



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

November 15, 2018

TRANSMITTED VIA E-MAIL

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL – OASAM
Office of Management and Budget
Room 10235
725 17th Street NW
Washington, DC 20503

U.S. Department of Labor – OASAM
Office of the Chief Information Officer
Attn: Departmental Information Compliance Management Program
Room N1301
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Comments Regarding the Youth CareerConnect Grant Program Participant Tracking System, OMB Control Number 1291-0002

To Whom It May Concern:

The U.S. Equal Employment Opportunity Commission (EEOC) submits this comment in response to the request for comments regarding the Department of Labor's (DOL's) information collection request, Youth CareerConnect (YCC) Grant Program Participant Tracking System.¹

As you know, the EEOC enforces the federal laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.² The laws enforced by the EEOC also prohibit retaliation for filing a charge or complaint of employment discrimination, participating in an employment discrimination

¹ Agency Information Collection Activities; Submission for OMB Review; Comment Request; Youth CareerConnect Grant Program Participant Tracking System, 83 Fed. Reg. 52,234 (Oct. 16, 2018).

² See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.; Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791; Titles I and V of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

proceeding, or opposing employment discrimination.³ Further, the EEOC coordinates and leads the federal government's efforts to eradicate employment discrimination.⁴

As described in greater detail below, we recommend that DOL revise the YCC Data Elements form, 29 C.F.R. § 37.4 (which is referenced in the form), and related regulations as necessary to ensure consistency with the ADA Amendments Act of 2008 and Title VII of the Civil Rights Act of 1964.⁵ We also suggest a few editorial edits to the YCC Data Elements form and 29 C.F.R. § 37.4.

We submit the following comments only to the extent that the terms and definitions identified in this comment are the same terms and definitions that are included in federal employment discrimination laws and regulations, and only to the extent that the terms and definitions apply in the employment context.

Recommendations Pursuant to the ADA Amendments Act of 2008

Cell C11 in the YCC Data Elements form instructs YCC grantees to report whether participants have indicated that they have any disabilities, as defined in Section 3(2)(a) of the Americans with Disabilities Act of 1990 (ADA); summarizes the ADA statutory definition of “disability”; and refers grantees to the definitions and examples of “physical or mental impairment” and “major life activities” in DOL’s Workforce Investment Act of 1998 (WIA) non-discrimination regulation, 29 C.F.R. § 37.4.

The ADA Amendments Act of 2008 (ADAAA) made several significant changes to the definition of “disability” under the ADA and, correspondingly, the Rehabilitation Act of 1973, as amended (Rehabilitation Act).⁶ To ensure that the YCC Data Elements form and DOL’s WIA regulation reflect these changes, we recommend that DOL review and revise the following definitions and terms, as appropriate:

³ 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 29 U.S.C. § 791(g) (incorporating, among other provisions, the anti-retaliation provision of the ADA into the Rehabilitation Act); 29 U.S.C. § 215(a)(3); 42 U.S.C. § 2000ff-6(f).

⁴ Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

⁵ For example, 29 C.F.R. § 32 and 29 C.F.R. § 33 may not incorporate the changes made by the ADAAA. We note that the EEOC submitted comments on 29 C.F.R. § 37 to DOL on October 31, 2014, and referenced 29 C.F.R. § 37 in similar comments on WIOA and other proposed regulations submitted to DOL on June 15, 2015.

⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; 29 U.S.C. § 705(20)(B) (incorporating the ADA’s definition of “individual with a disability” into the Rehabilitation Act).

- “Disability” definition

Cell C11 in the YCC Data Elements form states that a “disability” under the ADA is “a physical or mental impairment that substantially limits one or more of [a] person’s major life activities.” That definition, while accurate, addresses only one part of the three-part definition of “disability” under the ADA. In addition to the first prong, an actual disability, a disability under the ADA also includes a past disability and a perceived disability (regardless of whether a disability actually exists).⁷ If a history of a disability and/or a perceived disability are relevant in the YCC context, we recommend that DOL revise the definition in Cell C11 by adding the following to the end of the sentence: “, a record (past history) of a substantially limiting impairment, or being regarded as having an impairment (even if the person does not have that impairment) that will last, or is expected to last, at least six months and is not minor.”⁸ Because YCC grantees who complete this form may be unfamiliar with, or have limited familiarity with, the ADA and the legal definition of “disability,” it also may be helpful for DOL to include a link to relevant EEOC ADA resources intended for a non-legal audience.⁹

