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NUMERICAL GOALS FOR EMPLOYMENT OF PEOPLE WITH DISABILITIES BY FEDERAL AGENCIES AND CONTRACTORS

MARK C. WEBER*

ABSTRACT

This essay discusses recent developments concerning numerical goals for employing workers with disabilities by federal agencies and federal contractors. On May 15, 2014, the Equal Employment Opportunity Commission issued an Advance Notice of Proposed Rulemaking asking for comments about, among other things, placing on federal agencies numerical employment goals for individuals with disabilities. On September 24, 2013, the Office of Federal Contract Compliance Programs adopted a Final Rule that imposed on federal contractors a numerical utilization goal for employees with disabilities, a regulation that the Circuit Court of Appeals for the District of Columbia upheld against challenge in 2014. A number of legal scholars have discussed the use of numerical standards for employment of people with disabilities. This essay brings the discussion up to date by taking a close look at the new regulatory initiatives on the subject. It further suggests ways on which the yet-unformed parts of the program might develop. In particular, it notes the importance of establishing goals for the employment of people with severe disabilities by federal agencies and discusses several additional steps to promote employment of people with disabilities in the federal sector.

* Vincent dePaul Professor of Law, DePaul University. Thanks to Paul Secunda and Barry Taylor for their input on the Comment to the Advance Notice of Proposed Rulemaking that was the impetus for this project. Thanks to Marcia McCormick and Elizabeth Pendo for their efforts on *The ADA at 25: Disability Rights and the Health Care Workforce* Symposium. Thanks to Vaughn Bentley, DePaul University College of Law 2016, for research assistance.

I. INTRODUCTION

This essay discusses recent developments concerning numerical goals for employing workers with disabilities by federal agencies and federal contractors. On May 15, 2014, the Equal Employment Opportunity Commission (EEOC) issued an Advance Notice of Proposed Rulemaking asking for comments on, among other things, placing numerical employment goals for individuals with disabilities on federal agencies.¹ On September 24, 2013, The Office of Federal Contract Compliance Programs (OFCCP) adopted a Final Rule that imposed on federal contractors a numerical utilization goal for employees with disabilities.²

Imposing numerical goals on federal agencies and federal contractors is an important step in promoting employment of Americans with disabling conditions. The federal government is the nation's largest employer, with a workforce of almost 4.2 million, of whom roughly 2.7 million are executive branch civilian workers.³ More than 45,000 companies are federal contractors, and they have 200,000 workplaces with an unknown but vast number of employees.⁴ In reference to the specific subject of this Symposium, it must be noted that federal agencies are both huge providers of⁵ and huge contractors for⁶ health services, so disability employment goals will have a major impact on the health care workforce.

1. The Federal Sector's Obligation To Be a Model Employer of Individuals with Disabilities, 79 Fed. Reg. 27,824, 27,825 (May 15, 2014). The comment period closed July 14, 2014. As of January 18, 2016, the EEOC had not issued proposed or final rules.

2. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,682 (Sept. 24, 2013) (codified at 41 C.F.R. pt. 60-741).

3. U.S. Office of Pers. Mgmt., *Total Federal Government Employment Since 1962: Historical Federal Workforce Tables*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/> (last visited July 29, 2015).

4. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. at 58,682 ("Executive Summary").

5. The Veterans Health Administration alone is the nation's largest health care system, with 1700 sites and 8.76 million veterans served each year. VETERANS HEALTH ADMIN., U.S. DEP'T OF VETERANS AFF., <http://www.va.gov/health/> (last visited July 29, 2015). One government publication from 2009 notes that "more than half of the physicians practicing in the United States had some of their professional education in the VA health care system." *Facts about the Department of Veterans Affairs*, U.S. DEP'T OF VETERANS AFF. (Jan. 2009), http://www.vaca.reers.va.gov/assets/common/print/fs_department_of_veterans_affairs.pdf.

6. Of the top 100 federal contractors, number 13 is Humana, Inc., number 16 is UnitedHealth Group, Inc., number 17 is Health Net, Inc., number 36 is Merck & Co., number 41 is Cardinal Health, number 64 is Pfizer, Inc., number 70 is GlaxoSmithKline, and number 75 is Express Scripts Holding Corp. U.S. GEN. SERVS. ADMIN., FED. PROCUREMENT DATA SYSTEM-NEXT GENERATION TOP 100 CONTRACTORS REPORT (2014), https://www.fpbs.gov/fpdsng_cms/

A number of legal scholars have discussed the use of numerical standards for employment of people with disabilities,⁷ and the work includes some early research of mine.⁸ This essay brings the discussion up to date by taking a close look at the new regulatory initiatives on the subject. It further suggests ways on which the yet-unformed parts of the program might develop. In particular, it notes the importance of establishing firm goals for the employment of people with severe disabilities by federal agencies and discusses several additional steps to promote employment of people with disabilities in the federal sector.

Part I describes the persistent shortfalls in employment of people with disabilities that are the reason for numerical hiring goals. Part II discusses the statutory bases for rulemaking regarding numerical goals. Part III describes the rule that the OFCCP adopted and considers litigation that was recently concluded in which federal construction contractors challenged the OFCCP rule. Part IV discusses some of the choices facing the EEOC as it formulates the rule for federal agencies, particularly the idea of goals for employment of individuals with severe disabilities, and then suggests additional related measures to promote the employment of people with disabilities.

II. REASONS FOR AGENCY ACTION

People with disabilities have far higher rates of unemployment than people without disabilities and earn less when they are employed. The unemployment rate for persons with disabilities is significantly more than double the unemployment rate of the population at large.⁹ The mean hourly wage for

index.php/en/reports/62-top-100-contractors-report3.html (last visited Jan. 5, 2016). The System for Award Management Assistance, a private entity, proclaims that “the United States Federal Government is the world’s largest purchaser of goods and services, spending around \$500 billion each year.” *Does Your Business Qualify for Government Contracting?*, U.S. FED. CONTRACTOR REGISTRATION, <https://uscontractorregistration.com/qualify/> (last visited Jan. 18, 2016).

7. E.g., SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 137 (2009); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 355-56 (2001); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211 (1994); Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62 (1996).

8. Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 159-74 (1998) [hereinafter, Weber, *Employment Policy*]; Mark C. Weber, *Disability and the Law of Welfare*, 2000 U. ILL. L. REV. 889, 952 (2000); Mark C. Weber, *The Americans with Disabilities Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, 415-18 (2000).

9. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,682 (Sept. 24, 2013) (“Executive Summary”) (analyzing data from CARMEN DENAVAS-WALT ET AL., *INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012*, U.S. CENSUS

workers with disabilities is four dollars less than that of those without disabilities.¹⁰ Household income for householders with a disability of working age is \$25,420 compared to \$59,411 for others.¹¹ The poverty rate for working-age people with disabilities is more than twice that of people without disabilities.¹² Sources that include persons who are not currently seeking jobs indicate that seventy percent of the working-age Americans with disabilities do not work.¹³

Although the Americans with Disabilities Act (ADA)¹⁴ provides a deterrent to and remedy for disability discrimination in employment, it has not proven successful at changing the facts of joblessness and low wages for large numbers of people with disabilities who want to work.¹⁵ The legislation may become more effective¹⁶ now that Congress has amended the Act to broaden

BUREAU CURRENT POPULATION REPORTS (2013), <https://www.census.gov/prod/2013pubs/p60-245.pdf>).

10. *Id.*

11. *Id.*

12. *Id.* Additional data may be found at EMP'T & DISABILITY INST. AT CORNELL UNIV., 2012 DISABILITY STATUS REPORT (2012), http://www.disabilitystatistics.org/StatusReports/2012-PDF/2012-StatusReport_US.pdf#cgi.SCRIPT_NAME#; see also MATTHEW W. BRAULT, AMERICANS WITH DISABILITIES: 2010 HOUSEHOLD ECONOMIC STUDIES, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS (2012), <http://www.census.gov/prod/2012pubs/p70-131.pdf> (explaining Census disability categorization).

13. See, e.g., U.S. S. COMM. HEALTH, EDUCATION, LABOR & PENSIONS, 113TH CONG., FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 3 (2014) ("Of the over 20 million Americans with disabilities who are of working age, less than 30 percent work, compared to over 78 percent of non-disabled Americans."), <http://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf>. See also *Economic News Release*, BUREAU LAB. STAT., <http://www.bls.gov/news.release/empstat06.htm> (last visited July 29, 2015) (discussing current rates of employment of people with disabilities).

14. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012).

15. Rates of success in reported cases under the Act have historically been poor, and even though reports of cases are not necessarily a perfect indicator, the best-known study gives statistics that are so lopsided that the trend is evident. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. REV. 99, 100 (1999) ("[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases.").

16. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2046, 2049-50 (2013) (reporting post-amendment decline in employers prevailing on issue of whether employee is disabled, but increase in employer success on lack of qualification of employee). A recent article describing California's experience with legislation that provides broader coverage for individuals claiming disability discrimination suggests that laws with broader coverage have demonstrable positive effects on employment. Patrick Button, *Expanding Disability Discrimination Protections to Those with Less Severe Impairments: Evidence from California's Prudence Kay Poppink Act*

its coverage, a change that does not apply to violations that took place before January 1, 2009.¹⁷ But disability discrimination, particularly hiring discrimination,¹⁸ is notoriously difficult to prove to the satisfaction of the judiciary,¹⁹ and attitudes that act as barriers to employing people with disabilities and furnishing needed accommodations are pervasive and resistant to change.²⁰

As the country's largest employer, the federal government is part of the problem and has the potential to be a major part of the solution. President Obama recognized the distance between the ideal and the reality when he issued Executive Order 13548, "Increasing Federal Employment of Individuals with Disabilities," stating in his announcement that individuals with disabilities amount to just above five percent of the 2.5 million people in the federal workforce, and that people with more severe "targeted" disabilities are less than one percent of the federal workforce.²¹ Moreover, as the President noted, the number of workers with targeted disabilities actually decreased in the final

(manuscript at 6, 19-20) (July 19, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621246.

17. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213).

18. See BAGENSTOS, *supra* note 7, at 118, 127-28 (contrasting hiring claims with discharge claims).

19. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 60-66, 73-78 (2014) (collecting and analyzing post-ADAAA cases with regard to qualification standards and accommodations); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act*, MICH. ST. L. REV. (forthcoming 2016) (manuscript at 18-32), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607330 (collecting and analyzing post-ADAAA cases regarding qualifications and essential functions of jobs); see Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, n.228 (2015) (collecting sources on difficulty of proving ADA claims).

20. See Mark C. Weber, *Intent in Disability Discrimination Law: Social Science Insights and Comparisons to Race and Sex Discrimination*, U. ILL. L. REV. (forthcoming 2016) (manuscript at 12-14), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619348 (describing attitudes that hamper employment of people with disabilities and collecting sources); Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 475-478 (2008) (collecting sources indicating that implicit bias regarding disability is strong and widespread).

21. Exec. Order No. 13548, 75 Fed. Reg. 45,039, 45,039 (July 26, 2010); see U.S. EEOC, ANNUAL REPORT ON THE FEDERAL WORKFORCE PART II: WORK FORCE STATISTICS: FISCAL YEAR 2011, at 15 (2011) (reporting underlying data). The EEOC designated the targeted disabilities in a management directive issued in 1979 and revised in 2003. U.S. EEOC, EQUAL EMPLOYMENT OPPORTUNITY: MANAGEMENT DIRECTIVE 715: APPENDIX A (Oct. 1, 2003), <http://www.eeoc.gov/federal/directives/md715.cfm> [hereinafter EEOC Management Directive]. See generally Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 302-05 (2008) (describing history of targeted disabilities designation and reporting low numbers of federal employees with targeted disabilities).

years of the last decade before leveling off in 2010.²² Greater federal agency and federal contractor employment of persons with disabilities will put more Americans with disabilities into the working economy and will demonstrate that individuals with disabilities can be valuable contributors to the enterprise of any employer.

