



New York **Makes Work Pay**

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Medicaid Infrastructure Grant (MIG) Report

Affirmative Action for People with Disabilities in New York State:

Analysis and Recommendations

Report to the New York State Medicaid Infrastructure Grant

December 2010

Presented by:

The Burton Blatt Institute at Syracuse University

Contributors:

Eve Hill, Esq.

Elizabeth Ribet, Ph.D., J.D.

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Cornell University
ILR School
Employment and Disability Institute

New York Makes Work Pay is a Comprehensive Employment System Medicaid Infrastructure Grant (#1QACMS030318) from the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) to the Office of Mental Health on behalf of New York State. It is a joint effort of the Burton Blatt Institute at Syracuse University and the Employment and Disability Institute at Cornell University with the collaborative support of the Employment Committee of the New York State Most Integrated Setting Coordinating Council (MISCC) to develop pathways and remove obstacles to employment for New Yorkers with disabilities.

Affirmative Action for People with Disabilities in New York State: Analysis and Recommendations

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New York State has expressed a commitment to improving employment outcomes for people with disabilities. A recent example is the creation of the Most Integrated Settings Coordinating Council (MISCC) established by Chapter 551 of the laws of 2002. The MISCC is responsible for developing a comprehensive Statewide plan to ensure that people of all ages with physical and mental disabilities receive care and services in the most integrated settings appropriate to their individual needs, including employment.¹

Despite coverage of individuals with disabilities in the New York Human Rights Law since 1974 (and requirement of reasonable accommodations since 1997), the passage of Section 504 of the Rehabilitation Act in 1973 and the passage of the ADA in 1990, the employment rate of Americans with disabilities remains dramatically lower than the employment rate of people without disabilities.² The recent recession has affected the employment of individuals with disabilities even more severely than the general population.³

In New York State, the employment rate for people with disabilities is 33.1%, compared with 72.3% for people without disabilities, a gap of 39.3%.⁴ Thus, people with disabilities who are qualified to work are being excluded from employment, imposing unnecessary costs on themselves, their families, governments, and taxpayers.⁵ This sustained inequity is the basis for disability affirmative action.

¹ <http://www.omr.state.ny.us/MISCC/>.

² Bureau of Labor Statistics, Table A-6, <http://www.bls.gov/news.release/empsit.t06.htm>

³ H.S. Kaye, "The Disproportionate Impact of the Great Recession on Workers with Disabilities," Institute for Health & Aging University of California San Francisco (2010) available at <http://www.disabilityfunders.org/resource.html>

⁴ New York Makes Work Pay, New York State Disability and Employment Status Report, p. 3 (2009), available at <http://www.ilr.cornell.edu/edi/nymakesworkpay/m-resources.cfm>.

⁵ LEN BARTON, ED., DISABILITY & DEPENDENCY (2007).

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Affirmative action can provide an effective tool to increase employment, and reduce dependence, of qualified people with disabilities. Affirmative action is a civil rights remedy intended to improve the representation and access of economically marginalized or under-represented groups, in the areas of employment and education. Historically in the U.S., affirmative action was first conceived as a civil rights strategy for overcoming the effects of past discrimination and discouraging current discrimination against racial minorities in various areas of economic participation.⁶ It has expanded to encompass a number of disadvantaged groups, such that many contemporary affirmative action laws at the state and federal levels include race, gender, disability, veteran status, and others. Municipal government and private employer affirmative action plans also sometimes include categories such as sexual orientation, age, or prison re-entry populations.⁷ This paper focuses on disability-based affirmative action in employment in New York State: what it is currently and what it could be.

Generally, affirmative action is not a social welfare program or charitable benefit. That is, it does not guarantee resources to people solely based on need or deprivation, regardless of competency. Rather, it functions to level the playing field; it provides a resource to people who are qualified to work, and have been excluded based on discriminatory barriers.⁸ In race and gender contexts, affirmative action has been shown to be effective, particularly when coupled with strong anti-discrimination policies, in increasing diversity in employment, and mitigating inequitable barriers to hiring and advancement.⁹

Americans with disabilities are disproportionately unemployed, underemployed, and living in poverty. No other disadvantaged group has a higher rate of unemployment. Research indicates that inaccessibility and discrimination in the workforce are key reasons for unemployment among disability populations.¹⁰

