

National Aeronautics and Space Administration

Headquarters

Washington, DC 20546-0001



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Reply to Attn of:

Office of Diversity and Equal Opportunity

TO: Officials-in-Charge of Headquarters Offices
Center Directors

FROM: Assistant Administrator for Diversity and Equal Opportunity

SUBJECT: Recently Enacted Civil Rights Laws and New EEO Regulations

Over the past year, Congress has enacted significant new civil rights legislation, and the U.S. Equal Employment Opportunity Commission (EEOC) is currently developing implementing regulations under these laws, as well as new regulations under the Age Discrimination in Employment Act of 1967. These new laws and regulations will have an important impact on the Agency's Equal Employment Opportunity (EEO) policies and programs.

In an effort to keep the Agency apprised of these developments and how they will impact the Agency's EEO efforts, we are providing the following information:

Americans with Disabilities Act Amendments of 2008

On September 25, 2008, Congress enacted sweeping amendments to the Americans with Disabilities Act of 1990. The new law became effective on January 1, 2009.

In general, the law has broadened the principles to be applied in determining whether an individual has a disability within the meaning of the ADA. The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA, and generally shall not require extensive analysis. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability.

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- Expands the definition of "major life activities" by including two non-exhaustive lists: the first list includes many activities that the EEOC has recognized (e.g.,

walking, hearing, seeing, thinking, communicating); the second list includes major bodily functions (e.g., neurological, brain, respiratory, circulatory);

- States that mitigating measures, such as medication, prosthetics, and assistive technology (but not "ordinary eyeglasses or contact lenses") *shall not be considered* in assessing whether an individual has a disability;
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor; and provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

Congress has charged the EEOC with issuing regulations implementing the provisions of the new law, not later than one year after passage. EEOC also has stated that it will be evaluating the impact of these changes in its enforcement guidances and other publications addressing the ADA.

The full implications of the new law for the Agency are unclear at this point, especially given that EEOC has not yet issued guidance to agencies. However, given the breadth of the changes to the ADA, we may expect important implications for the Agency regarding requests for reasonable accommodations and processing of EEO complaints based on disability.

Genetic Information Non-Discrimination Act of 2008

The Genetic Information Non-discrimination Act (GINA) of 2008 was passed on May 21, 2008. GINA prohibits employment discrimination on the basis of genetic information (such as genetic test results and information about an individual's family medical history such as the manifestation of a disease or disorder).

GINA was enacted, in large part, in recognition of developments in the field of genetics. Genetic tests now exist that can inform individuals whether they may be at risk for developing a specific disease or disorder. But just as the number of genetic tests increase, so do the concerns about whether individuals may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information.

GINA's prohibition on *use* of genetic information in making employment decisions is absolute. However, there are any exceptions to the general rule against *acquisition* of genetic information. For example, one exception, sometimes referred to as the "water cooler" exception, applies to inadvertent acquisition of genetic information, e.g., where a supervisor overhears a conversation between co-workers in which genetic information is discussed. Another exception is where an employer receives genetic information as part

of documentation an employee submits in support of a request for reasonable accommodation under the Americans with Disabilities Act (ADA) or other similar law.

The employment discrimination provisions of GINA became effective on November 21, 2009. EEOC is required to issue regulations implementing employment provisions of the Act by May 21, 2009. On February 25, 2009, the EEOC issued a notice of proposed rulemaking with a 60 day comment period. ODEO is coordinating the Agency's comments on the proposed rules, in conjunction with NASA's EEO, Human Resources and legal communities.

Lilly Ledbetter Fair Pay Act of 2009

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 ("Act"), which supersedes a private sector U.S. Supreme Court decision requiring a compensation discrimination charge (complaint) to be filed within 180 days (or 45 days in the case of Federal employees) of a discriminatory pay-setting decision.

The Act restores the pre-*Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began. As noted in the Act, it recognizes the "reality of wage discrimination" and restores "bedrock principles of American law."

The Act has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date.

Revised EEOC Age Discrimination Act in Employment (ADEA) Regulations

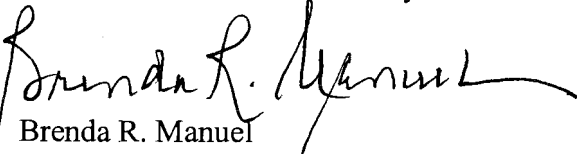
EEOC is revising its regulations under the ADEA to conform to a 2005 U.S. Supreme Court ruling that disparate impact claims are cognizable under the Age Discrimination in Employment Act.

"Disparate impact" claims of discrimination allege that facially neutral policies of an employer are nonetheless having a discriminatory effect based on a protected classification, such as age. While the Court held that such claims are cognizable under the ADEA, it also held that liability against an employer is precluded when the impact is attributable to a "reasonable factor other than age." However, current EEOC regulations interpret the ADEA as prohibiting an employment practice that has a disparate impact on individuals within the protected age group unless it is justified as a *business necessity*, a higher standard for the employer to meet. EEOC is revising its ADEA regulations accordingly and expects to issue a final rule by May 2009.

The new rules demonstrate, among other things, the need for employers to be vigilant in ensuring that workforce policies and practices, such as recruitment and retention strategies, are broadly inclusive regardless of age.

Going forward, ODEO will be providing further updates on these and other changes to civil rights laws and regulations, and their impacts on the Agency's EEO efforts.

Should you have any questions regarding this memorandum, please do not hesitate to contact David Chambers of my staff on 202-358-2128 or at david.r.chambers@nasa.gov.



Brenda R. Manuel

cc:
EO Directors