Accommodation is the key.²³ To take the one example of health care, and pulling back from a focus on federal contractors to the American workforce as a whole, a significant development has been the growing awareness that health care workers with disabilities can be highly successful in jobs that demand extensive skill and training, as long as the employer provides accommodations.²⁴ For example, an assistant can set up intravenous lines, place stethoscopes, and do other tasks under the direction of a qualified nurse who has limits on the use of arms or hands. Devices such as magnifiers and onscreen enlargement software permit medical workers with visual impairments to perform duties safely and efficiently.²⁵ Health care personnel with limits that cannot be accommodated in their current positions may choose to move into specialties or particular positions that maximize the capabilities they have.²⁶ Health care is an area in which there will be extensive needs in coming years. As a Department of Labor report notes, “People with disabilities have an important role to play in this changing landscape. They not only represent an untapped talent pool, but also offer significant value and insight that can improve patient care.”²⁷

22. See Statement Of Chai Feldblum, Comm’r, U.S. EEOC Before the Comm. On Homeland Sec. & Governmental Affairs U.S. S., 112th Cong. 4 (2011), <http://www.hsgac.senate.gov/subcommittees/oversight-of-government-management/hearings/improving-federal-employment-of-people-with-disabilities>.

23. See Matthew J. Hill et al., *Employer Accommodation and Labor Supply of Disabled Workers*, Rand Working Paper Series WR-1047 (Mar. 18, 2014), at 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426707 (collecting sources) (“A natural way for employers to retain disabled workers is to accommodate their disabilities so they can continue to be productive despite the existence of a health impairment that would otherwise impede work, for example by modifying job requirements or work schedules.”).

24. See, e.g., Janet Edwards, *Game Changers: Nurses with Disabilities Work to Dispel Bias in Health Care*, INSIGHT INTO DIVERSITY, Apr.-May 2013, at 8, <http://www.dol.gov/odep/pdf/GameChangersNurses.pdf>.

25. See *id.* at 9-10.

26. See Leslie Neal-Boylan, *End the Disability Debate in Nursing: Quality Care is Fact*, INSIGHT INTO DIVERSITY, Apr.-May 2013, at 11, <http://www.dol.gov/odep/pdf/DisabilityDebate.pdf>.

27. U.S. ACCESS BD., OFFICE OF DISABILITY EMP. POL’Y, U.S. DEP’T OF LABOR, HEALTH CARE PROFESSIONALS WITH DISABILITIES CAREER TRENDS, BEST PRACTICES AND CALL-TO-ACTION POLICY ROUNDTABLE, 3 (2014), <http://www.dol.gov/odep/alliances/nondalliancerooundtablereport.pdf>.

The absence from government and government contractor employment of people with disabilities, particularly those with deafness, blindness, paralysis, epilepsy, severe intellectual disability, and other conditions considered targeted disabilities, amounts to a major failure by government and the private sector to take advantage of talent and work capacity, as well as a loss of opportunity for people with disabilities who are eager to do the work. Unreviewed categorical job qualification standards, unduly subjective selection processes, and lack of outreach all contribute to low representation of people with disabilities in the workforce.²⁸ In light of the barriers to employment that continue to exist, mandatory numerical goals for employment of individuals with disabilities constitute a great advance in accomplishing the presidential and congressional goal of greater opportunity for those with disabilities in the federal sector. Goals are an outcome measure, precisely the kind of accountability mechanism that authorities have encouraged federal agencies and grantees to adopt to ensure successful performance in a wide range of areas.²⁹

Numerical goals for employment, often in a form stricter than that adopted by OFCCP for federal contractors and applicable to all employers over a certain size, are common in the developed world.³⁰ Although it is possible to criticize mandatory quantitative standards,³¹ systems employing numerical goals accomplish the fundamental objective of bringing people with disabilities into the workforce,³² and over the years those systems have eliminated various

28. EEOC OFFICE OF FED. OPERATIONS, IMPROVING THE PARTICIPATION RATE OF PEOPLE WITH TARGETED DISABILITIES IN THE FEDERAL WORK FORCE 23-24 (2008), <http://www.eeoc.gov/federal/reports/pwtd.pdf>; see also NAT'L COUNCIL ON DISABILITY, EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 20-21 (2007), http://www.ncd.gov/rawmedia_repository/d87db786_9053_49c2_8032_092ddde6752.pdf (describing obstacles to employment for people with disabilities).

29. See Nathan A. Bostick et al., *Report of the Council on Ethical and Judicial Affairs: Physician Pay-For-Performance Programs*, 3 IND. HEALTH L. REV. 429, 430-31 (2006) (discussing outcome measures for physician performance); Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 271-79 (2010) (discussing outcome measures in legal education); Beth Locker & Andrew Barclay, *Measuring the Next 30 Years*, 41 U. MICH. J.L. REFORM 269, 271-80 (2007) (discussing outcome measures for child protection policy).

30. See Weber, *Employment Policy*, *supra* note 8, at 169-70 (describing programs in Japan, Europe, and elsewhere (note, the British system listed with the others in that article was ultimately replaced with a job-subsidies initiative)).

31. See BAGENSTOS, *supra* note 7, at 137.

32. See Ryoko Sakuraba, *Complementary Approaches: Japanese Disability and Employment Law*, in DISABILITY AND EQUITY AT WORK 360, 361 (Jody Heymann et al. eds., 2014) (describing Japanese employment rate of people with disabilities under job quota and levy system as relatively high in comparison with rest of world); see also Tadashi Kudo, *Japan's Employment Rate of Persons with Disabilities and Outcome of Employment Quota System*, 7 JAPAN LAB. REV. 5, 16 (2010) ("[The] total number of persons with disabilities working for companies covered by the quota system for persons with disabilities has increased for 16 years, especially, that of those

potential problems with implementation and enforcement.³³ One well-recognized challenge for quantitative approaches is determining what is the baseline population of people with disabilities who have qualifications such that they potentially could perform various jobs if they were to receive reasonable accommodations, so that regulators can formulate specific goals for job categories.³⁴ An important effect of the new federal contractor rulemaking described below is that there will be comprehensive data reporting about federal contractor job applicants and employees who have disabling conditions.³⁵ Numerical systems complement, rather than conflict with, anti-discrimination laws.³⁶

In Executive Order No. 13548, in 2010, President Obama directed executive departments and agencies to develop agency-specific plans for promoting employment opportunities for people with disabilities that include numerical goals for employment of individuals with disabilities and sub-goals for those with the more severe, targeted disabilities.³⁷ Doubts about the efficacy of this self-directed agency activity have led the EEOC to consider

with severe disabilities has significantly increased.”). Some authorities believe that uniform numerical standards may also be fairer in their allocation of the costs of accommodation to the entire class of employers, rather than those employers who happen to have people with disabilities apply for their jobs. *See* Issacharoff & Nelson, *supra* note 7, at 355-56 (discussing German system of alternative quotas or government-imposed fees).