Disability affirmative action, like affirmative action in race and gender contexts, should, therefore, be understood as a remedy to mitigate the effects of past discrimination and a deterrent to current discrimination.¹¹ That is, discrimination creates obstacles that prevent

⁶ JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES AND FUTURE REPARATIONS* (2010)

⁷ See e.g. Harry J. Holzer et al, *Can Employers Play a More Positive Role in Prisoner Reentry*, Reentry Roundtable, the Urban Institute, (2002), available at: http://www.caction.org/rrt_new/professionals/articles/HOLZER-EMPLOYERS%27%20ROLE.pdf (last visited June 17, 2010).

⁸ Jonathon Leonard, *The Impact of Affirmative Action on Employment*, *Journal of Labor Economics*, 2:439-463 (1984).

⁹ *Id.*; Jonathon Leonard, *Employment and Occupational Advance Under Affirmative Action*, *The Review of Economics & Statistics* (1984).

¹⁰ Lisa Schur et al, *Is Disability Disabling in all Workplaces? Workplace Disparities and Corporate Culture* 48:3 *Industrial Relations* 381 (2009).

¹¹ *Id.*

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disadvantaged groups from accessing resources, gaining entry into institutions or succeeding as readily. Affirmative action is intended to counter-balance socially created inequities. While other areas of civil rights law are intended to prohibit discriminatory treatment, discrimination still persists.¹² Therefore, affirmative action remains a meaningful remedy as long as there are inequities in areas such as hiring, retention, and promotion.

Although discrimination is a major cause of underrepresentation of people with disabilities in the workforce, nondiscrimination laws, such as New York's Human Rights Law, alone, cannot be expected to overcome the legacy of disability discrimination. Affirmative action is needed to redress past and present hiring discrimination that cannot be proved (because applicants with disabilities are not told why they are not hired and employers do not record their discriminatory reasoning), to overcome pervasive negative employer attitudes that will not even be examined in the absence of affirmative obligations (people with disabilities can talk about their abilities in the application and interview process but cannot demonstrate their abilities until they are present in the workforce), and to break the pattern of invisibility of the group (if an employer has never hired a person with a disability, it is unlikely to even notice that its workforce does not include anyone with a disability).¹³ In addition, affirmative action allows individuals to get started earning, so they can use those earnings to overcome barriers (such as lack of reliable accessible transportation, equipment (including assistive technology), and personal assistance services) that would otherwise prevent them from getting jobs. Affirmative action can thus break the vicious cycle that a person can't afford to get a job until they have a job.

The key signifier of "affirmative action" is its end or goal – to improve representation and access of disadvantaged populations. Its mechanisms vary, including such strategies as non-competitive hiring or admission, targeted or inclusive recruitment strategies, policies intended to eliminate barriers or discrimination in workplace structures and relationships, and targeted resources to support retention and promotion.¹⁴ Most commonly however, affirmative action measures focus on the first two strategies: recruitment/outreach, and hiring/admission.

The New York State Human Rights Law prohibits discrimination in employment based on a number of protected characteristics, including disability.¹⁵ It does not provide any explicit

¹² Sarah Stroud, *The Aim of Affirmative Action*, Social Theory & Practice (1999); GERTRUDE EZORSKY, *RACISM & JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* (1991).

¹³ See Weber, M., "Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities," 46 Buffalo L. Rev. 123 (1998).

¹⁴ Cornell University Employment Policy RRTC, *New Directions for Federal Contractors and Disability Affirmative Action*, Washington, DC, (May 19, 2010)

¹⁵ N.Y. Exec. Law §§ 290-301, available at: <http://www.dhr.state.ny.us/doc/hrl.pdf>. (last visited June 17, 2010)

requirement that employers implement an affirmative action plan.¹⁶ For private employers, neither the Human Rights Law, nor any other New York state statute, prohibits affirmative action generally or on specific bases. In essence, under New York's anti-discrimination framework, private employers generally have the option, but not the legal obligation to utilize affirmative action as a remedy for workplace inequities. However, the New York Constitution limits affirmative action for state and local government employers. Article 5, section 6, says that "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." There is an exception in the Constitution for war veterans and disabled war veterans, which provides a 5 or 10 point preference, respectively. Government agencies generally may not provide preferences to underrepresented groups that make their appointments or promotions non-competitive.¹⁷

