



WORKPLACE ACCOMMODATIONS POLICY HIGHLIGHTS 2.01

February 2004

Overview

This edition of the Workplace Accommodations Policy Highlights provides information on the House and Senate's recent reauthorization of the Workforce Investment Act (WIA) and the Rehabilitation Act.

Reauthorization of both pieces of legislation came along with specific changes in the areas of funding, accessibility, and certain performance measures. President Bush signed the Consolidated Appropriations Act of 2004 [HR 2673] into law, containing the Fiscal Year 2004 budget which limits discretionary spending to the Administration's \$786 billion objective, or an approximately 3% increase over last year's comparable levels. The Department of Labor and the Small Business Administration have joined forces, signing a Strategic Alliance Memorandum that formalizes an agreement between the two agencies to help people with disabilities pursue small business ownership and to also increase their employment opportunities in small businesses.

Finally, updates are presented on two ADA-related Supreme Court cases, *Hernandez v. Raytheon* (No. 01-15512) and *Tennessee v. Lane* (No. 02-1667). The Supreme Court issued a decision in *Hernandez v. Raytheon*, stating that Raytheon was not required to rehire workers who violate its workplace misconduct rules. The plaintiff, Joel Hernandez, had claimed that his former company, Raytheon, discriminated against him because of his disability (recovering drug addiction) and that the company's blanket policy of rejecting applicants formerly dismissed for workplace misconduct negatively impacted recovering drug addicts to a greater degree than different groups. Arguments have been heard in *Tennessee v. Lane*, and the issue the court will decide is the right of private citizens to seek monetary damages from states for violation of federal laws (in this case, the Americans with Disabilities Act [ADA]).

Congress Passes Omnibus Appropriations Act

01.23.2004: President Bush signed the **Consolidated Appropriations Act of 2004 [HR 2673]** into law, containing the Fiscal Year (FY) 2004 budget which limits discretionary spending to the Administration's \$786 billion objective, or an approximately 3% increase over last year's comparable levels. It contains \$328.1 billion in discretionary spending and \$820 billion in total spending including mandatory funds. It also includes an across the board reduction of nearly six-tenths of one percent (0.59%) to all programs, projects and activities exempting Defense and Military Construction funds. In addition, the legislation provides for the following funding and provisions:

- \$139 billion in funding for the departments of Labor, Health and Human Services and Education
- Department of Justice – \$7,451,000 for education and training to end violence against and abuse of women with disabilities, as authorized by section 1402 of Public Law 106-386
- Department of Labor – expenses for the Office of Disability Employment Policy to provide leadership, develop policy and initiatives, and award grants furthering the objective of eliminating barriers to the training and employment of people with disabilities, totaling \$47,333,000
- Social Security - A 6.1% increase to the Social Security Administration to improve service Social Security benefit delivery and accelerate the time it takes to process disability claims
- Department of Agriculture - funding for the Rural Utilities Service, which provides loans of principal for direct distance learning and telemedicine in the amount of \$300 million, and allocates a principal amount of direct telecommunication loans of \$602 million to broadband deployment in rural areas
- Provisions within the bill [Section 629] amend Section 202 of the 1996 Telecommunications Act, increasing the percentage of local stations U.S. television networks may own, from 35 to 39 percent.

- Funding for the National Science Foundation (NSF) increased \$300 million over last year's level and \$130 million over the budget request, bringing FY04 funding to \$5.6 billion. Funding includes: \$4.3 billion for research; \$156 million for research equipment; and \$945 million for education and human resources

To view the legislation, search for "HR 2673" at <http://thomas.loc.gov>
A summary can be found at http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=342. [Library of Congress, U.S. House Appropriations Committee, *The Washington Post*]

Department of Labor (DOL) and Small Business Administration (SBA) Sign Strategic Alliance Memorandum (SAM)

12.11.2003: Labor Secretary Elaine L. Chao and Small Business Administration Administrator Hector V. Barreto signed a Strategic Alliance Memorandum (SAM), formalizing an agreement to implement a coordinated, interagency initiative to improve small business opportunities for people with disabilities. According to the DOL, small businesses make up 99.7 percent of all employers, employ more than half of all private sector employees, and generate anywhere from 60 to 80 percent of new jobs annually [DOL, <http://www.dol.gov/odep/newfreedom/sam.htm>]. For those reasons, small businesses constitute an important resource for increasing employment rates among people with disabilities. In the SAM, the DOL and the SBA agree to develop "The New Freedom Small Business Initiative," designed to help adult workers acquire the skills and resources necessary to successfully begin and operate small businesses and to educate small business owners about the benefits of hiring people with disabilities. The New Freedom Small Business Initiative consists of the following five components:

1. Encouraging small businesses to hire people with disabilities by providing them with information about tax and other incentives for hiring people with disabilities, resources for reasonable accommodation and assistive technologies, and other technical assistance and training resources.