- “Physical or mental impairment” definition

As currently defined in DOL’s WIA regulation, a “physical or mental impairment” is limited to a specified set of body systems.¹⁰ Under the EEOC’s ADA regulations, updated pursuant to the ADAAA, however, a “physical or mental impairment” may affect any body system.¹¹ We suggest that DOL ensure that the definition of “physical or mental impairment” appropriately reflects the broad scope of this term. For example, DOL could delete “of the following” prior to “body systems” and add “, such as” (or words to that effect) after “body systems”: “. . . affecting one or more body systems, such as neurological,”

⁷ 42 U.S.C. § 12102(1).

⁸ *Id.* See also our suggestion on page 6 that DOL revise the ADA citation in Cell 11.

⁹ See, e.g., EEOC, *Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, https://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm (last visited Nov. 8, 2018).

¹⁰ 29 C.F.R. § 37.4 (“The phrase physical or mental impairment means . . . [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss *affecting one or more of the following body systems*: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine”) (emphasis added).

¹¹ See 29 C.F.R. § 1630.2(h)(1) (defining “physical or mental impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss *affecting one or more body systems*,”) (emphasis added).

- “Major life activities” definition

DOL’s WIA regulation defines “major life activities” as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹² The ADAAA expanded the definition of “major life activities” to include, among other things, major bodily functions.¹³ We suggest that DOL revise this definition to reflect the broad range of functions that now constitute “major life activities.”

In addition, to provide further clarification regarding the broader “major life activities” definition, we suggest that DOL consider specifying that: (1) the operation of a major bodily function includes the operation of an individual organ within a body system; (2) the term “major” shall not be interpreted strictly to create a demanding standard for disability; and (3) whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”¹⁴

- “Regarded as” definition

DOL’s WIA regulation defines an individual with a disability as, among other things, an individual who “is regarded as having such an impairment,” referring to “a physical or mental impairment that substantially limits one or more major life activities” or “a record of such an impairment.”¹⁵ The ADAAA revised the “regarded as” definition to remove the requirement that an impairment substantially limit a major life activity, or be perceived to do so.¹⁶ Further, the ADAAA excludes impairments that are both transitory and minor from coverage under the

¹² 29 C.F.R. § 37.4.

¹³ Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (clarifying that “major life activity” includes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”); 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(i).

¹⁴ See 29 C.F.R. § 1630.2(i) (referencing Congressional intent to invalidate the “demanding standard for qualifying as disabled” established in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002)).

¹⁵ 29 C.F.R. § 37.4 (definition of “disability”); see also *id.* (definition of “is regarded as having an impairment”).

¹⁶ Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (stating that an individual has established coverage under the “regarded as” prong “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*”) (emphasis added); 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(g)(1)(iii); 29 C.F.R. § 1630(l)(1).

“regarded as” prong.¹⁷ We suggest that DOL revise the “regarded as” definitions and explanations to reflect the updated standard for coverage under this prong.

- “Individual with a disability” definition

DOL’s WIA regulation specifies that an “individual with a disability” does not include: (1) alcoholics whose current alcohol use prevents them from performing job duties or poses a safety threat; and (2) individuals with “currently contagious disease[s] or infection[s]” that prevent them from performing job duties or pose a safety threat.¹⁸

We recommend that DOL delete the provisions about alcoholics and individuals with currently contagious diseases or infections from the definition of “individual with a disability” in the WIA regulation. The legal question really is whether such individuals are “qualified” individuals with disabilities under the ADA, not whether they are “individuals with disabilities” under the statute. Indeed, individuals who are unable, with or without reasonable accommodation, to perform essential job functions because of alcoholism, contagious diseases or infections, or other medical conditions, or whose employment poses a “significant risk of substantial harm” to themselves or others because of a medical condition, may be individuals with disabilities under the ADA.¹⁹ However, they would not be “qualified” individuals under the ADA if, with or without reasonable accommodation, they could not perform essential job functions or they posed a high degree of risk to health or safety (a “direct threat”).²⁰ Consequently, an employer would not violate the ADA by refusing to hire them, firing them, or taking other adverse actions against them because of their inability to perform the job in question and/or the safety risks their employment would pose.²¹ The provisions at issue are therefore unnecessary to include in the

¹⁷ Pub. L. No. 110-325, § 4(a), 122 Stat. 3553; 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.2(g)(1)(iii) (defining, among other terms, a “transitory impairment” as “an impairment with an actual or expected duration of 6 months or less”).