The first section of this paper reviews the primary area where disability affirmative action functions in New York State—through state laws applicable to state and local government agencies as employers. This section reviews current New York State law governing affirmative action by government agency employers, identifies alternative models in other U.S. states, at the federal level, internationally, and initiated by private employers, and reviews legal and practical differences, similarities, and interaction between affirmative action law and policy in race, gender and disability contexts. The second section reviews the potential for state government to require affirmative action by private employers who accept state contracts, including federal and state models for such programs. The concluding section reviews areas for improvement, and recommendations for policy reform in New York state.

I. Affirmative Action in Public Employment

Public employers in the United States have played a significant role in the economic advancement of disadvantaged people by providing career opportunities and demonstrating inclusive practices to private employers. In New York, state government is one of the largest employers - although the workforce varies with economic conditions, it has exceeded 165,000 people for decades. However, the Department of Civil Service's 2009 report *Diversity in the New York State Government Workforce*¹⁸ documents that New Yorkers with known disabilities comprise only about 3.5% of state government employees,

¹⁶ Id.

¹⁷ Other states have amended their constitutions to prohibit affirmative action on the basis of race and gender. See e.g. California Proposition 209, Proposition Against Discrimination or Preferential Treatment by State or Other Public Entities. (1996), available at: <http://vote96.sos.ca.gov/bp/209.htm> (last visited June 17, 2010); Michigan Civil Rights Initiative, codified at Mich. Const. Art. I, § 26. Disability-based affirmative action is also not prohibited under the U.S. Constitution, as discussed below.

¹⁸ New York State Department of Civil Service, *Diversity in the New York State Government Workforce* (2009).

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compared to 11.1% of the New York's working age (16-64) population.¹⁹ The report also notes that 82% of state government employees with disabilities hold positions in the lowest of 4 compensation categories.²⁰

As Governor Paterson commented on the overall Affirmative Action performance, "These findings are unacceptable. Government should be a model of inclusion, but a model that has some groups faring well while others do not is really no model at all. New York can do better. And we will do better."²¹

Both New York's state executive and legislature have directed attention to the employment of people with disabilities. The most identifiable public Affirmative Action program in New York is known as Executive Order 6,²² aimed at increasing state government employment of people with disabilities and six other targeted groups ("protected classes"). A more focused effort is found in three related provisions of the Civil Service Law²³ that address the hiring of people with disabilities by state and local governments. Unfortunately, the net result of these initiatives has been very modest.

If New York's workforce is to reflect its citizenry, state practice is to be consistent with policy proclamations and government is to demonstrate the "business case" for inclusion, public employment opportunities for people with disabilities must expand.

A. New York State Law and Policy

1. Broad Affirmative Action Efforts – Executive Order 6

In 1983, Governor Mario Cuomo signed Executive Order 6²⁴ (EO 6) revising prior Affirmative Action Orders:

It is the policy of the State of New York that equal opportunity be assured in the State's personnel system and affirmative action provided in its administration, in accordance with the requirements of the State's Human Rights Law and the mandates of Title VII of the Federal Civil Rights Act, as amended. Accordingly, it is the responsibility of the State's Department of Civil Service to enforce the State's policy of ensuring full and equal opportunity for minorities, women, disabled persons and Vietnam era veterans at all occupational levels of State government.

¹⁹ <http://www.ilr.cornell.edu/edi/nymakesworkpay/policy/index.cfm>

²⁰ State Department of Civil Service, *Diversity in the New York State Government Workforce (2009)*. The lowest compensation category includes positions earning Salary Grades 1-23.

²¹ Office of the Governor, Press Release, April 21, 2009

²² Executive Order 6 (1983), available at <http://www.cs.state.ny.us/dpm/execor6.cfm>.

²³ McKinney's Civil Service Law §55-a, b and c.

²⁴ Executive Order 6 (1983), available at <http://www.cs.state.ny.us/dpm/execor6.cfm>.

