCs to “set placement goals on the basis of sexual orientation or gender identity, nor do they require [FCs] to collect or analyze any data on these basis.” Id. at 72, 986.


63. This list is meant only to be illustrative of what could be considered prohibited
A FC must now include in every contract with the federal government an Equal Opportunity for Workers with Disability clause that comprises seven paragraphs. The clause outlines the affirmative action steps the FC will employ. A FC may elect to include the wording verbatim or incorporate it by reference to 41 C.F.R. § 60-741.5(a).

Additionally, FCs are prohibited from using “qualification standards, employment tests, or other selection criteria that screen out or tend to screen out” IWDs. Pre-employment medical examinations prior to an offer of employment are likewise prohibited, as is any inquiry into whether an applicant or employee has a “disability or as to the nature or severity thereof.” Significantly, despite the inability of the FC to query an applicant as to a disability, the Regulations mandate that FCs invite the applicant to self-identify. Thus, it is now incumbent upon a FC to invite all applicants to self-identify as an IWD. Self-Identification forms, and any information regarding the medical history or condition of an applicant or employee, must be collected, maintained separately, and treated as confidential. Such forms and records cannot be housed in an employee’s personnel file.

Although Title I of the Americans with Disability Act prohibits “employers from making disability-related inquiries prior to an employment offer,” regulations promulgated by the EEOC implementing Title I provide that an employer will not be liable for a violation of Title I based upon an action it is “required to take under another federal statute or regulation.” In an opinion letter dated August 8, 2013, issued discrimination. Id. § 60-741.2(s). 41 C.F.R. §§ 60-741.21 to -741.25, entitled “Subpart B—Discrimination Prohibited,” sets forth all of the prohibitions and must be read in conjunction with the definition of “Reasonable Accommodation” contained in § 60-741.2(s). See id. §§ 60-741.2(s), 60-741.21.

64. Id. § 60-741.5(a).
65. Id.
66. Id. § 60-741.5(d).
67. Id. § 60-741.21(a)(7).
68. Id. § 60-741.23(a). But see, id. § 60-741.23(b)(1) (“The contractors may make pre-employment inquiries into the ability of an applicant to perform job related functions.”).
69. Id. § 60-741.23(c); see id. § 60-741.42, for an explanation of the specific rules related to the “invitation to self-identify.”
70. Id. § 60-741.23(d)(1).
71. Id.; id. § 60-741.42(e).
in response to an inquiry from the OFCCP Director, the EEOC’s legal
counsel opined that, “[t]his ‘other federal laws’ defense insulates federal
contractors from ADA liability for any actions that DOL regulations
require them to take.” 73

Moreover, the EEOC’s long-standing policy explicitly permits an
employer to invite applicants or employees to self-identify as IWDs for
affirmative action purposes, or if the “employer is voluntarily using the
information to benefit [IWDs].” 74 The EEOC’s Enforcement Guidance
policy further provides that, if an employer invites applicants to self-
identify, it must:

State clearly on any written questionnaire, or state clearly orally (if no
written questionnaire is used), that the information requested is used
solely in connection with its affirmative action obligations or efforts;
and state clearly that the information is being requested on a voluntary
basis, that it will be kept confidential in accordance with the ADA, that
refusal to provide it will not subject the applicant to any adverse
treatment, and that it will be used only in accordance with the ADA. 75

Finally, the EEOC’s regulations also permit employers to comply
with any laws that afford IWDs “equal or greater rights.” 76

B. The Affirmative Action Program

Perhaps the most onerous of requirements imposed by the new
Regulations is the mandated development of a written and
comprehensive affirmative action plan (AAP). To be sure, the
Regulations themselves state that an AAP is a “commitment to equality
in every aspect of employment and is more than a paperwork
exercise.” 77 It must include “measurable objectives, quantitative
analysis, [and] internal auditing and reporting systems that measure the
[FC’s] progress toward achieving equal employment opportunities” for
IWDs. 78 The AAP must be reviewed and updated annually and it must

73. Id. (citing 29 C.F.R. § 1630.15(e) (2015) (“[i]t may be a defense to a charge of
discrimination under this part that a challenged action is required or necessitated by another Federal
law or regulation . . .”)).
74. U.S. EQUAL EMP. OPPORTUNITY COMM’N, No. 915.002, ENFORCEMENT GUIDANCE: PRE-
EMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995),
75. Id.
76. 29 C.F.R. § 1630.1(c)(2).
78. Id.
set forth the policies and procedures a FC will implement in accordance with the Regulations. The FC has the option of integrating an IWD component within its existing AAP plan or preparing a separate and distinct AAP applicable to IWDs. The AAP must be made available to any applicant or employee upon request and its location and hours of availability posted. Finally, as previously mentioned, an applicant must be given the opportunity to self-identify as an IWD. After any offer of employment, but before such employment commences, the FC must again invite the offered applicant to self-identify. As to current employees, the FC must initially invite all employees to self-identify in the year that the AAP becomes effective, and then again at five year intervals. At some point in the intervening five year period, all employees must be reminded that they have the right to update their disability status.

