Background

The final and temporary regulations that are the subject of these corrections are under sections 401, 403, 408, 457, and 4974 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final and temporary regulations (TD 8987), that were the subject of FR Doc. 02-8963, are corrected as follows:

1. On page 18991, column 2, in the preamble under the paragraph heading ''*Temporary Rules for Defined Benefit Plans and Annuity Contracts*'', first paragraph, line 2 from the bottom, the language ''assets has been replaced with this more'' is corrected to read ''assets have been replaced with this more''.

§ 54.4974–2 [Corrected]

2. On page 19028, column 1, § 54.4974–2(b)(4), line 19, the language ''the calendar in which the employee'' is corrected to read ''the calendar year in which the employee''.

Cynthia E. Grigsby,

Chief, Regulations Unit, Associate Chief Counsel, (Income Tax and Accounting).

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046–AA57

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Equal Employment Opportunity Commission is publishing this final rule to implement the amendment of section 501 of the Rehabilitation Act, under the Rehabilitation Act Amendments of 1992. This rule continues the movement towards full integration of individuals with disabilities into the Federal workforce.

DATES: Effective June 20, 2002.

FOR FURTHER INFORMATION CONTACT: Carol R. Miaskoff, Assistant Legal Counsel, or Mary Kay Mauren, Senior Attorney Advisor, (202) 663–4689 (voice), (202) 663–7026 (TDD). This document is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this document in an alternative format should be made to the Publications Information Center at 1–800–669–3362.

SUPPLEMENTARY INFORMATION: Increasing the employment of individuals with disabilities is one of the goals of section 501 of the Rehabilitation Act of 1973, as amended (section 501),[1] and Title I and selected sections of Title V of the Americans with Disabilities Act (ADA).[2] Section 501 has prohibited the federal government, as an employer, from discriminating on the basis of disability since the late 1970's. Title I of the ADA applied similar prohibitions to private sector and state and local government employers in 1990. To promote consistent and full enforcement of these two laws, Congress amended section 501 in 1992 [3] to adopt the employment nondiscrimination standards of the Americans with Disabilities Act (ADA).[4] In a Notice of Proposed Rulemaking (NPRM), the U.S. Equal Employment Opportunity Commission (EEOC or Commission) proposed to implement the 1992 Amendments by deleting the text of its old section 501 regulation, at 29 CFR 1614.203, and inserting new language to cross-reference the Commission's existing ADA regulation at 29 CFR part 1630.[5] The Commission now responds to public comments submitted in response to this NPRM and issues a final rule. Consistent with President George W. Bush's New Freedom Initiative, this final rule continues ''the movement towards full integration of individuals with disabilities'' into the workforce and promotes full compliance with section 501.[6]

[1] 29 U.S.C. 791(1994) (codified as amended). For a summary of the early history of Section 501, see *Prewitt v. United States Postal Service,* 662 F.2d 292, 301–304 (5th Cir. 1981).

[2] 42 U.S.C. 12101–12117, 12201–12213 (1994) (codified as amended). This goal was reaffirmed by the New Freedom Initiative of President George W. Bush (Integrating Americans with Disabilities into the Workforce, Part C: Compliance with the Americans with Disabilities Act) (Feb. 1, 2001), at http://www.whitehouse.gov/news/freedominitiative/freedominitiative.html (visited 1/09/02) [hereinafter New Freedom Initiative].

[3] Rehabilitation Act Amendments of 1992, Pub. L. 102–569, 106 Stat. 4344, 4424 (1992) (codified as amended at 29 U.S.C. 791(g) (1994)) (1992 Amendments).

[4] The 1992 Amendments refer to Title I and selected sections of Title V (sections 501 through 504 and 510).

[5] Notice of Proposed Rulemaking to Update 29 CFR 1614.203, 65 FR 11019, March 1, 2000.

[6] New Freedom Initiative, *supra* note 2.

Overview of Public Comments

The Commission received fifteen comments in response to this NPRM. Of these comments, four were from federal agencies, two were from federal unions, two from advocacy groups representing persons with disabilities, one from a group representing employment attorneys, and one from a state agency. The remaining submissions were from four individuals and one group not specifically involved with federal employees or disability rights. The Commission has carefully considered all of the comments and, as a result, has made some changes to the proposed regulation. The public comments and the text of the final regulation are discussed below.