2. Building the capacity of the workforce investment system and the SBA to increase small business opportunities for people with disabilities by utilizing established programs (e.g. One Stop Career Centers) and creating partnerships between state and local agencies and organizations to provide training to staff (on how to better serve people with disabilities) and to people with disabilities (on how to become successful entrepreneurs).
3. Leveraging of other federal, state and private programs for support of entrepreneurship for people with disabilities.
4. Encouraging people with disabilities to pursue small business ownership as a career choice by making information available to them regarding procedures and resources available for starting a small business.
5. Establishing a coordinated effort to document and disseminate best practices to potential employers of persons with disabilities, potential employees, and entrepreneurs with disabilities.

SBA Administrator Barreto stated "the small business community can't afford to be without this group of Americans, and encouraging people with disabilities to become part of the most powerful segment of our economy is more than just the right thing to do, it's the smart business thing to do." [Department of Labor, <http://www.dol.gov/odep/media/press/sba.htm>; <http://www.dol.gov/odep/newfreedom/sam.htm>]

Federal Disability Statistics Subject of National Council on Disability (NCD) Position Paper

01.09.2004: The NCD released a paper, *Improving Federal Disability Statistics* [<http://www.ncd.gov/newsroom/publications/improvedata.html>], which focuses on the critical issues associated with federal disability data. The report notes that while there is no Congressional mandate that the Decennial Census accurately capture data on the millions of Americans with disabilities, communities and people with disabilities are affected if the Decennial Census is inaccurate. "Census data are used by educators,

policymakers, and community leaders and directly affect funding for many programs critical to individuals with disabilities, including programs for health care, transportation, employment training, and housing." Hundreds of billions of dollars in critical services and supports are distributed each year by federal, state and local governments based on the information provided in the Census. The NCD calls on the Departments of Commerce and Labor to reevaluate the collection of disability data through the Decennial Census, the American Community Survey, and the Current Population Survey.

Two key recommendations in the NCD's paper are 1) that the United States Census Bureau immediately revise Census questions for the Year 2010 Census (and the American Community Survey) to reflect the Americans with Disabilities Act (ADA) definition of disability, and 2) that "the Department of Labor finish its work with all due haste involving questions being developed by the Bureau of Labor Statistics (BLS) to identify people with disabilities in response to Executive Order 13078 through its redesign of disability employment questions for the BLS Current Population Survey." Currently, many states are dealing with budget crises that have the potential to lead to major unmet needs in the field of human services. Accurate disability statistics would better target funding for programs and services benefiting the needs of persons with disabilities. [National Council on Disability, <http://www.ncd.gov/newsroom/news/r04-445.html>]

Georgia: Telecom Bill to Aid the Blind Introduced

12.02.2003: State Representative Buddy Childers [District 13, Post 1-D] introduced a bill [HB 1055] that would establish a statewide telecommunication system capable of providing audible universal information access services to blind and print disabled citizens. The legislation acknowledges the importance of public interest to take advantage of innovative technological uses for the promotion of universal access to information and resources by people who are blind. Georgia's Public Service Commission would establish and administer a statewide audible universal information access service that would operate seven days per week and 24 hours per day. The legislation is currently in the House Health and Human Services Committee. The legislation is available

at the House Committee on Health and Human Services website
[http://www.legis.state.ga.us/legis/2003_04/house/Committees/health.htm]
[Georgia General Assembly, House Committee on Health and Human Services]

House and Senate Reauthorize Workforce Investment Act (WIA) and Rehabilitation Act