EO 6 articulates broad “equal opportunity” objectives rather than specific targets, and focuses on administrative responsibilities. For example, executive agencies under the governor’s authority²⁵ are mandated to develop Affirmative Action Plans, including goals and timeframes, to appoint Affirmative Action Officers and to submit annual performance reports to the Department of Civil Service. EO 6 also established administrative roles for the Governor’s Executive Committee for Affirmative Action, composed of high level policy makers, and the Affirmative Action Advisory Council, composed of all the agencies’ Affirmative Action Officers.

The “protected classes” covered by EO 6 are African Americans, Hispanics, Asians/Pacific Islanders, American Indians/Native Alaskans, Females, Veterans and Persons with Disabilities.”²⁶ Disability is not defined in EO 6, although a Model Affirmative Action Plan disseminated by the Department of Civil Service²⁷ discusses “Covered Individuals” using terminology from the Americans with Disabilities Act. The Model Plan was issued in 1984 and amended to reflect the ADA but has not been updated to incorporate the revised definition of disability in the ADA Amendments Act of 2008.²⁸

Concerns about diversity in the public workforce are long standing - a 1995 report of the Office of the Comptroller²⁹ found widespread deficiencies in the state’s Affirmative Action efforts, and in 1996 the legislature created the Commission on Increasing Diversity in the State Government Workforce. The Commission continues to consider the issues, recently issuing a report and holding public hearings focused on the qualifications and authority of the state agencies’ Affirmative Action Officers.³⁰

Key elements of New York’s affirmative action system for people with disabilities and other underrepresented groups are the Model Affirmative Action Plan and the position of

²⁵ EO 6 excludes the judiciary and the legislature as well as the Comptroller and Attorney General. However, the Comptroller and Attorney General have Affirmative Action plans and submit annual performance reports

²⁶ New York State Department of Civil Service, Model Affirmative Action Plan, Exhibit E to Commission on Increasing Diversity in the State Government Workforce, Report on the Roles and Responsibilities of Affirmative Action Officers in New York State, available at www.cs.state.ny.us/pio/Commission_AAO_Final_Report.pdf.

²⁷ New York State Department of Civil Service, Model Affirmative Action Plan (1984) 70, Exhibit E to Commission on Increasing Diversity in the State Government Workforce, Report on the Roles and Responsibilities of Affirmative Action Officers in New York State, available at www.cs.state.ny.us/pio/Commission_AAO_Final_Report.pdf.

²⁸ ADA Amend Act of 2008, Pub. L. 110–325 (Sept. 25, 2008).

²⁹ State of New York Office of the State Comptroller Division of Management Audit Department Of Civil Service Oversight Of New York State’s Affirmative Action Program Report 95-S-28.

³⁰ Commission on Increasing Diversity in the State Workforce, Report on the Roles and Responsibilities of Affirmative Action Officers in New York State – Final Version, June 28, 2010, www.cs.state.ny.us/pio/Commission_AAO_Final_Report.pdf; Comments of the New York State Affirmative Action Advisory Council on the Report on the Roles and Responsibilities of Affirmative Action Officers, March 15, 2010; Commission on Increasing Diversity in the State Government Workforce Notice of Public Hearing, April 21 2010, Albany New York.

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Affirmative Action Officer. The recent Report by the Commission on Increasing Diversity in the State Government Workforce notes a number of general improvements needed to the role and qualifications of Affirmative Action Officers, many of which would serve the state interest of increasing representation of people with disabilities in the state workforce.

The Model Affirmative Action Plan calls for agencies to establish goals and timetables, using a utilization analysis based on comparing the agency workforce to the available labor force for the Federal Occupational Category as reported in the 1980 U.S. Census. However, until 2008, the U.S. Census did not ask about disability and, therefore, there was not a strong basis for setting goals for hiring people with disabilities under this definition. The same utilization analysis is also to be used to determine whether an agency was disproportionately eliminating positions held by people with disabilities in reductions in force or by other means. Now, however, both the annual American Community Survey (ACS) and the monthly Current Population Survey (CPS) have questions designed to determine whether individuals have any of the following disabilities:

- Deafness or other serious hearing difficulty
- Blindness or other serious seeing difficulty (after correction)
- Physical, mental, or emotional condition that causes serious difficulty concentrating, remembering, or making decisions
- Serious difficulty walking or climbing stairs
- Difficulty dressing or bathing
- Physical, mental, or emotional condition that causes difficulty doing errands alone such as visiting a doctor's office or shopping