33. *See* Sakuraba, *supra* note 32, at 361-62 (noting additional initiatives that promote success of quota system in Japan, including administrative guidance, financial support for training and accommodations, and vocational rehabilitation services), 370 (describing government certification program for eligible workers); *see also* NAT’L DISABILITY AUTH. OF IR., STATUTORY TARGETS ON EMPLOYMENT OF PEOPLE WITH DISABILITIES IN THE PUBLIC SECTOR 6-18 (2007), <http://nda.ie/nda-files/Statutory-Targets-on-Employment-of-People-with-Disabilities-in-the-Public-Sector.pdf> (discussing methods to measure compliance with Ireland’s three percent target for employment of people with disabilities by public bodies and comparing compliance methods for numerical standards used in other countries).

34. *See* Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, Final Rule, 78 Fed. Reg. 58,682, 58,715 (Sept. 24, 2013). *See generally* Exec. Order No. 13548 §§ 1, 2(b), 75 Fed. Reg. 45,039 (July 26, 2010).

35. *See* Affirmative Action and Nondiscrimination Obligations, 78 Fed. Reg. at 58,683 (describing reasons for data collection requirements).

36. *See, e.g.,* Tamako Hasegawa, *Japan’s Employment Measures for Persons with Disabilities: Centered on Quota System of “Act on Employment Promotion of Persons with Disabilities,”* 7 JAPAN LAB. REV., Spring 2010, at 26, 27 (“The importance of this quota approach never changes even after the enactment of an antidiscrimination law for persons with disabilities.”); *see also* Tamako Hasegawa, *Equality of Opportunity or Employment Quotas?—A Comparison of Japanese and American Employment Policies for the Disabled*, 10 SOC. SCI. JAPAN 41, 55-56 (2007) (discussing potential ways to harmonize anti-discrimination and quota systems).

37. Exec. Order No. 13548, 75 Fed. Reg. 45,039, 45,039 (July 26, 2010).

directly imposing across-the-board numerical goals on federal agency employers.³⁸

Unlike affirmative action on the basis of race, a measure whose constitutionality has often been called into question,³⁹ affirmative action on the basis of disability, including the use of numerical goals, is not in serious constitutional doubt. Classifications based on disability receive rational-basis review,⁴⁰ and there is no question that a numerical target is a rational means to achieve the legitimate governmental goal of promoting employment of persons with disabilities.

III. STATUTORY AUTHORITY

The statutory bases for rulemaking to establish numerical goals are sections 501 and 503 of the Rehabilitation Act of 1973.⁴¹ Federal agencies are barred from engaging in disability discrimination by section 501's better known cousin, section 504, which also prohibits disability discrimination by entities receiving federal funds.⁴² Federal contractors must obey section 503, which bans discrimination on the basis of disability by those entities.

A. Section 501

Section 501 goes beyond the nondiscrimination provision of section 504 in promoting employment of people with disabilities. It states:

38. The Federal Sector's Obligation To Be a Model Employer of Individuals with Disabilities, 79 Fed. Reg. 27,824, 27,825 (May 15, 2014).

39. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 771 F.3d 274 (5th Cir. 2014) (upholding challenge to affirmative action based on race in university admissions), *cert. granted*, 132 S. Ct. 1536 (2015).

40. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985) (applying rational-basis review to classification based on intellectual disability); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (reasoning from use of rational-basis review to conclusion that nondiscrimination remedies ADA imposed on states did not override Eleventh Amendment immunity).

41. Rehabilitation Act of 1973, Pub. L. No. 93-112, Title V §§ 501, 503, 87 Stat. 355, 390-91, 393-94 (1973) (codified at 29 U.S.C. §§ 791, 793 (2012)).

42. 29 U.S.C. § 794 (2012) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."). Executive agencies and the Postal Service were added to the statute in 1978 after some uncertainty emerged over section 501's application in discrimination cases. Pub. L. 95-602, Title I § 119, 92 Stat. 2982, 2987 (1978); *see Kathryn W. Tate, The Federal Employer's Duty Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment*, 67 TEX. L. REV. 781, 786 n.21 (1989) (discussing authorities that questioned existence of enforceable duties against discrimination by federal agencies before amendment of section 504).

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall . . . submit to the [Equal Employment Opportunity] Commission and to the [Interagency] Committee [on Employees who are Individuals with Disabilities] an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution.⁴³

Accordingly, cases alleging failure to engage in affirmative action are treated differently from those alleging discrimination that is prohibited under section 504:

The standards used to determine whether this section has been violated in a complaint alleging *nonaffirmative action* employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 . . . , as such sections relate to employment.⁴⁴

This statutory language leads to the conclusion that the section 501 affirmative action standard is one of elevated accommodation, different from nonaffirmative action cases. Civil Rights Act Title VII remedies, including a private right of action in court, are available to persons who believe that a federal agency violated their rights under section 501.⁴⁵

The regulation that interprets section 501 repeats the language about standards to determine violations,⁴⁶ and adds emphasis to the statutory command to take extra effort to accommodate applicants and employees with disabilities, to the point of making the federal government an ideal for the rest of the country's employers: "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."⁴⁷

43. 29 U.S.C. § 791(b) (2012).

44. *Id.* § 791(f) (emphasis added).

45. 29 U.S.C. § 794a(a)(1) (2012). ("The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.").

46. 29 C.F.R. § 1614.203(b) (2015).

47. *Id.* § 1614.203(a).

The judiciary has clarified the higher duty that section 501 imposes on federal agencies and distinguished it from ordinary nondiscrimination obligations owed by federal grantees under section 504. In *Southeastern Community College v. Davis*,⁴⁸ a deaf student argued that her nursing school violated section 504 by failing to modify its course of study to permit her to complete the clinical part of the coursework. The Supreme Court ruled against the student, acknowledging that section 504 requires accommodations, but concluding that the changes needed to permit her to complete the program were more than the law demanded.⁴⁹ In its reasoning, the Court contrasted the duty of reasonable accommodation under section 504 with the greater obligations of affirmative action imposed on federal agencies by section 501: “A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.”⁵⁰ In later caselaw, the Court equated the “affirmative action” that fell outside section 504 but potentially within section 501 with “fundamental alterations” of programs.⁵¹

Lower courts have applied the section 501 standard to require federal agencies to make significant accommodations to employees with disabilities. In a leading case, *Taylor v. Garrett*,⁵² Judge Louis Pollak held that a civilian Navy employee who had worked as a rigger before he sustained a back injury could be entitled to a permanent light duty position. The court denied the defendant’s motion for summary judgment, stressing that section 501 places obligations on federal employers that are higher than those established by section 504.⁵³ Other courts that have considered the accommodation standards thoughtfully have fallen in line with the interpretation of section 501 in *Davis* and *Taylor*.⁵⁴

48. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 402 (1979).