On its face one might not find surveying all job applicants and current employees at five (5) year intervals overly burdensome. However, when one recognizes that the paperwork must be maintained in separate files, procedures adopted to ensure confidentiality, and that this data collection must be obtained from all employees, the task, at the very least, could be viewed as difficult, expensive and time consuming. FCs can have numerous locations across the United States with hundreds or thousands of employees. When one contemplates compliance against that backdrop, the Regulations can be viewed as quite onerous for many FCs.

The AAP itself must contain a policy statement and such policy

79. Id. § 60-741.40(b)(2)-(3).
80. Id. § 60-741.40(b)(2).
81. Id. § 60-741.41.
82. Id. § 60-741.42(a).
83. Id. § 60-741.42(b).
84. Id. § 60-741.42(c).
85. Id. It bears mention that when the NPRM was issued, the proposed regulations required FCs to invite all employees to self-identify on an annual basis. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,694 (Sept. 24, 2013) (to be codified 41 C.F.R. pt. 60). Many of the public comments received by the NPRM criticized the time consuming and onerous nature of this proposed reporting requirement. See id. The annual requirement was removed from the Regulations in final form in lieu of the five year self-reporting requirement and included an employee reminder during the five year interval. Id. at 58,695.
86. 41 C.F.R. § 60-741.42.
statement must be posted in an accessible format. Examples of such a format could include, utilizing Braille or large print for those with sight impairments, or posting the policy at a lower height for those utilizing a wheelchair. The policy must further provide for an audit and reporting system as well as designate the responsible party/office for implementing all affirmative action activities. The AAP must also set forth a process for reviewing personnel policies applicable to hiring, promotion, and training that give rise to “careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities.” Procedures must be designed and implemented so that review by the FC and by OFCCP can be facilitated.

If all of the above requirements do not give FCs a giant headache, there are more that surely will. The AAP must also contain “a schedule for the review of all physical and mental job qualification standards to ensure, that” where such qualifications tend to preclude IWDs from employment, they are consistent with a business necessity. The onus is on the FC to demonstrate compliance. It is not OFCCP’s burden to prove non-compliance with the Regulations.

Yet another obligation of a FC is to confidentially notify any employee with a known disability having job performance issues that the employer perceives a performance problem, and inquire on the employee if the problem is related to the disability. If the employee claims performance is attributable to disability, it is again incumbent of the FC to ask the employee if reasonable accommodations are necessary and to provide them. Indeed, the OFCCP has suggested it a “best practice” to use written procedures/forms for accomplishing this and if such a practice is implemented, it could demonstrate compliance under this part of the Regulations. Even “absent a specific request for a reasonable

88. 41 C.F.R. § 60-741.44(a).
89. Id.
90. See id. § 60-741.44(a), (h).
91. Id. § 60-741.44(b).
92. Id.
93. Id. § 60-741.44(c).
94. Id. § 60-741.44(c)(2).
95. Id. § 60-741.44(d).
96. Id.
97. Although it is not a violation of the Regulations for a FC to forego written procedures/forms, the practice is strongly suggested. Appendix B to the Regulations provides guidance for FCs that are willing to develop and utilize “written reasonable accommodation procedures.” See Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,686 (Sept. 24,
accommodation,” FCs are “encouraged to make its information and communication technologies” available.98

A “Reasonable Accommodation” is a buzz word that has become recognized since the passage of the Americans with Disabilities Act in 1990.99 A FC must provide a reasonable accommodation for a “known physical or mental limitation[] of an otherwise qualified [IWD],” unless the FC can demonstrate that to do so “would impose an undue hardship on the operation of its business."100 The burden is on the FC to prove an undue hardship.101