The ACS data enables detailed measurement down to the local geographical location, which is necessary in order to identify the relevant labor pools. Because of these changes to the annual ACS made by the Census Bureau in 2008, valid and reliable survey data now exist that will allow New York state agencies to compare incidence of disability in their workforce with the incidence of disability in the relevant labor force. This data will permit people with disabilities to be included in legitimate numerical affirmative action goals, allowing assessment of whether agencies have actually achieved, or moved toward, proportionate representation of employees with disabilities. EO 6 and the Model Affirmative Action Plan do not provide for preferences of any kind for protected classes, including people with disabilities. Rather, EO 6 and the Model Plan serve to set goals and expectations, inhibit discrimination, monitor progress, and call attention to disparities. This is consistent with the civil rights perspective from which affirmative action arose. However, it does not address the systemic barriers that keep people with disabilities and other protected groups from entering and advancing in state government employment. As discussed below (regarding Civil Service Law Section 55), the policy of having an "affirmative action" program gives the impression that protected groups are given some kind of preference, and may actually create a stigma against employees in those groups, when, in fact, they receive no preference. This perception that protected employees have been given some special advantage or that they have not met the qualification standards may actually create a backlash that inhibits retention and promotion of protected groups.

Arguably, in the absence of a constitutional amendment permitting real substantive affirmative action in the form of hiring preferences or points preferences on civil service examinations, it may be preferable to stop referring to “affirmative action” in the current program, and refer, instead, to diversity and diversity management. The Commission on Increasing Diversity in the State Government Workforce recommends a transition from mere affirmative action aimed at proportionate representation to a “diversity management” approach that seeks to create truly inclusive workplaces. Research by a consortium led by the Burton Blatt Institute has shown that diversity management practices similar to those recommended by the Commission generally to visibly demonstrate commitment to diversity and to create an inclusive workplace, are effective in creating inclusive workplaces for people with disabilities as well.³¹ In addition, a “diversity management” approach that explicitly includes disability as part of diversity would include best practices such as development of centralized funding for, and universal approaches to, reasonable accommodations.

2. Disability-Specific Mechanisms – Civil Service Law Section 55

An exception to the general state requirement that hiring and promotion be based on competitive examination is the “non-competitive class,” which consists of jobs for which competitive examination is not practicable. Generally, non-competitive class jobs include skilled trades and higher level administrative, scientific or technical positions, positions that are confidential in nature, or involve making or influencing policy.³² The Civil Service Law (CSL) extends this exception to support non-competitive hiring of people with disabilities.³³ The CSL contains three provisions on hiring people with disabilities, 55-a concerns local governments, 55-b provides a mechanism for state agencies and 55-c addresses state agencies hiring wartime veterans with disabilities. The origins of the current CSL 55 laws were laws enacted in the 1970’s which had authorized Nassau and Suffolk counties to fill 140 “limited duty positions” reserved for people with physical handicaps. The CSL Section 55 provisions have abandoned a welfare concept of benevolence towards people with disabilities but have not adopted a civil rights concept. The “limited duty” provision was dropped from the law in 1983 and in 1995 “persons with disabilities” replaced “handicapped but capable of performing the duties of such positions.”³⁴ The legal and programmatic developments in New York have been well intentioned but halting and less than effective.

a) State Government Employment - Civil Service Law Sections 55-b and 55-c

³¹ Disability Case Study Research Consortium. (2008). *Conducting & Benchmarking Inclusive Employment Policies, Practices, and Culture*. On file with author.

³² New York State Department of Civil Service, “Summary of New York State Civil Service Law,” www.cs.state.ny.us/pio/publications/summofcsl.pdf (2008).

³³ *Id.* at 4.

³⁴ 1995 N.Y. Sess. Law 1591 (McKinney).

