

EEOC Office of Legal Counsel staff members wrote the following informal discussion letter in response to an inquiry from a member of the public. This letter is intended to provide an informal discussion of the noted issue and does not constitute an official opinion of the Commission.

ADA: TITLE VII: ADEA: WORK OPPORTUNITY TAX CREDIT

APRIL 29, 2004

Re: Federal Work Opportunity Tax Credit

This is in response to your request for information concerning the relationship between the federal equal employment opportunity (EEO) laws and the federal Work Opportunity Tax Credit (WOTC) program. You requested information for employers who may be concerned that completing the required WOTC forms will expose them to liability under the EEO laws. Asking the questions as required on the Internal Revenue Service (IRS) Form 8850 and the Department of Labor (DOL) Form 9061 will not expose employers to liability under the EEO laws. This letter explains the rationale for that conclusion.

Background

To qualify for the Work Opportunity Tax Credit, an employer must obtain information confirming that a job applicant is a member of a WOTC-targeted group before making an offer of employment. See 26 U.S.C. § 51(d)(12). The targeted groups under the WOTC have some overlap with groups protected by the federal EEO laws. For example, certain people with disabilities who are targeted by the WOTC also may be protected from employment discrimination by the Americans with Disabilities Act. Employers have asked whether the questions required by the WOTC program may be prohibited by the EEO laws, especially the Americans with Disabilities Act.

The Americans with Disabilities Act

Under Title I of the Americans with Disabilities Act (ADA), employers are barred from making pre-offer disability-related inquiries. 29 U.S.C. § 12112(d)(2)(A). As the EEOC has explained in its *ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations*, a disability-related inquiry is a question that is "*likely to elicit* information about a disability." *Enforcement Guidance* at 4 (emphasis in original). The *Guidance* further states, however, that "if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not 'disability-related.'" *Id.* Available at www.eeoc.gov.

IRS Form 8850 and DOL Form 9061

The IRS Form 8850 is structured to ask a broadly-framed question to job applicants about whether they are members of the WOTC-targeted groups. As written, the Form 8850 asks generally if the applicant is a member of *any* targeted group, one of which is "vocational rehabilitation referral." A "yes" or "no" answer to this general question does not indicate to which of the groups the applicant belongs. Thus, if asked exactly as posed on the Form 8850, this inquiry is not a "disability-related inquiry" for purposes of the ADA and therefore is not prohibited by the ADA before an offer of employment.

The DOL 9061 form also does not violate the ADA, but the reason is more complicated. Although the rehabilitation services inquiry on Form 9061 is considered a "disability-related inquiry" under the ADA, it is required by another federal law and therefore would not violate the ADA.

DOL's Form 9061 includes separate questions about the job applicant's membership in each of the WOTC-targeted groups. One of these questions asks whether the applicant "is receiving or has received Rehabilitation Services through a State Rehabilitation Services program or the Veterans

Administration." Applicants must respond "yes" if this is the basis for their WOTC status. Under the ADA, this specific question is likely to elicit information about disability and therefore is considered a "disability-related inquiry" that would be prohibited by the ADA for job applicants.

However, for purposes of the WOTC, employers are protected from liability if they ask this question to job applicants. The EEOC's ADA regulation states, in pertinent part, that "[i]t may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, ..." 29 C.F.R. § 1630.15(e). In its 1992 *Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act*, the EEOC stated that predecessor statutes to the WOTC, which DOL administered, necessitated pre-offer disability-related inquiries about job applicant eligibility status and that "[t]hese inquiries would not violate the ADA." *Technical Assistance Manual* at V-9. Because the WOTC is the same as the predecessor statutes with regard to such inquiries, and because DOL has determined that employers should determine into which of the eligibility categories each applicant fits before extending a job offer, use of the DOL Form 9061 for job applicants does not violate the ADA. This ADA defense also would be available to an employer using a non-Federal form that posed the same rehabilitation services inquiry as the Form 9061 for the purpose of determining applicant eligibility for the WOTC.

Recognition that the rehabilitation services inquiry on DOL Form 9061 or a similar private sector form falls within the other Federal laws defense does not, however, extend ADA protection to employers who misuse the information that these forms provide. An employer using a form that includes, among other things, a rehabilitation services inquiry must understand that it may be obtaining disability-related information along with the WOTC information. Such information may not be used in a manner that is adverse to the applicant.

Age Discrimination and Title VII

Use of the IRS Form 8850 and the DOL Form 9061 does not expose employers to liability under other EEO laws. The requests on Form 8850 and Form 9061 for the birth date of an individual under the age of 25, does not violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. The ADEA regulation includes a specific exemption from "all prohibitions of the Act" for programs "carried out by the public employment services of the several States, designed exclusively . . . to encourage the employment of [various groups including] youth." 29 C.F.R. § 1627.16.

In addition, the use of Form 8850 and Form 9061 does not put the employer in the position of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII does not expressly prohibit pre-employment inquiries which disclose an applicant's race, color or national origin. In any event, Form 8850 and Form 9061 do not ask whether an individual belongs to a particular Title VII protected group.

We hope this information is helpful to you. Please note that this is not an official opinion of the Equal Employment Opportunity Commission. If you have any questions or would like to discuss this or any related matter in more detail, you may telephone _____, Assistant Legal Counsel at _____.

Sincerely,

Peggy R. Mastroianni

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