THE DAILY CALLER
OPINION

New from Washington: Disabled-employee quotas for federal contractors

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One of the Obama administration's most ambitious and far-reaching regulatory initiatives has thus far received very little notice in the press. In December the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) proposed expanding the government's affirmative action program for federal contractors (a category that includes most of the nation's biggest companies) to include various new obligations regarding disabled employees. The most notable of these is a new quota (they deny that it is such, of course, and call it merely a "required … hiring goal") under which disabled employees are to make up at least 7 percent of a contractor's workforce. A public comments period expired February 21.

It might appear that the disabled as an interest group are arriving rather late to the affirmative-action scene, but that's actually not the case. In fact long before the sort of preference by race that came to the fore in the 1960s, the federal government was encouraging its contractors to give preference to disabled job applicants. The practice was envisioned above all as a way to assist wounded war veterans, but also was meant to benefit other disabled persons, most prominently those in the traditional disability groups of blindness, deafness and paraplegia.

In some ways, hiring preference for disabled applicants was de-emphasized after Congress enacted the Americans with Disabilities Act (ADA) in 1990. It was imagined that by mandating accommodations such as ramps, Braille and audio subtitles, as well as general private sector nondiscrimination toward the disabled, the ADA would lessen any need for outright favoritism in hiring (which some disabled advocates saw as redolent of demeaning sympathy, anyway). We soon learned better, of course; labor force participation by the disabled plunged rather than rose by comparison with their non-disabled kin.

So here come the quotas, in vastly more onerous form than the old preferences, of course. One obvious problem is that across many occupations and industries the percentage of

job applicants who are observably disabled, and therefore will reliably count toward the quota, is nowhere near 7 percent (or even 4 percent, a number some think OFCCP may be willing to fall back to as a compromise). So a 2 percent quota is proposed for severe disability, with the other 5 percent to be filled with those whose disabilities are less severe. To achieve the latter, employers will need to hope that large numbers of new hires will turn out to have less visible disabilities, such as back problems, diabetes or (perhaps most useful because most subjectively defined) the array of mental, emotional and behavioral issues that are the most dynamically expansive disability category of all, and which can range from neurosis to learning disability to oppositional defiant disorder to drug and alcohol abuse (if in rehab).

Trouble is, it's illegal under the ADA for employers to *ask* job applicants whether they're disabled, even if the question is offered with favorable intent. So the rules contemplate a fan dance of "invited self-identification" in which workers are given repeated chances at successive stages of the hiring process to announce that they are disabled. Unfortunately for quota compliance, even after getting the job an employee may be too shy to offer such a self-identification, which means the employer may lose any "credit" for the hire. Perhaps equally frustrating, an employee hired with the quota in mind may turn out not to have any disability at all ("Dang it! And she *looked* so disabled!").

Among the public comments on the Regulations.gov docket, an employee with a Philadelphia bank warns that in proposing an across-the-board rule, "You are setting up many companies for failure." A Tallahassee disabled woman writes, "I don't believe all the markedly added burdens offered in this NPRM will facilitate employment in this area, but could, in fact, inhibit it." A Southern California steel company says the rules would "amount to another Government tax, for those companies like ours who are already taxed too heavily by our Government," with a paperwork burden that "is daunting to a small business already drowning in Govt red tape. Why not make rules that allow U.S. businesses to be MORE competitive, instead of less?"

It's a question Washington doesn't seem very interested in answering.

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