

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, IRS Form 8850 & ETA Form 9061

September 15, 2010

Dear:

This letter responds to your recent inquiry about the Internal Revenue Service (IRS) Form 8850 (Form 8850) and the Department of Labor, Employment and Training Administration (ETA) Form 9061 (Form 9061), used in the Federal Work Opportunity Tax Credit (WOTC) programs. You asked whether the Equal Employment Opportunity Commission's (EEOC or Commission) position regarding the use of Form 8850 and Form 9061 (the Forms) has changed since our last correspondence with you several years ago. As more fully set forth below, our position has not changed, and we continue to advise that proper employer use of the Forms would not violate the federal equal employment opportunity (EEO) laws, most prominently Title I of the Americans with Disabilities Act (ADA).

I. Background

As you know, the purpose of the WOTC is to encourage employers to hire and train people who are experiencing severe difficulties that are often linked to unemployment. For example, the WOTC program applies to people who have been long-term recipients of payments under the Temporary Assistance to Needy Families (TANF) program, and to individuals who have completed or are completing certain rehabilitative services. To qualify for the WOTC tax credit for hiring people who have experienced such difficulties, the WOTC law requires employers to obtain official confirmation of job applicants' WOTC status before the employer makes an offer of employment. 26 U.S.C. § 51(d)(13) (Section 51).

You inquired about the EEOC's position regarding the use of the Forms dated August 2009. Both include, as a separate question, whether the applicant has a service-connected disability. See Form 8850, Box 4 and Form 9061, Box 13. These questions were added because Congress amended the WOTC statute in 2007 to "increase and expand" the tax benefit for employers who hire qualified disabled veterans.¹ Section 51 now provides that employers may receive double the tax benefits for hiring veterans who are "entitled to compensation for a service-connected disability" and who meet certain other criteria. 26 U.S.C. §§ 51(b)(3) & (d)(3)(A)(ii). The WOTC requires that the employer make the decision to hire a qualified service-connected disabled veteran with knowledge that the veteran meets the statute's requirements.

II. Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA)

For the following reasons, employer use of the Forms, in compliance with IRS and ETA requirements, remains lawful under the ADA.

A. Form 8850

ADA-covered employers are barred from making pre-offer disability-related inquiries. 42 U.S.C. § 12112(d)(2)(A). In the Commission's *ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations*, 8 Fair Empl. Prac. Man. (BNA) 405:7191, 7192 (the Guidance), the Commission defined a disability-related inquiry as a question that is "likely to elicit information about a disability."² The new question added to Form 8850 pursuant to the 2007 WOTC amendments focuses solely on whether the job applicant is a disabled veteran and, therefore, is likely to elicit information about a disability. Accordingly, it is subject to the ADA's restrictions.

However, there is a relevant exception to the general ADA prohibition on pre-offer disability-related inquiries. Specifically, as explained in the Guidance:

An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if: the employer is undertaking affirmative action because of a federal, state, or local law including a veterans' preference law that requires affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); or the employer is voluntarily using the information to benefit individuals with disabilities.

Id. at 7196-97. The Guidance further notes that applicants must be informed that the request for self-identification is voluntary (that is, the applicant need not disclose his or her status as an individual with a disability), and that the information provided will be used only for affirmative action purposes.

We believe that this exception applies to Form 8850's question asking if the job applicant is a veteran entitled to compensation for a service-connected disability. One goal of the WOTC program generally, and of the amended provisions supporting employment of service-connected disabled veterans specifically, is to increase the employment of persons with disabilities. Therefore, employers that choose to take advantage of the federal WOTC program and, consequently, use Form 8850 on a pre-employment basis to identify for hire veterans with service-connected disabilities are "voluntarily using the [disability-related] information [they collect] to benefit individuals with disabilities." Additionally, Form 8850 clearly informs job applicants that completion is voluntary. If completion is in fact voluntary and the collected information is held confidentially, this ADA exception would apply to the inquiry. ³