C. Outreach & Recruitment

In addition to the requirements enumerated above, the Regulations mandate community outreach and positive recruitment efforts.102 The suggested examples of outreach and recruitment activities contained in the Regulations are as follows: (1) “[e]nlisting the assistance and support of persons and organizations in recruiting, and developing on-the-job training opportunities” for IWDs; (2) hosting, “preferably” on the FC’s premises, formal briefing sessions with representatives from recruiting sources; (3) where recruitment is done at educational institutions, special efforts to reach students with disabilities should be made; (4) “participat[ing] in work-study programs for students, trainees, or interns with disabilities”; (5) making current employees who are IWDs available for career days, youth motivation programs and community related activities; (6) taking “other positive steps . . . to attract [IWDs] not currently in the work force . . . through state and local agencies . . . [and/or] organizations that provide services for IWDs; and (7) considering IWD applicants “for all available positions for which they may be qualified when the [actual] position(s) applied for are unavailable.”103

2013) (to be codified 41 C.F.R. pt. 60).
98. 41 C.F.R. § 60-741.44(b).
100. 41 C.F.R. § 60-741.21(a)(6).
101. Id.
102. Id. § 60-741.44(f)(1)(i) (“[FCs] shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit qualified individuals with disabilities.” (emphasis added)).
103. Id. § 60-741.44(f)(2) (“[S]tate and local agencies [include those] supported by the U.S. Department of Education’s Rehabilitation Services Administration [and] local Ticket-to-Work
In terms of obtaining assistance and support for recruitment, FCs may partner with state agencies servicing IWDs, Employment One-Stop Career Centers, the Department of Veterans Affairs, entities funded by the DOL, local employment networks listed in the Social Security Administration’s Ticket to Work directory, local disability groups, and private recruitment firms that specialize in placing IWDs.\textsuperscript{104}

Many of the local, state, and federal programs listed above, as well as local and even national disability organizations, are primarily focused on the placement and training of IWDs in lower level job categories.\textsuperscript{105} These include service workers, laborers/Helpers, semi-skilled machine operators, and administrative office support.\textsuperscript{106} There are relatively few private recruitment firms and staffing companies that specialize in the placement of IWDs.\textsuperscript{107} There are likely even fewer that are in a position to place IWDs in professional, executive/senior, and/or first/midlevel managerial positions or, for that matter, even sales or technical positions. Thus, it is highly likely that FCs will be turning to educational institutions and their Centers for Students with Disabilities at both the undergraduate and graduate levels.\textsuperscript{108} While this may provide FCs with entry level professionals, it will not necessarily help them find seasoned, experienced professional IWDs. Accordingly, one might expect to see an increase in the number of placement firms that devote their time and attention to this niche market, or perhaps divisions created within larger staffing companies that specialize in placing IWDs.

Either way, at the present time, FCs who must comply with the Regulations, and conduct outreach and recruitment are undoubtedly in a...
quandary as to how to proceed.\textsuperscript{109} While EEO language on company job sites and the utilization of diversity friendly language in employment postings highlighting that a FC does not discriminate on the basis of disability is helpful, it may not specifically target the population of applicants that a FC needs to bring itself in conformity with the 7% Utilization Goal.\textsuperscript{110}

Moreover, as mentioned previously, FCs are prohibited from specifically inquiring into whether an applicant has a disability other than to invite them to self identify.\textsuperscript{111} One is left to wonder whether job applicants that do not have an obvious disability would be willing to disclose a physical or mental impairment to a potential employer. They may be willing to do so if they were aware that such disclosure could benefit them in the hiring process and were also confident that such disclosure would not be utilized against them. Thus, FCs may need to adopt, promote, publicly disclose, and market a disability policy that attracts IWDs, and gives applicants and existing employees comfort to classify themselves as disabled.\textsuperscript{112} To do so will take an orchestrated

\textsuperscript{109} Carol Glazer, President of the National Organization on Disability, remarked, “When I talk with employers, which is just about every day, they tell me their inability to hire [those] with disabilities is not due to a lack of qualified candidates, but rather a lack of access.” See Carol Glazer, \textit{Cracks in the “Talent Pipeline” Pose Risks for Employers and College Students with Disabilities}, \textsc{HUFFINGTON POST} (Jan. 30, 2015, 11:27 AM), http://www.huffingtonpost.com/carol-glazer/cracks-in-talent-pipeline-b_6559184.html.