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CSL Section 55-b³⁵ authorizes the state Civil Service Commission to convert state agency positions from the competitive to non-competitive category for up to 1200 people certified as having disabilities.³⁶ Currently, 1,050 such positions are filled.³⁷ Section 55-c³⁸ authorizes the Commission to convert up to 500 positions to non-competitive for veterans with disabilities who served in “time of war,” as defined in the law.³⁹ Currently, 109 such positions are filled.⁴⁰

To be eligible for 55-b/c positions, disability, which is not defined in these laws, must be certified by a physician from the Department of Civil Service’s Employee Health Service. Applicants are required to submit a questionnaire completed by a physician that includes the diagnosis, prognosis and a description of the impact the disability has on the individual’s major life activities. The individual also submits a statement describing how the disability impacts his/her life and interferes with employment,⁴¹ and he/she may be required to undergo a physical examination by a Civil Service physician. If determined to be disabled, the Employee Health Service will issue a 55-b/c “Eligibility Letter,” which is valid for three years. For wartime veterans, disability need not be service-connected, but eligibility is automatic if he/she was awarded the Purple Heart or receives a Veterans Administration disability rating of 20% or greater.

Interested individuals learn about the 55-b/c mechanisms from flyers and the Civil Service Department’s website.⁴² Applications and instructions are available, as well as phone numbers and email addresses of designated staff members. They provide information on how disability is determined, which state agencies are recruiting for entry level positions, the relevant job qualifications and the state agencies’ websites /personnel offices’ phone numbers. Staff will assist with completing forms, but the individual must seek employment directly from the state agency for which he/she is interested in working.

State agencies do not designate positions for 55-b/c status (there is no list of available “55-b/c jobs”) and they have discretion as to whether to interview a “55-b/c certified”

³⁵ McKinney’s Civil Service Law §55-b. See also New York Department of Civil Service website at <http://www.cs.state.ny.us/dpm/workersdisabilities.cfm>.

³⁶ When the provision was enacted in 1977, the legislation specified a maximum of 200 “55-b” positions. The cap was increased by statutory amendment 5 times between 1977 and 1990 to 1200 positions.

³⁷ Conversation with Jennifer Hoerup, Principal Staffing Services Representative with the New York State Department of Civil Service, June 2, 2010.

³⁸ McKinney’s Civil Service Law §55-c. See also New York Department of Civil Service website at <http://www.cs.state.ny.us/dpm/workersdisabilities.cfm>.

³⁹ Enacted in 1987, this provision specified a maximum of 300 positions, and in 2008 the cap was increased to 500.

⁴⁰ Conversation with Jennifer Hoerup, Principal Staffing Services Representative with the New York State Department of Civil Service, June 2, 2010.

⁴¹ The individual statement and physician form are available at <http://www.cs.state.ny.us/dpm/b55.cfm>.

⁴² New York Department of Civil Service website at <http://www.cs.state.ny.us/dpm/workersdisabilities.cfm>.

applicant with the education/experience job qualifications. An agency that wants to offer the person a position can request the Civil Service Commission to convert it from competitive to non-competitive classification and he/she can be hired without the oral or written Civil Service examination otherwise required. A 55-b/c employee is eligible to seek any promotions available for that job title through the same general examination mechanisms as for others in that competitive classification.

In terms of utilization, 1159 of the 1700 state agency positions authorized under Civil Service Law 55-b/c are filled, with a waiting list of more than 4,000 individuals certified as 55-b/c eligible within the last three years. In 2008, the Civil Service Department recognized that the number of placements made under 55-b and -c in 2007 (13 and 12, respectively) was unacceptable and increased efforts. Placements rose in 2008 (55-b: 137, 55-c: 32) then declined in 2009 (55-b: 84, 55-c: 32), consistent with the overall trend in state hiring. Recently, the Civil Service Department has proposed Guidelines and Procedures for Appointments Pursuant to Section 55-b/c Civil Service Law.⁴³ The Department issued the draft guidelines in July 2010, received public comment until October, 2010, and will issue final guidelines in December 2010. The proposed Guidelines attempt to limit the applicability of Section 55-b/c by stating that “the intent is to provide an entry-level employment opportunity in state government for those with severe physical or mental disabilities, whose disabilities have placed them at a serious disadvantage in the labor market.”⁴⁴ Although Section 55-b/c is not, on its face, limited to people with the most severe disabilities, according to the Division, “While all are invited to apply for program consideration, applicants should be aware that eligibility determinations will be made in consonance with this statement of intent and philosophy.”⁴⁵ Thus, the draft Guidelines would limit eligibility to those who can demonstrate

- legal blindness;
- deafness or severe hearing loss;
- musculoskeletal condition or neuromuscular condition which severely limits ambulation;
- cardiovascular condition or pulmonary condition which severely limits ambulation and/or requires constant oxygen administration;
- developmental disability attributable to Mental Retardation, Cerebral Palsy, Epilepsy, Neurological Impairment, Familial Dysautonomia, Autism or any other condition closely related to Mental Retardation;

⁴³

www.cs.state.ny.us/...c%20guidelines/55bc%20final%20draft%20guidelines%20for%20public%20review.pdf.