12.2003: Both the House and Senate have passed legislation reauthorizing the WIA and the Rehabilitation Act. According to the National Council on Disability's Congressional Update, this reauthorization came along with changes to the legislation in the areas of funding, accessibility, and certain performance measures. Both S. 1627 and H.R. 1261 [<http://thomas.loc.gov>] allow governors to divert funds authorized for public Vocational Rehabilitation (VR) programs to the One-Stop system, whereas in Title 1 of the Rehabilitation Act, funds are specified as being limited only to activities supporting VR services for eligible individuals with disabilities. Accessibility, both physical and programmatic, is a major barrier for individuals with disabilities wishing to receive the services of the One-Stop centers. The Senate bill includes provisions to strengthen the requirements that individuals with disabilities have equal access to One-Stop services. S. 1627 would require states to periodically assess the physical and programmatic accessibility of the One-Stop system and require the Department of Labor to provide technical assistance to help ensure this accessibility. Finally, concerning the issue of performance measures, H.R. 1261 introduces cost-effectiveness as an indicator of acceptable performance of the workforce development and VR systems. According to a General Accounting Office report (GAO-03-884T), cost-effectiveness would create significant disincentives for serving harder-to-serve populations. The Senate bill requires state and local workforce boards to adjust performance measures to accurately reflect and measure the provision of services to individuals with disabilities. The Senate bill also creates incentives for local One-Stops that do an exemplary job of providing services to people with disabilities. [National Council on Disability, <http://www.aapd-dc.org/docs/ncdcongup.html>; GAO report available in accessible format at <http://www.gao.gov>].

Social Security Administration (SSA): Strategic Workforce Planning Needed to Address Human Capital Challenges Facing the Disability Determination Services (DDSs)

01.14.2004: The SSA oversees and fully funds primarily state-operated DDSs that determine whether applicants are eligible for disability benefits. The disability examiners employed by the DDSs play a key role in determining benefit eligibility. United States General Accounting Office Report GAO-04-121 examines (1) the challenges the DDSs face today in retaining and recruiting examiners and enhancing their expertise; (2) the extent to which the DDSs engage in workforce planning and encounter obstacles in doing so; and (3) the extent to which SSA is addressing present and future human capital challenges in the DDSs.

The United States General Accounting Office (GAO) found—through its survey of 52 of the 54 DDS directors and interviews with SSA officials and DDS staff—that the DDSs face three key challenges in retaining examiners and enhancing their expertise: high turnover, recruiting and hiring difficulties, and gaps in key skills.

While acknowledging the difficulties the SSA faces in addressing DDS human capital issues within the federal-state context, the GAO recommends that SSA improve its workforce planning by:

- Developing a nationwide strategic workforce plan that addresses present and future DDS human capital challenges;
- Establishing uniform minimum qualifications for examiners; and
- Working with DDSs to close gaps between current and required examiner skills.

[General Accounting Office, <http://www.gao.gov>]

Judicial Activities

U.S. Supreme Court Issues Ruling in *Hernandez v. Raytheon*

12.02.2003: In *Hernandez v. Raytheon* (No. 01-15512), the United States Supreme Court sided with a Raytheon Co. unit that refused to rehire a former 25-year employee, Joel Hernandez, who had been dismissed from the company two years earlier for failing a drug test. Hernandez brought

forth two claims: that Raytheon discriminated against him because of his disability (recovering drug addiction) and that the company's blanket policy of rejecting applicants formerly dismissed for workplace misconduct negatively impacted recovering drug addicts to a greater degree than different groups. The Supreme Court ruled that Raytheon does not have to rehire workers who violate its workplace misconduct rules. However, the court did not address the issue of the Americans with Disabilities Act (ADA) and what protection it affords the more than five million workers with a history of substance abuse who could potentially be disparately impacted by an employer's workplace policies.

As it stands, the ADA does not protect current users of illegal drugs, however it does protect rehabilitated substance abusers if they have proof that they are recovering addicts. The court found that Raytheon's blanket policy of not rehiring previously dismissed employees was a legitimate defense, unless the plaintiff could prove he was dismissed solely on the basis of his disability. Therefore, the case was sent back to the Ninth Circuit court to determine Raytheon's reason for not rehiring the plaintiff. The Supreme Court did not issue a definitive ruling on the relationship between workplace policies, the ADA, and recovering drug/alcohol addicts, a ruling that the business community had sought. Chai Feldblum, a law professor at Georgetown University Law Center, said the ruling "should raise the consciousness of employers that neutral rules, such as 'we don't hire someone fired for misconduct,' which sound legitimate...can have a disparate impact on a class of people who are protected by federal law" [*The Wall Street Journal*; 12/3/2003]. According to the National Council on Disability's (NCD) December 2003 NCD Bulletin, The court's ruling was a partial victory for people with disabilities, as it left intact the ADA's requirement that employers not discriminate against potential employees who are rehabilitated former drug users.