In the past, we also have noted that Form 8850 finds support in the EEOC's ADA regulation that provides for an "other Federal laws defense." Specifically, we cited the section of the ADA regulation stating 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). The WOTC requires employers to know whether an applicant falls into the service-connected disabled veteran eligibility category before making an offer of employment in order to receive the tax credit. ⁴

B. Form 9061

Although Form 9061 asks questions similar to those asked on Form 8850, it cannot be justified under the ADA exception that allows employers to invite applicants to voluntarily self-identify because it is missing key language concerning the confidentiality of the collected information, as well as assurances that the information provided will be used in a manner consistent with the ADA. However, Form 9061 does find support in EEOC's ADA regulation that provides for an "other Federal laws defense," described above, and as explained in prior WOTC letters. See, e.g., http://www.eeoc.gov/eeoc/foia/letters/2004/ada_adea_titlevii_tax_credit.html

C. Limited Use of Information

Recognition that the Forms' inquires falls within ADA exceptions does not, however, extend ADA protection to employers who misuse the information that the Forms provide. An employer using the Forms will be obtaining disability-related information along with the WOTC information, and must not use it to make a discriminatory employment decision in violation of the ADA.

III. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq.

Neither Form 8850 nor Form 9061 puts the employer in the position of violating Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, national origin or sex. The Forms also do not ask whether an individual belongs to a particular Title VII protected group. By its terms, Title VII does not expressly prohibit employment inquiries that disclose that an applicant is a member of a protected group.

IV. Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et. seq.

Neither the request for the applicant's date of birth if the applicant is under 40 years old, nor the question concerning whether the applicant is between 16 and 24 violates the ADEA, as the ADEA does not expressly prohibit an employer from asking an applicant's age. The Forms request this information in order to determine if applicants fit the eligibility requirements to be considered "summer youth employees" or "disconnected youth" for purposes of the WOTC. See IRS Form 8850 Instructions, p. 2. The EEOC's ADEA regulations include a specific employment program 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. § 1625.31. Additionally, because the ADEA only prohibits employers from discriminating against employees and applicants who are 40 years of age or older, none of the applicants who provide a birth date fall within the purview of the statute. 29 U.S.C. § 631.

We hope this information is helpful to you. Please note that this letter is an informal discussion of the issues you raised and is not an official opinion of the EEOC. If you have any questions or would like to discuss this or any related matter in more detail, you may reach me at 202-663-4645.

Sincerely,

/s/

Carol R. Miaskoff
Assistant Legal Counsel

Footnotes

¹ 153 Cong. Rec. S6699 (May 24, 2007) (statement of Sen. Baucus). The amendment to the WOTC may be found at section 8211 of the Small Business & Work Opportunity Tax Act of 2007, which itself is a part of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery & Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112.

² The Guidance is available on the EEOC web site at <http://www.eeoc.gov/policy/docs/preemp.html>.

³ The EEOC's Guidance provides that applicants should be informed that the information will be kept confidential, that no adverse consequences flow from a decision not to provide the information, and that it will be used in a manner consistent with the ADA. Form 8850 meets these requirements: it notes that the information is covered by the IRS confidentiality provision, 26 U.S.C. § 6103; the Form advises applicants that completion of the Form is voluntary; and it informs applicants that the Form's use is to "assist members of targeted groups in securing employment."

⁴ Historically, in its 1992 *Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act*, the EEOC noted that predecessor statutes to the WOTC necessitated pre-offer disability-related inquiries about job applicant eligibility status for the benefits that these statutes offered and that "[t]hese inquiries would not violate the ADA." *Technical Assistance Manual* § 5.5(c) at V-9. (The Manual is available on the web site of the Job Accommodation Network (JAN) at <http://www.jan.wvu.edu/links/ADAtam1.html>. JAN is a free service from the Department of Labor's Office of Disability Employment Policy that provides, among other things, technical assistance regarding the ADA and individualized worksite accommodations solutions.)

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