⁴⁴ Id.

⁴⁵ Id.

- mental illness which severely disturbs thinking, judgment and/or behavior or requires constant supervision; or
- other physical or mental conditions which significantly and adversely impact the individual's ability to work, shown by an employment history documenting the individual's inability to secure employment or inability to maintain employment.

This definition of disability is quite similar to the definition used by the Census Bureau's American Community Survey, which could be used to determine the appropriate number of CSL Section 55-b/c positions. The proposed definition is much more narrow than the definition of disability under the Americans with Disabilities Act (ADA), as amended. Such a narrow definition is more appropriate for an affirmative action program than for an anti-discrimination law.

Notably, the proposed Guidelines state that "All conditions must be permanent and will be assessed on the applicant's current functional status, taking into account measures which the individual has taken to ameliorate functional limitations, including, but not limited to, prosthesis, medications, eyeglasses or hearing aids." This is in stark contrast to the ADA, as amended, which forbids consideration of mitigating measures in determining whether a person has a disability for nondiscrimination purposes. While not prohibited by the ADA, such a definition may cause implementation problems. Prior to the ADA Amendments Act of 2008, the ADA was also interpreted to include consideration of "mitigating measures" in determining whether a person had a disability. Courts applying the definition had difficulty applying the definition and it sometimes led to anomalous results, including denying coverage to people with what would usually clearly be considered disabilities, such as muscular dystrophy.⁴⁶ Moreover, assessing disability in its mitigated state may exclude exactly the people affirmative action is intended to reach – those with disabilities severe enough to make it hard for them to get a job (either because of the examination and application requirements or because of discriminatory attitudes), but who are actually able to do the job. Mitigating measures, such as prosthetics, may make the difference for those individuals, yet the draft Guidelines would prevent them from benefitting from CSL Section 55. The ADA Amendments Act struck the balance by prohibiting consideration of mitigating measures other than ordinary eyeglasses.

The proposed Guidelines also make clear that current or previous government employees are generally not eligible for Section 55-b/c appointment, except in limited circumstances. In addition, Section 55-b/c positions that are vacated revert to the competitive class.

b) Local Government Employment - Civil Service Law 55-a

Similar in principle, Section 55-a authorizes local governments⁴⁷ to designate up to 700 non-competitive jobs for people with disabilities.⁴⁸ The number of positions filled is

⁴⁶ See *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5th Cir. 2003).

⁴⁷ For these purposes, there are 62 counties and 38 cities in New York.

unknown. Eligibility and qualification is determined by the state Vocational Rehabilitation agencies (Vocational and Educational Services for Individuals with Disabilities (VESID) or the state Commission on the Blind and Visually Handicapped). However, conversion of positions from competitive to non-competitive service must be sought by the local appointing authority and conversion is accomplished by the local government civil service commission or personnel office.⁴⁹ Individuals interested in learning about CSL 55-a are provided a brief overview on the State Civil Service website⁵⁰ and referred to local governments for more information.

c) Problems with CSL 55-a/b/c

Although state and local government agencies benefit from employees with disabilities' skills and perspectives, Civil Service Law Sections 55-a/b/c themselves offer very limited incentives to employers. It is possible, for example, that a person with a disability can be hired more quickly than other applicants because examinations and ranking procedures are not required. However, the person must be determined eligible by a Civil Service physician, which takes approximately two weeks. Similarly, Sections 55-b/c can benefit an agency when a hiring freeze is imposed and the Division of Budget requires an individual waiver to hire someone, as the requirement is sometimes relaxed for 55-b/c hires. However, this benefit is limited because the agency must still satisfy other requirements (e.g., budget and employee limits) in order to hire someone under 55-b/c.