Nondiscrimination and Model Employer

An advocacy group for individuals with disabilities expressed concern that paragraph (a) of the proposed rule specifically referenced hiring, placement, and advancement of qualified individuals with disabilities, but did not enumerate all the types of employment discrimination prohibited by the ADA. To clarify that the ADA's broad nondiscrimination standards apply in the federal sector, this commenter suggested cross-referencing the ADA's list of prohibited activities in paragraph (a) and also deleting the specific references to hiring, placement, and advancement.

The Commission concludes that these changes are not necessary because paragraph (b) of the rule already cross references the ADA statute and regulation. Specifically, paragraph (b) states that the ADA's nondiscrimination standards apply to section 501 complaints, and cross references the ADA rule at 29 CFR part 1630. Title I of the ADA, and the ADA rule at 29 CFR part 1630, both enumerate many types of prohibited employment discrimination. In light of this cross-reference, it is unnecessary to supplement paragraph (a) to establish that the ADA's broad discrimination prohibitions apply under section 501. Furthermore, for purposes of simplicity and clarity, the Commission makes paragraph (b) the sole reference to nondiscrimination in the final rule, deleting the general nondiscrimination language from paragraph (a).

Using the ADA Rule To Implement the 1992 Amendments

One commenter questioned the Commission's proposal to implement the 1992 Amendments by cross-referencing its ADA regulation at 29

CFR part 1630. The Commission remains convinced that this is the most efficient way to implement the 1992 Amendments. The Commission's ADA regulation at 29 CFR part 1630 implements the ADA employment provisions that are cited in the 1992 Amendments.[7]

This commenter also correctly noted that the ADA's statutory definition of ''employer'' excludes the United States. On this basis, the commenter contended that the ADA cannot cover federal employers. This commenter misapprehended both the purpose and effect of the 1992 Amendments and this regulation. Neither the 1992 Amendments nor this regulation result in the ADA directly covering federal employers. Rather, section 501 of the Rehabilitation Act continues to cover federal employers. Due to the text of the 1992 Amendments, however, section 501 now incorporates by reference the ADA's nondiscrimination standards. The ADA's statutory definition of ''employer'' does not impact the coverage of section 501.

Self-Identification and Affirmative Action

One advocacy group for individuals with disabilities asserted that old subparagraph 1614.203(e)(3), which permitted self-identification for affirmative action purposes, should be retained so that federal agencies can comply with their affirmative action responsibilities under section 501.[8] The Commission has considered the comment but concludes that old subparagraph 1614.203(e)(3) should be deleted in its entirety. Contrary to the commenter's assertions, the ADA standard does not prevent federal employers from satisfying their section 501 affirmative action obligations. The ADA permits affirmative action disability-related inquiries of job applicants if certain requirements are met. Specifically, employers may ask applicants to voluntarily self-identify as individuals with disabilities if the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities.[9] This would include the government's affirmative action efforts under section 501. *See* 29 U.S.C. 791(b).

Definition of Disability

An advocacy group for individuals with disabilities contended that the U.S. Supreme Court's decision in *Sutton* v. *United Airlines,* Inc., 527 U.S. 471 (1999), should not apply to section 501. The Commission has considered this comment but does not adopt it. The ADA definition of ''disability'' as construed by the Supreme Court must apply to section 501.[10]

Safety Issues and ''Direct Threat'

A federal agency commented that the NPRM imposes a burden on federal employers because they may need to determine whether an applicant or employee poses a ''direct threat'' to health or safety. The Commission has considered this comment but has decided that, pursuant to the 1992 Amendments, the same ''direct threat'' standard must apply to federal employers as to private employers. The NPRM correctly stated the ADA standard for ''direct threat,'' which requires employers to assess each individual's ability to safely perform a particular job, based on the most current medical assessment or other objective evidence.[11]

Reasonable Accommodation

Section 501 requires federal employers to provide reasonable accommodation for qualified applicants and employees with disabilities, barring undue hardship. Reasonable accommodation is central to integrating individuals with disabilities into the workforce.[12] The NPRM preamble addressed the ADA's treatment of the interactive process, reassignment, and undue hardship. The Commission reiterates that the ADA standards that apply in private sector employment apply to federal employment as well.[13] The following discussion addresses some of the public comments regarding reasonable accommodation.

