

State Personnel System



Voluntary Self-Identification

Frequently Asked Questions

Division of State Human Resource Management

Revised December 27, 2021

FREQUENTLY ASKED QUESTIONS (FAQ) FOR HR PRACTITIONERS

Voluntary Self-Identification (Section 110.112, Florida Statutes)

PURPOSE

The following questions and answers are intended to assist human resource professionals understand issues related to the collection and use of voluntary self-identification disability status data for employees and applicants.

1. Why are employees and applicants being asked to voluntarily self-identify their disability status?

Chapter 2016-3, Laws of Florida, amended section 110.112, F.S., requiring each executive agency to establish goals, implement an affirmative action plan and develop an agency-specific plan to promote the employment of individuals with disabilities. To successfully implement an affirmative action program and annually report data on their progress toward hiring, promoting, and retaining individuals with disabilities an agency will need to collect information on the disability status of applicants and employees. This data will also allow agencies to monitor and improve their practices regarding placement, retention, and promotion.

2. Do agencies have the authority to invite employees and applicants to self-identify as individuals with disabilities?

Yes. ADA Enforcement Guidance issued by the Equal Employment Opportunity Commission (EEOC) states employers may invite individuals to voluntarily self-identify as an individual with disabilities (IWD) when undertaking affirmative action (AA) because of a federal, state, or local law (including a veterans' preference law) that requires AA for IWD; or the employer is voluntarily using the information to benefit IWD^{1,2}. The 1995 EEOC Enforcement Guidance has more recently been cited by the EEOC Legal Counsel in an August 8, 2013, response to an inquiry from the Director of the Office of Federal Contract Compliance Programs (OFCCP) emphasizing that "any employer may invite applicants or employees to voluntarily self-identify as individuals with disabilities for affirmative action purposes, whether pursuant to a federally-mandated affirmative action requirement such as Section 503 or a voluntarily adopted program³."

Additionally, EEOC has made clear in its regulations implementing Title I of the ADA (29 CFR 1630.1) that the law does not limit rights or procedures "of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part." If an affirmative action program implemented under Section 503 or under state law is intended to benefit IWD, this provision authorizes such programs under Title I of the ADA.

3. When should applicants be invited to self-identify?

¹ U.S. Equal Employment Opportunity Commission, "Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," EEOC Notice Number 915.002, October 10, 1995, <https://www.eeoc.gov/policy/docs/preemp.html>.

² U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)," EEOC Notice Number 915.002, July 27, 2000, <https://www.eeoc.gov/policy/docs/preemp.html>.

³ Mastroianni, Peggy R. "Invitation to Voluntary Self-Identify as Individuals with Disabilities." Letter to Director Patricia A. Shiu. 8 Aug. 2013, https://www.dol.gov/ofccp/regs/compliance/sec503/Self_ID_Forms/OLC_letter_to_OFCCP_8-8-2013_508c.pdf.

Employers are permitted to invite applicants to self-identify at the pre-offer and post-offer stage of the hiring process. The pre-offer invitation is necessary to evaluate the effectiveness of an agency's affirmative action plan outreach and recruitment efforts and document the number of candidates with a disability that apply for vacancies. The post-offer invitation allows those individuals hired for a position to self-identify who may feel more comfortable doing so once they have received an offer of employment and/or to help facilitate the accommodation process.

4. When and how often do current employees self-identify?

The ADA, when read with the Rehabilitation Act, Section 503, and the state statute, provides for periodic invitations to employees to self-identify. Upon implementation of an affirmative action program for individuals with disabilities agencies will need to invite their current employees to self-identify. They may also periodically remind employees that they may voluntarily update their disability status at any time. The initial invitation and periodic reminder will allow agencies to capture data on employees who become disabled while employed, as well as those with existing disabilities who may feel more comfortable self-identifying once they have been employed for some time. (**Recommended Frequency:** Agencies should invite employees to voluntarily self-identify every two years (beginning in 2017) with a periodic reminder to the employee, every even numbered year, that they may update their disability status at any time.)

5. What type of notice must individuals receive in conjunction with a voluntary self-identification invitation?

EEOC Enforcement Guidance previously cited above provides that when an employer invites individuals to voluntarily self-identify, the employer must clearly state that the information is used solely in connection with its affirmative action obligations and efforts; is being requested on a voluntary basis; will be kept confidential and used only in accordance with the ADA; and that refusal to provide it will not subject the applicant to any adverse treatment.