¹⁸ 29 C.F.R. § 37.4.

¹⁹ 42 U.S.C. § 12102 (defining “disability” and stating that “[t]he definition of disability [in the ADA] shall be construed in favor of broad coverage of individuals . . . , to the maximum extent permitted by the [statute]”); 29 C.F.R. § 1630.2(r) (defining “direct threat” as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”).

²⁰ 42 U.S.C. § 12111(8) (defining a “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”); *see also* EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), 2002 WL 31994335, at *26, <https://www.eeoc.gov/policy/docs/accommodation.html> (“if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified”).

²¹ *See supra* note 20; *see also* 42 U.S.C. § 12112(a) (prohibiting employment discrimination “against a *qualified individual* on the basis of disability”) (emphasis added).

WIA regulation. Moreover, we are concerned that singling out two types of medical conditions in the regulation may cause some covered entities to erroneously assume that individuals with those conditions are always unqualified, without engaging, as required by the ADA, in individualized analysis or considering reasonable accommodations that would enable those individuals to perform essential job functions, or reduce or eliminate the risk of harm.²²

Recommendation Pursuant to Title VII of the Civil Rights Act of 1964

DOL’s WIA regulation defines undue hardship under Title VII as “any additional, unusual costs, other than de minimis costs” posed by a religious accommodation.²³ We are concerned that the reference to “any additional, unusual costs” in this definition imposes a higher burden than that required by law. Specifically, EEOC’s religious discrimination regulation defines an undue hardship as, in part, “more than a de minimis cost,” noting that relevant considerations include the “identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.”²⁴ EEOC’s regulation notes, however, that certain additional costs, such as temporary or infrequent payment of premium wages, and administrative costs associated with accommodations, generally will not constitute an undue hardship.²⁵ Accordingly, we recommend that DOL revise the “undue hardship” definition in the WIA regulation by replacing “any additional, unusual costs, other than de minimis costs” with “more than a de minimis cost or operational burden.”²⁶

Suggested Editorial Comments

As noted above, among other things, Cell C11 in the YCC Data Elements form instructs YCC grantees to report whether participants have indicated that they have any disabilities, as defined in Section 3(2)(a) of the ADA. Many ADA sections were renumbered to incorporate changes made by the ADAAA. We recommend that DOL replace “Section 3(2)(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)” with “paragraph 1 of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. § 12102).”

²² 29 C.F.R. § 1630.2(r) (stating that direct threat determinations must be based on “an individualized assessment of the individual’s present ability to safely perform the essential functions of the job[.] . . . based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence,” and listing relevant factors for consideration); *see also* 29 C.F.R. § 1630.2(o)(4) (requiring covered entities to provide reasonable accommodations, absent undue hardship, to individuals with an actual disability or a record of a disability).

²³ 29 C.F.R. § 37.4 (definition of “religious accommodation” within definition of “undue hardship”).

²⁴ 29 C.F.R. § 1605.2(e)(1).

²⁵ *Id.*

²⁶ *See* EEOC, *Compliance Manual § 12: Religious Discrimination § 12-IV* (2008), <https://www.eeoc.gov/policy/docs/religion.html> (“Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a ‘more than de minimis’ cost or burden.”).

In the definition of “physical or mental impairment,” the WIA regulation twice refers to “mental retardation.”²⁷ We recommend that DOL replace this phrase with “intellectual disability,” the term currently used to describe such an impairment.

In subsection (2)(iii) of the definition of “individual with a disability” in the WIA regulation, we recommend that DOL replace “paragraph (1)(i) or (1) (ii) of this definition” with “paragraph (2)(i) or (2)(ii) of this definition.”²⁸

Thank you for the opportunity to provide these comments in response to this information system. Should you have any questions, please feel free to contact me at lisa.schnall@eeoc.gov or (202) 663-4845.

Sincerely,

Lisa Schnall
Senior Attorney Advisor
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission

²⁷ 29 C.F.R. § 37.4.

²⁸ *Id.*