The Interactive Process

The Commission agrees with the public comment that, under ADA standards, a request for reasonable accommodation and the informal interactive process are two distinct steps. First, the individual must request reasonable accommodation, in all but the most limited circumstances.[14] Second, the employer engages in the interactive process if the disability or the type of accommodation needed are not obvious.[15] Under ADA standards, employers must make a reasonable effort to identify an effective accommodation that does not pose an

[7] The 1992 Amendments cite two sections in Title V of the ADA that are not implemented by the Commission's ADA regulation because they do not concern employment. These are sections 502 (state immunity) and 504 (regulations by the Architectural and Transportation Barriers Compliance Board). *Compare* 29 U.S.C. 791(g) (1994) *with* 29 CFR 1630.1(a) (2001).

[8] Old subparagraph 1614.203(e)(3) states: ''To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped * * *''

[9] The employer also must state clearly on any written questionnaire, or orally if no written questionnaire is used, that the information requested is used solely in connection with its affirmative obligations or efforts, and that the information is being requested on a voluntary basis and will be kept confidential and used in accordance with the ADA (or section 501 of the Rehabilitation Act). The information must also be on a form that is kept separate from the application. *See* ''ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,'' at 12, 8 FEP Manual (BNA) 405:7191, 7196–97 (1995) [hereinafter ''Guidance on Preemployment Inquiries'']. (This and other ADA guidances are available through the Internet at *http://www.eeoc.gov.*) However, the information on a separate form may be provided to hiring officials or special appointing authorities to fulfill affirmative action obligations.

[10] The Commission notes that the *Sutton* analysis has been applied in section 501 decisions. *See Crocker* v. *Runyon,* 207 F.3d 314, 319 n.1 (6th Cir. 2000). *See also Flynn-Banigan* v. *Dep't of Justice,* EEOC Appeal No. 01973401 (August 3, 2000), *Pulcini* v. *Social Security Admin.,* EEOC Appeal No. 01990835 (July 27, 2000).

[11] The Supreme Court is deciding an ADA direct threat case this term. *See Chevron U.S.A., Inc.* v. *Echazabal,* No. 00–1406 (U.S. argued February 27, 2002). The Commission already has applied the ADA ''direct threat'' standard to federal employers in its decisions. *Kahout* v. *United States Postal Service,* EEOC Appeal No. 01954900 (June 19, 1997); *Hobbs* v. *United States Postal Service,* EEOC Appeal No. 01944181 (January 26, 1996); *Robinson* v. *United States Postal Service,* EEOC Request No. 05940034 (September 16, 1994). *See* 29 CFR 1630.2(r)(2001)(definition of ''direct threat''). For a discussion of when employers may request medical information necessary for assessing ''direct threat,'' see ''Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act,'' question 5, n.39, 8 FEP Manual (BNA) 405:7701, 7708 (2000).

[12] *See* New Freedom Initiative *supra* note 2.

[13] In *US Airways, Inc.* v. *Barnett,* No. 00–1250, slip op. at 9 (U.S. April 29, 2002), the Supreme Court adopted the position articulated in several lower court cases that in any reasonable accommodation case, a plaintiff/employee ''need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases,'' to defeat a defendant/employer's motion for summary judgment with respect to whether an accommodation is ''reasonable.'' Once the plaintiff/employee has made this showing, the defendant/employer has the burden of demonstrating undue hardship on the facts of the particular case. The decision in *Barnett* involved a conflict between a seniority system and a reassignment as a reasonable accommodation.

[14] *See* ''EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,'' at questions 1–4, 39, 8 FEP Manual (BNA) at 405:7601, 7604–07, 7628–29 (1999) [hereinafter ''Reasonable Accommodation Guidance'']. The Reasonable Accommodation Guidance contains a detailed description of the reasonable accommodation interactive process.

[15] *See* Reasonable Accommodation Guidance, supra note 14 at question 5, 8 FEP at 405:7606–07 (1999).

undue hardship. *See* 29 CFR part 1630 app. 1630.9.