\textsuperscript{110} See Barbara Frankel, \textit{Solution to Gap in Skilled Workers: Hire People with Disabilities}, \textsc{DIVERSITYInc} (July 14, 2015, 3:10 PM), http://bestpractices.diversityinc.com/war-for-talent/shortfalls-and-bias-driven-discrepancies-war-for-talent/solution-to-gap-in-skilled-workers-hire-people-with-disabilities/ (“Historically, when companies made a push to hire people with disabilities, it was easier to find lower-level people through the state and county vocational systems . . . . There are still issues with students not wanting to disclose disabilities and employers who still have misconceptions and fears.”).

\textsuperscript{111} 41 C.F.R. § 60-741.23(a), (c) (2015).

\textsuperscript{112} Many large publicly traded companies are already doing this. These companies join as “Lead Partners,” “President Circles,” and “Corporate Circle Members” within the National Organization on Disability as a part of its “CEO Council,” gaining access to webinars and publication in addition to receiving brand recognition. \textit{CEO Council of Corporate Leaders}, \textsc{NAT'\textsc{L} ORG. ON DISABILITY}, http://nod.org/for_business_leaders/ceo_council (last visited Sept. 6, 2015). By way of illustration, some of the current members of the National Organization on Disability’s CEO Council as of April 2015 included Prudential Financial, UPS, Colgate-Palmolive, Wal-Mart Stores/Sam’s Club, Northrop Grumman, Cigna, General Motors Foundation, Morgan Stanley and Sony Corporation of America. \textit{Id}. Diversity Inc, is a not for profit corporation committed to “bring education and clarity to the business benefits of diversity.” \textit{About DiversityInc}, \textsc{DIVERSITYInc}, http://www.diversityinc.com/about-us/ (last visited Nov. 3, 2015). Diversity Inc., also maintains a banner of its members that reads like a Who’s Who of American companies and includes such household names as MasterCard, The Walt Disney Company, BP, Kraft, Time Warner, AIG, Hilton Worldwide, and Kellogg’s. \textit{Member Organizations}, \textsc{DIVERSITYInc BEST PRACTICES}, http://bestpractices.diversityinc.com/corporate-subscribers/ (last visited Sept. 6, 2015).
public relations campaign that would be expensive. Fortune 500 companies are clearly in a better position to utilize the services of public relations firms. While small and mid-sized FCs will likely need to rely on educational institutions and employment firms specializing in the placement of IWDs.

It is important to remember that the 7% Utilization Goal across job categories is not mandated. However, many of the provisions of the Regulations applicable to job postings and dissemination of workplace information, the collection and maintenance of paperwork, the preparation of AAPs, as well as the undertaking of outreach and recruitment to attract IWDs is absolutely required. A FC who derives substantial revenue from its federal contracts clearly would not want an OFCCP audit, just as a private individual does not want an IRS audit. It stands to reason that this is true even if the FC has made a good faith effort to comply with the Regulations and believes it is in compliance. A FC deemed in non-compliance could face remedial action such as requiring employee reinstatement, back pay fines, or, in the worst case scenario, debarment, prohibiting the FC from being awarded any further federal contracts. Accordingly, the question turns to what the OFCCP will view as sufficient compliance by a FC in terms of employment, hiring, and outreach and recruitment practices when it conducts a review and/or audit of the FC’s practices and procedures. One can surmise that, if a FC has at least met or exceeded the 7% Utilization Goal across job categories and the FC is paperwork compliant, it will survive the scrutiny of an initial OFCCP review in so far as reprimands, fines, and penalties are concerned, which may also deter the OFCCP from proceeding to a “full blown” audit.

National Business and Disability Council (NBDC) offers a tiered model of membership for corporate partners with levels that range from basic to gold to platinum. Corporate Partnership Directory, NAT’L BUS. & DISABILITY COUNCIL, http://www.viscardicenter.org/services/nbdc/membership/list.html (last visited Sept. 6, 2015). NBDC’s web site lists its corporate partners and even has a member spotlight web page. As of April 2015, NBDC’s corporate partner members included IBM, Hess, JetBlue Airways, Cannon, and Goldman Sachs. Id.

113. See Become a CEO Council Member, NAT’L ORG. ON DISABILITY, http://nod.org/for_business_leaders/ceo_council/become_a_member (last visited Sept. 7, 2015) (illustrating that members pay between $10,000 to $25,000 to help market themselves in the field of disability employment).


115. See id. § 60-741.44(f)-(g), (k).

On the other hand, where the Utilization Goal has not been met, the opposite may be true. It stands to reason that the OFCCP could determine to inquire and scrutinize a FC’s practices, particularly its outreach and recruitment efforts, more thoroughly if it falls below the 7% goal. Thus, an assumption can be made that it behooves a FC to adhere to the 7% Utilization Goal and certainly to exceed it.