49. *Id.* at 410-11.

50. *Id.* at 411.

51. *Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985) (“[I]t is clear from the context of *Davis* that the term ‘affirmative action’ referred to those ‘changes,’ ‘adjustments,’ or ‘modifications’ to existing programs that would be ‘substantial,’ or that would constitute ‘fundamental alteration[s] in the nature of a program False’ rather than to those changes that would be reasonable accommodations.”) (citations omitted).

52. *Taylor v. Garrett*, 820 F. Supp. 933, 933-34 (E.D. Pa. 1993).

53. *Id.* at 936 (“[S]ection 501’s requirement of affirmative action, incumbent only on federal employers, extends beyond the duty of reasonable accommodation incumbent upon federal grantees covered by section 504.”).

54. *Woodman v. Runyon*, 132 F.3d 1330, 1343 (10th Cir. 1997) (reversing summary judgment against employee on reasonable accommodation claim; stating: “It is well established both by the statutory language and Supreme Court decisions interpreting the Act that federal employers have greater duties to accommodate disabled workers under section 501 than the duties owed by federal grantees under section 504 or those owed by employers under the ADA.”);

In the period before the 2014 Advance Notice of Proposed Rulemaking, the federal government took various steps to implement section 501 and its interpretive regulation. President Clinton issued a series of executive orders directing agencies to increase outreach, provide accommodations, and enhance training with regard to the accommodations process.⁵⁵ During the George W. Bush Administration, the Office of Personnel Management issued a report identifying best practices for promoting hiring and advancement of employees with disabilities,⁵⁶ and the EEOC began Project LEAD (Leadership for the

Mantolite v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (overturning judgment against job applicant with epilepsy; stating: “In addressing federal employers and contractors, Congress chose to use the term ‘affirmative action’ . . . ; it was clearly implying that a more active and extensive effort than ‘non-discrimination’ must be made to eliminate barriers to employment of the handicapped”); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 307 (5th Cir. 1981) (reversing summary judgment against applicant on disparate impact and reasonable accommodation claims; stating: “[S]ection 501(b), unlike section 504, explicitly requires federal government employers to undertake ‘affirmative action’ on behalf of the handicapped. And the new section 505, added by Congress in 1978, explicitly permits courts to fashion ‘an equitable or affirmative action remedy’ for violations of section 501, with the caveat that ‘the reasonableness of the cost of any necessary workplace accommodation’ should be taken into account.”); *Boandl v. Geithner*, 752 F. Supp. 2d 540, 558 (E.D. Pa. 2010) (denying defendant’s motion for summary judgment on employee’s reasonable accommodation claim; stating: “Section 501 of the Act creates even more stringent standards for the treatment of disabled employees [than section 504], but applies only to federal agencies.”); *Norden v. Samper*, 503 F. Supp. 2d 130, 144 (D.D.C. 2007) (granting summary judgment on accommodation claim in favor of plaintiff entomologist employed at Smithsonian who as result of illness contracted while on assignment was unable to work near chemical used to preserve insect specimens, needed flexible schedule, and requested intellectually stimulating work comparable to previous duties; stating: “Because of the affirmative action obligations placed on federal agencies and the Smithsonian, ‘[i]t is well established both by the statutory language and Supreme Court decisions interpreting the [Rehabilitation] Act that federal employers have greater duties to accommodate disabled workers under [29 U.S.C. § 791] than the duties owed by federal grantees under [29 U.S.C. § 794] or those owed by employers under the ADA.”) (citation omitted); *see Tate*, *supra* note 42, at 801-02 (“Because the Court has also made clear that the federal employer’s duty [under section 501] is greater than that of the grantee-employer [under section 504], courts must set the test for the mandated ‘reasonable’ accommodation under section 501 at a higher level of effort than that required under section 504.”); *see also Fedro v. Reno*, 21 F.3d 1391, 1398 (7th Cir. 1994) (Rovner, J., concurring in part and dissenting in part) (“Under section 501 of the Rehabilitation Act, federal agencies owe their disabled employees more than a simple duty of nondiscrimination; they bear an affirmative obligation to meet the special needs of disabled employees and thus to broaden their employment opportunities.”); *cf. Bennett v. Henderson*, 15 F. Supp. 2d 1097, 1104 (D. Kan. 1998) (“The court also recognizes significant differences between regulations promulgated under section 501 and those promulgated under the ADA. The former regulations ‘are stricter than those promulgated under the ADA.’”) (citation omitted).

55. Burgdorf, *supra* note 21, at 302 & n.283 (collecting sources).

56. U.S. Office of Pers. Mgmt., *Federal Employment of People with Disabilities: Model Federal Agency Plan for the Employment of People with Disabilities*, <http://www.opm.gov/disability>

Employment of Americans with Disabilities) to raise awareness, educate federal agency administrators about special projects, and call attention to accommodation obligations.⁵⁷ Nevertheless, the Bush Administration took no action on an executive order issued by President Clinton near the end of his term that called for hiring an additional 100,000 federal employees within five years.⁵⁸ President Obama reinstated Clinton's order in 2010.⁵⁹ Numerical goals implemented and enforced by the EEOC have the potential to go far toward fulfilling the order's promise.

B. Section 503

Section 503 provides:

Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of \$10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.⁶⁰

Despite the similarity of sections 501 and 503,⁶¹ courts have been unwilling to find a private right of action for individuals to sue for violations of the affirmative action provision of section 503.⁶² Thus no body of judicial

bility/hrpro_8-04.asp [http://web.archive.org/web/20050813062101/http://www.opm.gov/disability/hrpro_8-04.asp] (last visited Sept. 18, 2015) (cited in Burgdorf, *supra* note 21, at 302 n.284).