[NCD, <http://www.ncd.gov/newsroom/bulletins/b1203.html>;
The Wall Street Journal, p. A3, 12/03/2003]

U.S. Supreme Court Hears Argument in *Tennessee v. Lane*

01.14.2004: The right of private citizens to seek monetary damages from states for violation of federal laws has been argued before the Supreme Court in *Tennessee v. Lane* (No. 02-1667). The case has received much publicity, as it involves six plaintiffs who could not gain unassisted access to Tennessee county courthouses that lacked elevators. Among them is George Lane, a paraplegic who left his wheelchair and crawled up four flights of stairs to reach a public courtroom in the Polk County Courthouse in Benton, Tennessee. For what Lane contends was humiliating treatment, he wants to sue the state of Tennessee for \$100,000. Another plaintiff in the suit, court reporter Beverly Jones, states that she was forced to go about the courthouse, asking complete strangers for their assistance in carrying her up the stairs so she could perform the duties of her job. In an interview, Jones said "all the while I was doing this, I was trying to keep the situation from the attorneys who were hiring me, because I had a fear of influencing them in the future, where they wouldn't want to hire me." [ADA Watch, 2004] *Tennessee v. Lane* represents the latest look at civil rights under the scope of the 1990 Americans with Disabilities Act (ADA).

In a series of decisions over the past decade the Supreme Court, led by Chief Justice William H. Rehnquist, has shifted the balance of power between Congress, state governments, and the federal government toward the states. The state of Tennessee hopes the court issues another verdict in favor of state government, as it claims that Congress placed too many obligations on state governments when writing the ADA. The state claims that Lane and others have no right to sue and that Lane, in particular, had other options to reach the courtroom (including being carried up the stairs or moving the hearing to a location on the first floor of the courthouse). Tennessee Solicitor General Michael E. Moore claims that Lane's Constitutional rights were not violated by the absence of elevators or other accommodations.

The issue the court must decide is not whether Tennessee was in violation of the ADA, but what action Lane and others can take, as private citizens, if the state violated the statute. A previous Supreme Court decision in *University of Alabama v. Garrett* held that states are immune from suit by their employees under the provision of the ADA that protects state

employees from discrimination because of disability. However, the ADA does require that states make their services available to all, a mandate that has led to installation of wheelchair ramps and other accommodations in state buildings. If the court finds for Tennessee, the provisions of the ADA will remain intact. The federal government will be the sole enforcer of the ADA and if states violate any provision of the law, individuals will have no recourse in court. Disability advocates, along with the Bush administration, support the right of Lane and others to bring suit against Tennessee. According to disability advocates, lawsuits like *Tennessee v. Lane* force state governments to adhere to the requirements of the ADA and should be permissible under federal law. A decision from the court is expected by summer 2004. [ADA Watch, <http://www.adawatch.org> ; *Associated Press*, 1/14/2004; *The New York Times*, 1/14/2004, Section A; Page 16; Column 1; National Desk]



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This is a publication of the Rehabilitation Engineering Research Center on Workplace Accommodations supported by the National Institute on Disability and Rehabilitation Research of the U.S. Department of Education, grant # H133E020720. The opinions contained in this publication are those of the grantee and do not necessarily reflect those of the U.S. Department of Education

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The Office of Technology Policy and Programs (OTP), GCATT, produces a monthly newsletter, *Workplace Accommodations Policy Highlights*, that reviews policy, regulatory framework and market factors that can be useful in reducing barriers to integrating people with disabilities into the workforce. The primary objectives of the Rehabilitation Engineering Research Center on Workplace Accommodation, a federal program funded by The National Institute on Disability and Rehabilitation Research (NIDRR), U.S Department of Education, are to identify, design, develop, and promote new assistive devices and universally-designed technologies that will enable all individuals, and particularly those with disabilities, to achieve the greatest degree of independence and integration in the workplace. To accomplish its mission, the RERC engages in a comprehensive program of research, development, training, and information dissemination.

For further information on items summarized in this report, or if you have items of interest that you would like included in future editions, please contact the editor, Lynzee Head (lynzee.head@gcatt.gatech.edu) or Andrew Ward, PH.D., MPH, Project Co-Director, Workplace Accommodations Policy Initiatives (RERC) (andrew.ward@gcatt.gatech.edu).