It can also be argued that the federal government is attempting to indirectly impose a hiring quota. The United States Supreme Court made it clear in Regents of the University of California v. Bakke that racial quotas were unacceptable. Since that decision, those defending hiring practices and/or admission practices have been careful not to use the word “quota” and rather, defend such practices in terms of “inclusiveness” and “diversity conscious” strategies. Indeed, the OFCCP’s Regulations explicitly state that the Utilization Goal “is not a rigid and inflexible quota” and that “[q]uotas are expressly forbidden.” Rather, the Utilization Goal, according to the OFCCP, is “a benchmark against which the contractor must measure the representation of individuals within each job group in its workforce, or within the contractor’s entire workforce.”

The Regulations further provide that “[t]he [U]tilization [G]oal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.” By negative implication, despite the fact that the goal is not required, if an FC has not been able to attain the 7% marker, the OFCCP, invoking this language, could determine that the FC has not complied with all aspects of the affirmative action requirements. Nevertheless, when the Regulations are read as a whole and against the backdrop of the comments made by the then DOL Secretary and OFCCP Director, it is reasonable to assume that a FC who has not met the Utilization Goal could, at the very least, receive stricter scrutiny when an audit is conducted.

Finally, a FC is required to document all activities it undertakes to comply with outreach and recruitment and retain those records for three years. As a practical matter, if the FC does not meet the Utilization

119. 41 C.F.R. § 60-741.45 (emphasis added).
120. Id. § 60-741.45(b).
121. Id.
122. Id. § 60-741.44(f)(4).
Goal, it “must take steps to determine whether and where impediments to equal employment opportunity exist” by, among other things, assessing its personnel processes and outreach and recruitment efforts. If problem areas are identified, the FC must develop and execute action-oriented programs designed to correct those impediments. Thus, the Regulations not only prohibit discriminatory conduct and dictate hiring practices and procedures, they also instruct FCs to be proactive in the community, assess their activities annually and develop new outreach and recruitment programs if they do not meet self-imposed benchmarks.

D. Data Collection & The Hiring Process

The FC must also designate an “official” who has the responsibility of implementing all of the affirmative action activities. The official’s identity must be disclosed on “all internal and external communications regarding the [FC’s] affirmative action program” and he/she must be given the support of senior management and staff to implement the AAP’s policies, procedures and programs. All FC “personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the... [FC’s] affirmative action program[s] are implemented.”

Internal dissemination of the FC’s affirmative action programs and policies is not only advised, it is required. Section 60-741.44(g) provides that a FC must notify union officials if the FC is a party to a collective bargaining agreement. FCs must also:

123. Id. § 60-741.44(e).
124. See id. § 60-741.44(f)(3).
125. Id. § 60-741.20.
126. See id. § 60-741.44(f)(1)-(3).
127. Id. § 60-741.44(i).
128. Id.
129. Id. § 60-741.44(j). An annual evaluation of the Utilization Goal in each job category or the FC’s entire workforce is also required. Id. § 60-741.45(d)(3).
130. Id. § 60-741.44(g).
131. Id. § 60-741.44(g)(2)(i).
(i) Inform all employees... of its commitment to engage in affirmative action to increase employment opportunities for [IDWs].

... .

(iii) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy... ;

(iv) Discuss the policy thoroughly in both employee orientation and management training programs;

(v) Include articles on accomplishments of individuals with disabilities in company publications; and

(vi) When employees are featured in employee handbooks or similar publications for employees, include individuals with disabilities.\(^{132}\)

Development of self auditing and reporting systems is also mandated, as is data collection and analysis on an annual basis.\(^{133}\) Data collection includes:

(1) The number of applicants who self-identified as [IWDs] pursuant to § 60-741.42(a), or who are otherwise known to be [IWDs];

(2) The total number of job openings and total number of jobs filled;

(3) The total number of applicants for all jobs;

(4) The number of applicants with disabilities hired; and

(5) The total number of applicants hired.\(^{134}\)

Computations and comparisons of these numbers are to be done on an annual basis and the documentation relating thereto maintained for three years.\(^{135}\) When a FC has failed to preserve complete and accurate records as required by the Regulations, a presumption may arise that the unpreserved or destroyed information would have been unfavorable to

\(^{132}\) Id. § 60-741.44(g)(3)(i), (3)(iii)-(vi).

\(^{133}\) Id. § 60-741.44(h), (k).