57. See U.S. EEOC, *Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce*, <http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm> (last visited July 2, 2015).

58. Lukas Pleva, *Obama Reinstates Executive Order on Disability Hiring*, POLITIFACT.COM (July 30, 2010, 12:22 PM), <http://www.politifact.com/truth-ometer/promises/obameter/promise/93/reinstate-executiveorder-to-hire-an-additional-10/> (discussing Increasing the Opportunity for Individuals with Disabilities to Be Employed in the Federal Government, Exec. Order No. 13163, 65 Fed. Reg. 46,562, 46,563 (July 26, 2000)).

59. Exec. Order No. 13548, 75 Fed. Reg. 45,039, 45,039 (July 26, 2010).

60. 29 U.S.C. § 793(a) (2012).

61. One difference is that unlike section 501, section 503 does not bring into play the remedies provision in Title V of the Rehabilitation Act, 29 U.S.C. § 794a (2012). A negative presumption arising from the omission is perhaps the strongest basis for the holdings that deny a private right of action.

62. *E.g.*, *Hodges v. Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414, 416 (10th Cir. 1984); *Fisher v. City of Tucson*, 663 F.2d 861, 867 (9th Cir. 1981); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1244 (7th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir. 1980). *Contra* *Cal. Paralyzed Veterans Ass'n v. FCC*, 496 F. Supp. 125, 131 (C.D. Cal. 1980) (“[A] private remedy, far from frustrating the administrative scheme, will greatly enhance a handicapped person’s ability to obtain specific, individual relief from employment discrimination.

decisions has developed that is comparable to that establishing the elevated accommodations duty for section 501. The language identical to that in section 501 would imply that federal contractors have an obligation that exceeds reasonable accommodation under section 504 or the ADA.

Extensive regulations implement section 503.⁶³ The OFCCP, a subunit of the U.S. Department of Labor, writes and enforces the regulations.⁶⁴ If an entity has a contract or subcontract of \$50,000 or more and fifty employees, it must prepare and maintain an affirmative action plan that meets standards regarding notice, review of personnel processes, review of job qualifications, efforts on reasonable accommodation and prevention of harassment, outreach initiatives, and audit and reporting.⁶⁵ It must invite employees and individuals who are offered jobs to identify themselves as individuals with disabilities.⁶⁶

The idea of adding numerical goals to this list of federal contractor obligations percolated for years. When the Carter Administration revised the regulations in 1979-80, officials discussed the idea of numerical goals, but ultimately rejected the plan as too difficult to administer.⁶⁷ During the Obama Administration, the OFCCP observed that despite all the years the law had been in existence, workforce participation rates of people with disabilities remained stubbornly low, and unemployment persistently high.⁶⁸ In 2010, it asked for public comments on ideas to strengthen the effectiveness of the regulations; a notice of proposed rulemaking followed in 2011.⁶⁹ After receiving still more comments, the OFCCP issued a final rule that embraced numerical goals on September 24, 2013.⁷⁰

Additionally, such a remedy will further the important congressional goal, reflected throughout the Rehabilitation Act, of protecting the fundamental rights of handicapped persons, including the right to be free of employment discrimination by those receiving federal contracts.”), *aff’d on other grounds*, 721 F.2d 667 (9th Cir. 1983).

63. 41 C.F.R. §§ 60-741.1-.83 (2015).

64. *Id.* § 60-741.60, .65.

65. *Id.* § 60-741.40(b)(1), .44.

66. *Id.* § 60-741.42(b)-(c).

67. STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* 207 (1989) (“It was decided, however, that prescribing goals for handicapped employment would be administratively impossible given the breadth, diversity, and varying intensities of disabling conditions.”).

68. *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act, as Amended*, 75 Fed. Reg. 43,116, 43,117 (July 23, 2010).

69. *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, Notice of Proposed Rulemaking*, 76 Fed. Reg. 77,056, 77,056-57 (Dec. 9, 2011).

70. *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, Final Rule*, 78 Fed. Reg. 58,682, 58,685 (Sept. 24, 2013) (to be codified at 41 C.F.R. pt. 60–741).

IV. THE 2013 OFCCP RULE UNDER SECTION 503

The OFCCP adopted a numerical goal of seven percent for individuals with disabilities in federal contractors' various job groups. It then had to defend its action against a challenge by an alliance of government contractors, but it prevailed in the District of Columbia Circuit Court of Appeals.

A. *The OFCCP Final Rulemaking*

The 2013 final rulemaking retains the requirements of previous rules, but adds the requirement that contractors invite job applicants and employees to identify themselves as having disabilities,⁷¹ and places on contractors a seven percent utilization goal for employing individuals with disabilities.⁷² If the contractor has 100 employees or fewer, the goal may be applied to the entire workforce; for contractors with more than 100 employees, the goal applies to each job group⁷³ in the entity's workforce.⁷⁴ The purpose of the goal is to establish benchmarks against which to measure the representation of individuals with disabilities in a contractor's workforce.⁷⁵ If a contractor makes adequate efforts to comply with the other requirements of the affirmative action regulations, it ought to meet the goal.⁷⁶ The final rule cautions that a "utilization goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden."⁷⁷ If the goal is not met in one or more job groups, the contractor has to determine whether and where there are any impediments to equal opportunity, and if a barrier is identified, the contractor then has to develop and execute a program of action to address the problem.⁷⁸ According to OFCCP's estimate, federal contractors will hire 594,580 additional workers with disabilities to meet the goal.⁷⁹

The OFCCP arrived at the seven percent figure by looking to the Census Bureau's American Community Survey.⁸⁰ As the OFCCP noted, the definition

71. 41 C.F.R. § 60-741.42(a) (2015).

72. *Id.* § 60-741.45(a).

73. Job groups are a familiar concept for federal contractors. OFCCP uses them for enforcement of the ban on race discrimination under Executive Order No. 11246, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965). *See* 41 C.F.R. § 60-2.12 (2015) (setting out job group analysis requirements for federal contractors under Executive Order 11246).

74. 41 C.F.R. § 60-741.45(b), (d)(2)(i) (2015).

75. *Id.* § 60-741.45(b).

76. *Id.*

77. *Id.* § 60-741.45.

78. *Id.* § 60-741.45(e)-(f).

79. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, Final Rule, 78 Fed. Reg. 58,682, 58,683 (Sept. 24, 2013).

80. *Id.* at 58,703.

of disability the survey used is consistent with many federal statistical measures, but is not as broad as the definition of disability in the post-2008 amended ADA.⁸¹ For example, the survey does not direct respondents to ignore mitigating measures or to identify themselves as disabled if an impairment is in remission or substantially limits a major bodily function without having other effects.⁸² OFCCP took the 2009 survey's disability data for the civilian labor force and the civilian population, first averaged by job categories and then across category totals, to estimate that 5.7% of the civilian labor force has a disability.⁸³ It considered that number too low for establishing a goal, both because it does not employ the broader definition found in the ADA, and because it does not account for discouraged workers, or the effects of past discrimination that keeps workers with disabilities out of the workforce.⁸⁴ So the OFCCP added 1.7 percentage points, a number taken from the survey's count of individuals with disabilities who said they had an occupation but were not currently working.⁸⁵ That produced a figure of 7.4%, which OFCCP rounded down to 7% "to avoid implying a false level of precision."⁸⁶

B. Associated Builders & Contractors v. Shiu

The rule spurred a reaction. In *Associated Builders & Contractors v. Shiu*,⁸⁷ an association of construction contractors argued that the 2013 rulemaking exceeded the OFCCP's statutory authority and was arbitrary and capricious. The plaintiff objected to the requirement that contractors invite applicants (and not just current employees or those offered jobs) to self-identify as persons with disabilities and report the data, as well as to the seven percent utilization goal.⁸⁸ On the argument that the rulemaking went beyond OFCCP's statutory power, the District of Columbia Circuit applied the framework of *Chevron, U.S.A., Inc. v. National Resources Defense Council*,⁸⁹ asking first whether Congress spoke directly to the precise question at issue and noting that to succeed under that standard the plaintiffs needed to show that the statute granting rulemaking authority to the OFCCP unambiguously

81. *Id.* See generally 42 U.S.C. § 12102(2)(B), § 12102(4) (2012) (as amended effective Jan. 1, 2009) (amended ADA definition).

82. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, Final Rule, 78 Fed. Reg. at 58,703-04.

83. *Id.* at 58,704.

84. *Id.*

85. *Id.* at 58,705.

86. *Id.*

87. *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 260, 262 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2836 (2015).

88. *Id.* at 265.

89. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

foreclosed the OFCCP's interpretation.⁹⁰ Under the second step of the analysis, the court said it would need to ask if the OFCCP interpretation was based on a permissible reading of the statute.⁹¹ As to the "unambiguously foreclose[d]" question, the court said that although the statute uses the word "qualified" in its sentence requiring "affirmative action to employ and advance in employment qualified individuals with disabilities," that term does not in any way limit the statutory affirmative action to those already offered jobs.⁹² The court further declared that congressional reenactment of the language during the period in which the regulations did not include pre-job-offer provisions or utilization goals did not limit OFCCP to what it had done before.⁹³

That left the argument that the rulemaking was arbitrary and capricious. The court pointed out that OFCCP never made a factual finding in the past that utilization goals were not feasible, so no basis existed for heightened review.⁹⁴ Applying ordinary standards of review, the court said that OFCCP reasonably could infer the presence of employment barriers among federal contractors from an analysis of the national workplace as a whole.⁹⁵ The court held that data collection from applicants would assist the contractors and OFCCP to evaluate the availability of workers with disabilities and so was a reasonable requirement.⁹⁶ The plaintiff complained that the utilization goal did not account for variations in qualified persons with disabilities by industry or job type, but the court concluded that OFCCP adequately explained why a uniform numerical goal advanced the objective of the statute and more tailored goals were not possible given current data.⁹⁷ Adjusting the goal to account for discouraged workers was also a reasonable step.⁹⁸ Finally, the court rejected the argument that the construction industry should have received an exemption from the rulemaking.⁹⁹ Construction work may be hazardous and physically difficult, but nothing in the regulations requires hiring individuals who cannot perform the essential functions of the job with or without accommodations.¹⁰⁰ Thus the reporting and numerical goals requirements stand.

90. See *Associated Builders & Contractors, Inc.*, 773 F.3d at 262.

91. *Id.* The court said that the plaintiff's argument on this step repeated the argument on the first step, and summarily dismissed it. *Id.* at 263.

92. *Id.* at 262-63.

93. *Id.* at 263. The court also rejected as irrelevant an argument based on an analogy to the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 4211-4215 (2012), which expressly requires reporting of data on new hires. *Associated Builders & Contractors, Inc.*, 773 F.3d at 263.

94. *Associated Builders & Contractors, Inc.*, 773 F.3d at 264.

95. *Id.*

96. *Id.*

97. *Id.* at 265.

98. *Id.* at 265-66.

99. *Associated Builders & Contractors, Inc.*, 773 F.3d at 266.

100. *Id.*

V. EEOC'S PROPOSED RULEMAKING UNDER SECTION 501: ADDRESSING TARGETED DISABILITIES AND PROPOSING NEW DIRECTIONS

In contemplating the imposition of numerical hiring goals on federal agencies, the EEOC has followed a path similar to that of the OFCCP when it placed goals on federal contractors. So far, it has issued a request for comments without issuing any proposed regulations.¹⁰¹ The proposed regulations, then a final rule, should ensue. Given that the President has already directed agencies to adopt their own numerical goals, that the OFCCP has adopted numerical goals for contractors, and that the District of Columbia Circuit has upheld the OFCCP action, the momentum is strong for the EEOC to impose numerical goals on federal agencies. The real question is what the goals will be; specifically, how the rule will treat individuals with severe disabilities, and beyond that issue, what other initiatives the EEOC may adopt.

A. Targeted Disabilities

For the reasons the OFCCP spelled out when establishing its seven percent standard, numerical goals for federal government employment will not accomplish their objective unless they are of a similar magnitude or larger.¹⁰² Even more important, however, is a meaningful numerical standard for targeted disabilities: deafness; blindness; missing extremities; partial paralysis; complete paralysis; convulsive disorders; intellectual disability (sometimes referred to as mental retardation); mental illness; and distortion of a limb or the spine.¹⁰³ In 2008, the EEOC recommended that federal agencies adopt numerical goals for employment of individuals with targeted disabilities, repeating a requirement found in a 2003 management directive.¹⁰⁴ As noted, the President's 2010 executive order required agencies not just to adopt numerical goals for employment of persons with disabilities, but also to adopt sub-goals for employment of workers with targeted disabilities.¹⁰⁵ Various agencies have adopted goals for fiscal year 2015 in the range of 8% to 20% for

101. The Federal Sector's Obligation To Be a Model Employer of Individuals with Disabilities, 79 Fed. Reg. 27,824, 27,824 (May 15, 2014).