6. What are the confidentiality requirements for storing responses to paper and electronic invitations to self-identify?

Given that the confidentiality of self-identification forms/information is not addressed in section 110.112, F.S., it is appropriate for the state to adopt EEOC's Enforcement Guidance requirement to maintain this information separate from personal files/data. Also, given that OFCCP provides in its regulations for this information to be contained in a data file separate from the personnel and medical files, the department determined it is appropriate for the state to adopt this approach to file management. Employers may use their existing human resources information systems or applicant tracking systems as the data analysis file repositories for the disability data collected, provided that certain criteria are met. Specifically, disability-related data must be stored securely, apart from other personnel information, so that confidentiality is maintained, and access to this data must be limited solely to personnel who have a need to know the information for the purpose of complying with affirmative action programs. Self-identification data is to be collected and maintained on separate forms, kept confidential, and maintained in a data analysis file. An individual's medical information must be kept confidential with limited exceptions.

7. What are the confidentiality requirements for allowing access to self-identify disability status data?

Section 110.112, F.S., is silent regarding the confidentiality of self-identification disability information. The self-identification screen/data in People First constitutes medical information which is confidential under the Americans with Disabilities Act. The *EEOC 1995 ADA Enforcement Guidance*, provides that an employer must keep any medical information on applicants and employees confidential, with the following limited exceptions, none of which justify regular access to individual self-identification screens/data:

- a. **Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations.** (This typically occurs when an applicant or employee formally requests an accommodation. Simply choosing to self-identify does not constitute a request for accommodation; therefore, the manager or supervisor would have no justifiable reason to have access to the confidential information.);
 - b. **Information may be given to and used by appropriate decision-makers involved in the hiring process (or in implementing an affirmative action program) who need to know the information so they can make employment decisions consistent with the ADA.** (Based on this guidance disability related information can be shared with the decision maker if the information is being used to benefit the individual with a disability in the hiring process. Under the provision of Florida law, the self-identifying applicant is not being given preference in hiring and necessary summary data for affirmative action planning and reporting purposes will be available to the hiring agencies. Therefore, access to the individual's confidential self-identification information by decision makers in the hiring process is not necessary.);
 - c. **First aid and safety personnel may be told if the disability might require emergency treatment.** (The information collected for voluntary self-identification purposes reflects only that the employee has a disability, not the specific nature of the disability; therefore, this information would not be helpful in providing emergency treatment.);
 - d. **Government officials investigating compliance with the ADA must be given relevant information on request** (Agencies would be provided this information by the Division of State Human Resource Management (HRM)/People First Team upon request after verification of need.);
 - e. **Employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws.** (Relevant information could be made available for those purposes, under circumstances that require it.); and
 - f. **Employers may use the information for insurance purposes.** (Relevant information could be made available to the Division of State Group Insurance, under circumstances that require it.)
8. **Who will have access to the employee and applicant self-identification screens and corresponding disability self-identification status data?**

The only employees that will have access to the self-identification screens and identifying employee and applicant data are the members of the HRM or People First team with an "S" role code in order to administer the affirmative action program set forth in section 110.112, F.S. Agency human resource (HR) professionals, managers, nor supervisors will be able to see an employee or applicant's self-identification screen or corresponding disability status indicator. HR professionals will only have access to aggregate numerical data by EEO Category. In the event that any other classes of individuals, such as those listed in the exceptions detailed in questions seven above, need this information to fulfill their duties, the information may be provided by HRM. It should be noted that under section 20.055, Florida Statutes, inspectors general may be entitled to this information upon request when it is determined that this information is relevant to their

statutory duties.

9. Is the state or federal definition of a disability being used when inviting individuals to voluntarily self-identify as having a disability?

The department's Office of the General Counsel has concluded that DMS and the agencies are required to implement Chapter 2016-3, Section 3, consistent with the definition of disability contained within this state law. Given that we are undertaking this affirmative action program under the specific authority of this state statute in the absence of Section 503 application to the state as a federal contractor, we should use the definitions contained in state law to avoid a challenge that we are implementing an affirmative action program in a fashion that conflicts with and is beyond the scope of the authorizing state law.

NOTE: Although an agency's affirmative action program will focus outreach and recruitment efforts on those individuals meeting the state's definition of an individual with a disability; agencies are not exempt from their obligations under Title I of the ADA in the employment of individuals with disabilities, regardless of the type of disability.

APPLICABLE STATUTORY AND RULE CITATIONS (or where applicable within content):

29 C.F.R. § 1630, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act

Section 110.112, F.S., Affirmative Action; equal employment opportunity

Rule 60L-40, F.A.C., Sexual Harassment, Equal Employment Opportunity and Affirmative Action

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