\(^{134}\) Id. § 60-741.44(k)(1)-(5).

\(^{135}\) See id. §§ 60-741.44(k), 60-741.80(b).
There can be little doubt given the breadth of the Regulations and the clear and unambiguous mandates contained therein, that the OFCCP intends to hold FC’s accountable if they are not paperwork and AAP compliant.\textsuperscript{137} The OFCCP will hold FCs accountable if they do not evaluate their own efforts, make sincere, good faith attempts to hire and promote IWDs, or if they do not attempt new and different forms of outreach and recruitment should their efforts prove unsuccessful.\textsuperscript{138}

The OFCCP exists to monitor FCs and ensure adherence to federal statutes, executive orders, and administrative regulations.\textsuperscript{139} To reiterate, the acronym stands for the Office of Federal Contract Compliance Programs.\textsuperscript{140} The Introduction to the OFCCP Federal Contractor Compliance Manual clearly and unequivocally states:

\begin{quote}
At the Office of Federal Contract Compliance Programs (OFCCP), we protect workers, promote diversity through equal opportunity, and enforce the law. We hold those who do business with the Federal Government, contractors and subcontractors, to the fair and reasonable standard that they take affirmative action and not discriminate based on sex, race, color, religion, national origin, disability or status as a protected veteran.\textsuperscript{141}
\end{quote}

The OFCCP does exactly that. It is noteworthy that the OFCCP periodically issues news releases in cases where it has been victorious. By way of illustration, in January 2015, the OFCCP announced that the Applied Physics Laboratory at John Hopkins University paid $359,253 to settle race discrimination allegations.\textsuperscript{142} In September 2014, the OFCCP touted a $900,000 settlement with Fort Meyer Construction to resolve discrimination and harassment cases involving 371 women and minorities.\textsuperscript{143} That same month, the OFCCP also announced a $1.5
million dollar settlement with Westat to resolve claims that it had failed to provide equal employment opportunities to 3,651 minorities and women at its locations across the country. As a result of an OFCCP investigation, Great Plains Coca-Cola Bottling agreed to pay $475,000 in back wages and interest to female job seekers. Again in 2014, Cargill Meat Solutions of Kansas paid over $2.2 million in back wages for hiring discrimination. Finally, in 2013, the Bank of America was ordered by a DOL administrative law judge to pay $2,181,593 in back wages after a finding that it had engaged in discriminatory practices.

The OFCCP goes after large, well-known companies. But, it is able to pursue companies that are significantly smaller in size and those virtually unknown to the general public if they do business with the federal government. It is the large settlements and administrative orders however, that the OFCCP publicizes on the Department of Labor website. Nevertheless, one can rest assured with a headquarters in Washington, D.C. and numerous satellite offices around the country, that the OFCCP is conducting audits, monitoring compliance, handling complaints and scrutinizing FCs throughout the United States regardless of their size. Just as one never knows if they will be selected for audit by the IRS, FCs do not know if and when they will be selected for audit by the OFCCP. If evading fines and penalties, foregoing legal fees,
preserving substantial federal contract revenue and avoiding a public relations debacle (by being highlighted on the OFCCP's website as a company sanctioned for discriminatory practices against IWDs) is a priority, a FC has no option but to comply with the Regulations. 153

Complying with the Regulations can be a relatively expensive and complicated undertaking, particularly for small to mid-sized companies that do not maintain large human resource departments. Small to mid-sized companies may have to outsource the drafting of AAPs and compliance paperwork. They may also need to procure the services of outside consultants and/or attorneys to understand and implement the Regulations. Even if companies retain such functions in-house, as noted above, small to mid-sized companies will likely need to turn to specialized employment and staffing firms to recruit and attract IWDs.

E. What Colleges & Universities Need to Do Now

First and foremost, academics, career service specialists and disability service specialists on campuses across the country need to be informed of the Regulations and educated as to what they require, and the impact the Regulations will have in the future. When they become aware of the Regulations, these professionals will be in a position to make the students they serve aware.

Public awareness, particularly by those who will be entering the job

153. In November of 2013, shortly after the Regulations were adopted in final form, Associated Builders & Contractors, Inc. (ABC), a national trade association representing members from construction and industry related firms, filed an action against the DOL et. al. in the United States District Court for the District of Columbia seeking, to bar the OFCCP from enforcing or applying those portions of the Regulations that imposed data collection and/or the Utilization Goal on construction contractors. Cynthia L. Hackerott, In the Latest Act of Longstanding, Unsuccessful Protest Against Revised OFCCP Disability Regulations, Construction Contractor Groups Ask SCOTUS to Weigh in, WOLTERS KLUWER (Mar. 24, 2015) http://www.employmentlawdaily.com/index.php/2015/03/24/latest-act-of-longstanding-protest-against-ofccp-disability-regulations-construction-contractor-group-asks-scotus-to-weigh-in/. The District Court denied the relief and ABC appealed to the United States Court of Appeals for the District of Columbia Circuit. Id.