102. As the OFCCP noted, the percentage of the working age population with a disability that meets current Americans with Disabilities Act definitions is probably much higher than seven percent. See *supra* text accompanying notes 80-86 (describing OFCCP methodology). If the EEOC were to adopt an ADA definition of disability in its rulemaking, the percentage target it adopts will need to be higher still, and a goal for persons with targeted disabilities that much more important.

103. EEOC Management Directive, *supra* note 21, Appendix A.

104. See EEOC OFFICE OF FED. OPERATIONS, *supra* note 28, at vii (2008). This report contains a large number of recommendations for agencies to follow in increasing employment of workers with targeted disabilities; some of these recommendations overlap with the steps identified in the next subsection of this essay. *Id.* at 23-32.

105. Exec. Order No. 13548 § 2(b), 75 Fed. Reg. 45,039, 45,039 (July 26, 2010).

individuals with disabilities in general and 2.5% to 5.5% for individuals with targeted disabilities.¹⁰⁶ An EEOC-mandated goal for employees with targeted disabilities in the higher end of that range (five percent or greater) would appear appropriate.

The conclusion that a goal that separates out more severe disabilities is the only way to advance congressional and presidential objectives gains support from the experience of federally assisted state rehabilitation services. When state rehabilitation services agencies were evaluated simply on the number of persons with disabilities whom they placed in employment, they tended to select persons with the least severe disabilities, who arguably needed the services least but were easiest to place in competitive employment settings.¹⁰⁷ Congress addressed this problem by amending the federal rehabilitative services program and placing a priority on services to people with the most severe impairments.¹⁰⁸ Giving comparable priority to employment of people with severe, targeted disabilities in federal agencies is crucial.

B. Prospects for Further Reform

Means are available to increase the representation of people with disabilities in the federal workforce. The Government Accountability Office has identified eight leading practices:

- (1) top leadership commitment;
- (2) accountability, including goals to help guide and sustain efforts, as noted above;
- (3) regular surveying of the workforce on disability issues;
- (4) better coordination within and across agencies;
- (5) training for staff at all levels to disseminate leading practices throughout agencies;
- (6) career development opportunities inclusive of people with disabilities;
- (7) a flexible work environment; and
- (8) centralized funding at the agency level for reasonable accommodations.¹⁰⁹

106. OFFICE OF DISABILITY EMP'T POL'Y, U.S. DEP'T OF LABOR, SUMMARY: PROMISING AND EMERGING PRACTICES FOR ENHANCING THE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES INCLUDED IN PLANS SUBMITTED BY FEDERAL AGENCIES UNDER EXECUTIVE ORDER 13548, at 5-6 (2012).

107. See Weber, *Employment Policy*, *supra* note 8, at 141 (collecting sources).

108. *Id.*

109. U.S. GOV'T ACCOUNTABILITY OFFICE, DISABILITY EMPLOYMENT: FURTHER ACTION NEEDED TO OVERSEE EFFORTS TO MEET FEDERAL GOVERNMENT HIRING GOALS, GAO-12-568, at 6 (2012), <http://www.gao.gov/assets/600/591134.pdf>.

A survey of the most promising features of the plans of federal agencies that have already been adopted listed the following measures:

- (1) developing policy statements and recognizing the importance of leadership, commitment, infrastructure, and accountability;
- (2) making (and publicizing) the “business case” for employing qualified individuals with disabilities;
- (3) encouraging workers with disabilities and other employees to identify barriers without fear of reprisal; and
- (4) establishing a universal policy providing workplace flexibility, including the use of telework, flexiplace, and flextime options.¹¹⁰

As noted above, federal agencies should hold themselves to standards higher than reasonable accommodation as conventionally understood.¹¹¹ One of the difficulties for ADA enforcement in the private sector is an unduly restrictive view on the part of some courts with regard to what constitutes reasonable accommodation, even under non-affirmative action standards that apply to non-federal employers.¹¹² The ordinary reasonable accommodation obligation in fact is a significant one, and Congress intended to impose a cost-resources balance, rather than cost-benefit balance, requiring much more of larger and better-supported enterprises than others.¹¹³ If the agencies were to do merely what some courts require, it is unlikely that the goals of Congress and the President could be achieved. The legislative commands to be a model employer and to undertake affirmative action imply that federal agencies should offer accommodations greater than those conventionally viewed as reasonable.¹¹⁴

Means of identifying and promoting reasonable accommodation exist, including establishing streamlined procedures for processing requests, developing agency and sub-unit sources of expertise and funding, providing training opportunities to learn about new technology, tracking accommodations to determine their effectiveness, and creating relationships with outside sources of information about accommodations.¹¹⁵ Additional grievance and enforcement mechanisms should also be adopted. The EEOC should engage in outreach to encourage people who have been deterred from federal

110. OFFICE OF DISABILITY EMP’T POL’Y, *supra* note 106, at 3-4. The report lists various other steps as well. *Id.* at 4-19.

111. *See supra* text accompanying notes 48-54 (describing elevated accommodation duty).

112. *See* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1155-65 (2010).

113. *See id.* at 1150-51 (analyzing ADA legislative history).

114. *See* Weber, *Employment Policy*, *supra* note 8, at 151-59 (discussing judicial decisions and other sources).

115. *See* OFFICE OF DISABILITY EMP’T POL’Y, *supra* note 106, at 12-13 (listing steps).

employment to come forward. EEOC and agency review of grievance procedures to ensure they are disability-accommodating will be important early steps.

VI. CONCLUSION

Numerical goals have come to federal contractor employment, and barring some very unexpected event, EEOC-imposed numerical goals will arrive for federal agency employment. What form the EEOC goals will take is still uncertain, as is the content of other measures to accompany them. This essay seeks to contribute to the discussion of these remedial steps.