Reassignment as a Reasonable Accommodation

Reassignment Is Separate From the Federal Merit Promotion System

Several agencies expressed concern that section 501 reassignment actions could violate the federal merit promotion system. Under ADA standards, however, reassignment of a qualified individual with a disability is distinct from the competitive selection process. The ADA defines reassignment to be part of the duty of reasonable accommodation, which is a nondiscrimination obligation separate and apart from the competitive selection process.[16] Indeed, the Office of Personnel Management (OPM) has characterized the reasonable accommodation of reassignment as ''a non-competitive process.'' [17]

Probationary Employees and Reassignment

Agencies also expressed concern that the ADA approach to reassignment permits reassignment of probationary employees, contrary to the categorical prohibition against such reassignment in the old regulation at 29 CFR 1614.203(g). The Commission considered these comments and again concludes that reassignment is available as a reasonable accommodation for probationary employees.

Under the ADA, qualified individuals with disabilities are entitled to reasonable accommodation, barring undue hardship. Reassignment is a form of reasonable accommodation. An individual with a disability is qualified for reassignment if s/he has adequately performed the essential functions of the original position, with or without reasonable accommodation, before the need for reassignment arose.[18] The longer the period of time in which a probationary employee has adequately performed the essential job functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if s/he becomes unable to continue performing the essential functions of the position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never ''qualified'' for the original position.[19]

When a Position Becomes ''Vacant'' for Purposes of Reassignment

Two federal agencies responded to the Commission's request for comment on when a position becomes vacant in the federal government. One agency commented that a position must not only be funded and unencumbered but must also be one that the agency intends to fill rather than eliminate for budgetary or mission reasons. The other agency commented that positions subject to hiring or other employment freezes are not presently funded and so cannot be considered vacant positions even though they may be authorized and not filled. It further contended that if an employee leaves a position, the employer must continue to have the opportunity to decide whether to fund the position, abolish it, or modify it in accordance with changed work or business requirements. Both agencies contended that a position cannot be considered vacant if it has been unconditionally offered to another individual. Finally, one of the agencies argued that a position cannot be considered vacant if another employee has a vested priority to it by seniority or some other superior right based on the employer's non-discriminatory policies.

The Commission agrees that an agency must have an opportunity to decide whether to abolish, modify, or simply continue funding a position after an employee departs. The Commission also agrees that the duty to provide reassignment does not include reassignment to a position for which there has already been an offer to another individual.[20] Finally, a position is not vacant if it is subject to a hiring freeze. Any decision not to continue a position, whether for funding or mission reasons, must not be discriminatorily based.

Undue Hardship and the Extent of Duty To Search for a Vacancy

Several agencies commented on an employer's duty to search for vacancies throughout its organization and on issues involving reassignments denied on the basis of undue hardship. These agencies expressed concern that an obligation to search for vacant positions beyond a commuting area and throughout an entire organization would result in administrative difficulty and expense. One commenter asserted that federal employers should not always be required to search for vacancies in different subagencies or components of the larger agency, because subagencies may be legally separate and may operate under separate appropriations, appointing authorities, and personnel offices. Another commenter urged the Commission to redefine the ADA ''undue hardship'' standard for the federal sector, so that reassignment decisions could be based on the budget of a particular facility. In the federal sector, the agency commented, a facility may have a limited budget with which to respond to growing public needs.

Under the 1992 Amendments, the Commission is bound by ADA standards, including the undue hardship standard.[21] The Commission concludes, however, that the ADA's ''undue hardship'' analysis takes into account the operational, financial, and legal relationships between components of large organizations, whether the organizations are private or federal.[22] An employer seeking to demonstrate ''undue hardship'' under the ADA standard would have to demonstrate why, in light of the resources, operations, and constraints of its particular organization, a reasonable accommodation would result in significant difficulty or expense. If a federal employer seeks to demonstrate that a specific reasonable accommodation poses an undue hardship because it would compromise the agency's mission, the agency needs to factually assess the ''impact of the accommodation'' on operations.[23]

An advocacy group for individuals with disabilities objected that the proposed rule appeared to limit reassignment to situations in which there was no other effective accommodation, or in which all other accommodations would impose an undue hardship. The Commission has consistently interpreted the ADA to mean that reassignment is only required in these circumstances.[24] Reassignment may be an option in other circumstances if the employer and the employee agree to it.[25] To avoid any ambiguity

[16] *See* 42 U.S.C. 12111(9)(B) (1994).

[17] *See* Employment Service, U.S. Office of Personnel Management, People with Disabilities in the Federal Government: An Employment Guide at 31 (1999).

[18] *See* Reasonable Accommodation Guidance, *supra* note 14 at question 25, 8 FEP at 405:7622–23 (1999).