On December 12, 2014, the Court of Appeals affirmed the District Court's ruling emphasizing that judicial review of an agency's rulemaking authority is narrow, existing to ensure that the agency's actions are the "product of reasoned decision making" and held courts must apply a "highly deferential standard." Associated Builders & Contractors, Inc. v. Shiu, 773 F.3d 257, 266 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2836 (2015). The Court of Appeals concluded that ABC had not demonstrated that the "OFCCP acted arbitrarily and capriciously by failing to exempt the construction industry" from certain aspects of the Regulations. Id. On June 15, 2015, the Supreme Court of the United States denied ABC's petition for certiorari. Associated Builders & Contractors, Inc. v. Shiu, 135 S. Ct. 2836, 2837 (2015).
market, will promote self-identification. It is axiomatic that individuals seriously looking for employment opportunities, will rely on their positive attributes and utilize available resources at their disposable.\textsuperscript{154} That is, of course, if individuals are cognizant that their attributes will be perceived as positive and are aware the resources exist. IWDs have an innate attribute, one that should be classified as positive in terms of advancing their employment opportunities their disability.

Just as students often view self-identification as a woman or as a minority beneficial when applying for financial aid or scholarships, so too should students view their disability as a positive attribute that may buttress their chances of securing gainful employment. It bears mention that the OFCCP estimates "that nearly one in four American workers is employed by a company receiving federal funds for contracted work."\textsuperscript{155} Given those statistics, there will be many job opportunities among FCs who will be looking for entry level professionals, particularly IWDs, to satisfy their affirmative action obligations and meet or exceed the 7% Utilization Goal.

Workshops, speakers, informational sessions, orientations and the like can be held on college campuses to "get the word out" to students with disabilities that they should consider targeting FCs and self-identify when asked to do so.\textsuperscript{156} This can either be done by specifically alerting students with disabilities to the OFCCP regulations and requirements, or by devoting a portion of career service programs to helping students with disabilities become familiar with these regulations.

The Disability Centers and Career Service Centers on campuses are often separate and distinct offices, not only in location, but also in mindset as well.\textsuperscript{157} As a practical matter, career offices generally do not

\textsuperscript{154} See Glazer, supra note 109. The Rochester Institute of Technology, for example, is working to improve communications between its office of career services and employers who seek employees with disabilities for its students to use. \textit{Id.}

\textsuperscript{155} \textbf{FED. CONT. COMPL. MAN.}, \textit{supra} note 116, at 1.

\textsuperscript{156} The federal government's web site, \texttt{www.USAspending.gov}, contains a wealth of information that students and college professionals can access to determine if a company is a FC. \textit{See generally USASPENDING.GOV, \url{http://www.usaspending.gov/Pages/Default.aspx} \textit{(last visited Sept. 16, 2015)}}. It can be utilized to locate FCs, who received funding, in a given zip code. \textit{Id.} The web site also lists, on an annual basis, the total dollar amount of the federal contracts awarded. \textit{Id.}

\textsuperscript{157} At Hofstra University, the Career Center is a distinct department from the Student Accessibility Services Center. \textit{See e.g., Departments, \textbf{HOFSTRA U.}, \url{http://www.hofstra.edu/studentaffairs/student-affairs-departments.html} \textit{(last visited Sept. 10, 2015)}}. At the State University of New York College at Geneseo, Disability Services operates under the directive of the Office of the Provost, whereas Career Development is placed under the Office of Student and Campus Life. \textit{See College Offices, GENESEO, \url{http://www.genesee.edu/offices} \textit{(last visited Sept. 10, 2015)}}.
know which students are registered with the student disability office and vice-versa. In addition, both areas can be short staffed and have a tendency to focus on the needs of a student while they are pursuing their education, as opposed to what they need post-graduation.158 Even the OFCCP has recognized this on one of its web pages designed to aid FCs through a list of resources available for the recruitment and hiring of qualified IWDs.159 That web page advises that “[m]ost college campuses have designated offices for students with disabilities and veterans’ services. Note, that on some campuses these offices do not work closely with the career services departments and separate contacts will be necessary.”160

To better assist students and FCs who will reach out to colleges and universities, there needs to be more disclosure of information between Disability Centers and Career Service Centers. For those educational institutions that perceive sharing of information between such centers as a violation of student confidentiality, such an issue can be easily handled. When students are asked to complete the paperwork that allows them to register with the disability office, they can and should also be asked to execute a form (or even simpler, check a box on one of the forms already required) that waives any perceived conflict and permits the sharing of student information.161 Ironically, those that hold fast to the erroneous notion that a breach of confidentiality occurs by disclosing the names of students with disabilities to their career areas are actually utilizing rules put in place for the benefit of students to exclude them from obtaining needed help and advice.

Career service specialists should capitalize on the relationships they have with existing employers and inquire as to their diversity and inclusion strategies. Those FCs should be put in touch with students availing themselves of disability services. Something as simple as an identifying banner or sign at college job fairs touting the employer as disability friendly and alerting students to the significance of that could

160. Id.
161. The information to be shared does not have to be personal. It can be limited to the fact that the student has a disability and is utilizing the disability services provided by the educational institution.
have a large impact. Career service specialists can and should promote on campus recruiting and interviews by FCs. Some colleges and universities also have Workforce Development offices that specialize in providing seminars and workshops, as well as credit and non-credit bearing courses, offered to and designed for companies and their employees. These Workforce Development offices can assist Career Service offices in identifying FCs and educating them as well as students about the Regulations and the affirmative action programs and mandated compliance that is required.

In short, college professionals must be made aware of the Regulations and the benefit and impact they can have on students with disabilities. There should be collaboration between student service offices, academic departments, centers for students with disabilities, and even the educational institution’s affirmative action office. This collaboration should be fostered irrespective of what umbrella these distinct offices/centers may be classified under within the particular college or university. Students with disabilities need to be made aware of the Regulations and the potential benefits of self-identification. Rather than feel or perceive themselves to be stigmatized or disadvantaged by a disability, students should be taught to embrace their attributes and utilize them to their advantage. Before they can do so, students need to know the Regulations exist and that they can work to their advantage. Universities and colleges should not only implement programs, workshops, informational sessions, and even mail fliers or letters to their homes, but also develop traditional, hybrid, and online courses focused on disability law and policy. There can be little doubt that actual credit bearing and non-credit bearing courses are viable ways of disseminating information. Such coursework may be of great interest to students, particularly those with disabilities.

In addition to the above, educational institutions have alumni offices and/or alumni foundations as well as Offices of Institutional Research. These organizations often track and measure employment

162. It is not difficult to “get the word out” on a college campus. College campuses use email extensively as well as Twitter accounts, Facebook pages, and Instagram accounts. See Departments, supra note 157. Consequently, list-servs can be generated to target particular groups of students such as those registered with the disability centers and inform them of upcoming events and important information.


164. E.g., About Us, N.Y. U., https://www.nyu.edu/ir/about.us/ (last visited Sept. 5, 2015);
opportunities of graduates and can play a vital role in communicating with alumni. Educating students about the Regulations and their potential to advance employment opportunities does not have to be limited to those students presently attending. It can and should be communicated to former students and graduates.

All too often, colleges and universities focus on assisting students while they are on campus and in attendance. While career service specialists do provide a great deal of training and guidance to current students, a more concerted effort could be made to assist with post-graduation employment. Again, this can be accomplished through collaboration among departments and various offices as well as alumni organizations. Indeed, it is axiomatic that educational institutions embrace the notion of committees and collaboration. A college committee or sub-committee with representatives from the above named departments/centers, administration and student government associations, would readily foster that collaboration, aide in the exchange of ideas, and help our educational institutions prepare their current and former students for the future.

Colleges and universities are in the business of educating, not only in the classroom but across their campuses. Our educational institutions need to realize that FCs will be turning to them to find qualified IWDs to fill positions. The number of students registered with disability centers on campuses nationwide continues to grow at a significant rate. Clearly, there is a lot of underutilized and untapped talent on our campuses.

With a little effort, knowledge, collaboration, and federal grant money, colleges and universities can make a real difference in the lives and the futures of their disabled students. They are in a position to do so and should do so.

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166. See Kristi Wilson, Elizabeth Getzel & Tracey Brown, Enhancing the Post-Secondary Campus Climate for Students with Disabilities, 14 J. Vocational Rehabilitation 37, 37 (2000).