[19] *See id.*

[20] Under the ADA, a job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. *See* Guidance on Preemployment Inquiries, *supra* note 9, at 18–19, 8 FEP 405:7200 (1995).

[21] The Supreme Court, in *US Airways,* slip op. at 10, emphasized that the employer still retains the burden of showing undue hardship.

[22] *See* 42 U.S.C. 12111(10) (1994). *See also* 29 CFR 1630.2(p) (2001).

[23] *Id.*

[24] *See* Reasonable Accommodation Guidance, *supra* note 14, at p. 39, 8 FEP at 405:7622 (1999).

[25] *Id.*

concerning when reassignment is appropriate, we eliminated paragraph (b)(2) which defined the employer's duty to provide reasonable accommodation and reassignment. The remaining cross-reference to the ADA standards in paragraph (b) provides the appropriate standard.

Conflict With Collective Bargaining Agreement

Some federal unions and employers questioned whether reassignment should be required as a reasonable accommodation when it would create a conflict with another employee's seniority rights under a collective bargaining agreement (CBA). These commenters cited developing ADA case law on this issue and urged the view that CBA seniority rights should prevail. Following the submission of these public comments to the Commission, the U.S. Supreme Court decided *US Airways, Inc.* v. *Barnett,* No. 00–1250, (U.S. April 29, 2002). In *Barnett,* the Court considered whether the ADA requires an employer to reassign an individual with a disability as a reasonable accommodation when another employee is entitled to hold the position under an established seniority system.

The Court held that a conflict between a seniority system and a proposed accommodation should be analyzed to determine whether the requested accommodation is reasonable. The Court ruled that ''ordinarily'' a proposed accommodation will not be reasonable if it conflicts with a seniority system. *Barnett,* slip op. at 14. However, the Court also stated that, even if an employer shows that the proposed accommodation will violate a seniority system, a plaintiff/employee may nevertheless show that ''special circumstances'' warrant a finding that the accommodation is ''reasonable'' on the facts of the particular case. The plaintiff/employee has the burden of proof to show that such ''special circumstances'' exist. The Court remanded *Barnett* for consideration under this standard.

In *Barnett,* a seniority system was linked to longstanding employer practice but was not part of a negotiated CBA. In its analysis, the Court relied primarily on Rehabilitation Act and ADA case law involving collectively bargained seniority systems to conclude that accommodations conflicting with seniority systems are unreasonable absent special circumstances. The Court's language broadly and consistently referred to ''seniority systems.'' Accordingly, the Commission construes *Barnett* as applying to CBA seniority provisions as well as to seniority systems based on employer practices.

Effective Date of the Final Rule

This regulation will be effective 30 days after publication of the final rule in the **Federal Register**, and will apply to conduct occurring on or after that date.

Additional Amendment

The Commission did not receive public comment on its proposal to delete the provision in § 1614.102(a)(9) which refers to reassignment pursuant to § 1614.203(g). That paragraph is now deleted.

Regulatory Procedures

Executive Order 12866

Pursuant to Executive Order 12866, EEOC has coordinated this final rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

Paperwork Reduction Act

This regulation contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

In addition, the Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies and departments of the federal government. For this reason, a regulatory flexibility analysis is not required.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Equal employment opportunity, Government employees, Individuals with disabilities.

For the Commission.

Cari M. Dominguez,

Chair.

For the reasons set forth in the preamble, Chapter XIV of Title 29 of the Code of Federal Regulations is amended as follows:

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

1. The authority citation for part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633(a), 791 and 794a; 42 U.S.C. 2000e–16; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR 1978 Comp., p. 321.

§ 1614.102 [Amended]

2. Section 1614.102 is amended by removing paragraph (a)(9) and redesignating paragraphs (a)(10) through (a)(14) as paragraphs (a)(9) through (a)(13), respectively.

3. Section 1614.203 is revised to read as follows:

§ 1614.203 Rehabilitation Act.

(a) *Model employer.* The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

(b) *ADA standards.* The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulations at 29 CFR part 1630.

[FR Doc. 02–12543 Filed 5–20–02; 8:45 am]

BILLING CODE 6570–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 140

[FRL–7212–4]

Marine Sanitation Devices (MSDs); Regulation to Establish a No Discharge Zone (NDZ) for State Waters within the Boundary of the Florida Keys National Marine Sanctuary (FKNMS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is establishing a NDZ for State waters within the boundaries of