State agencies appear to have varying understanding of the 55-b/c mechanisms. The Department of Civil Service provides information to interested individuals and maintains utilization data. Civil Service Department staff assist applicants to complete the required forms and procedures, but it is unclear to what extent their efforts are coordinated with those provided by agency Affirmative Action and/or Personnel Officers. Civil Service Department staff respond to questions from state agencies, but there is not a comprehensive, continuous outreach program or written guidance on implementing the law's provisions. The low profile of the Section 55 mechanisms within the state's hiring process is clear from the minimal information available online to prospective job applicants. A review of the website employment sections of the ten largest New York state agencies (of 70), which employ 76% of the workforce, shows scant discussion of Section 55. Only two agencies, the Departments of Transportation and Environmental Conservation discuss reasonable accommodations for people with disabilities and provide contact information for obtaining assistance.

⁴⁸ McKinney's Civil Service Law §55-a.

⁴⁹ <http://www.cs.state.ny.us/dpm/55a.cfm>

⁵⁰ <http://www.cs.state.ny.us/dpm/55a.cfm>

To learn more go to <http://www.nymakesworkpay.org>

A fundamental problem with Section 55-a is the lack of data concerning its use by local governments.⁵¹ There may well be localities that effectively integrate people with disabilities into their workforce, and could serve as models to others. It is also unknown to what the extent individuals, families, service providers and other stakeholders are aware of the 55-a mechanism, but it is apparent that applicants need to make county-by-county inquiries. Anecdotal reports indicate that people are told to check with the individual department in which they would like to work and then find it very difficult to reach someone who has any familiarity with Civil Service Law Section 55-a.

Beyond the problems in implementation of CSL Section 55, there are issues in the statutes' basic approach to increasing employment opportunities for people with disabilities. For example, the number of positions that can be designated under Sections 55-a, -b and -c appears to be unrelated to any demographic factors associated with disability or to the workforce needs of government. The number for 55-b increased 6 fold within 13 years and then remained unchanged for 20 years. The numbers do not reflect the representation of people with disabilities in the New York population (11.1%, which would be approximately 18,000 out of the 165,000 state employees). The maximum number of positions authorized under CSL 55-b/c has never been reached, despite the high number of people who have been found eligible. New Census Bureau American Community Survey data could provide a basis for determining the appropriate number of CSL Section 55-b/c positions.

Section 55 does not operate as a quota in intent or outcome. The numbers are a cap on aggregate agency conversions of positions, rather than a set-aside. Agencies have complete discretion to request conversion of positions and are given little incentive, little monitoring, and no mandate to do so. Section 55 is misperceived to give preferential treatment to people with disabilities, when, in fact, it offers minimal benefit to people with disabilities. Although Section 55 allows the waiver of customary civil service exam requirements, eligible individuals with disabilities must still meet the qualifications of the position. In practical terms, the examination waiver itself does not result in employment – exams are eliminated only if the agency exercises its discretion to create and fill a non-competitive position with the Section 55 candidate.

The Americans with Disabilities Act (ADA)⁵² seeks to address barriers that may be overt or indirect, based on hostile bias or good intentions. The federal civil rights law is aimed at the discrimination that results in, among many consequences, widespread unemployment, harming both individuals and the public interest. The ADA gives job seekers enforceable rights and establishes meaningful duties for employers. Affirmative action programs can take many forms but their standards and procedures must be consistent with the ADA's mandates. Aspects of New York's Section 55 mechanisms raise concerns in this regard.

⁵¹ CBVH conducted a phone survey of the counties in 2007 to obtain the contact information for individuals responsible for Section 55a matters. Not all counties had designated anyone. The information collected was not widely disseminated and has not been updated.

⁵² 42 U.S.C. §12101 et seq.

Among the most important provisions of the ADA are those which prohibit an employer from discriminating against a qualified applicant with a disability who can perform the “essential functions” of a position with or without “reasonable accommodations.” The essential function element requires determining which aspects of job are marginal or could be removed without fundamentally altering the position. “Reasonable accommodations” could include restructuring the job to eliminate non-essential tasks, modifying work schedules, buying or altering equipment, adjusting or modifying exams and other changes to the job duties, work environment or manner in which things are typically done in the organization. The law imposes an affirmative duty on the employer to make adjustments that will reduce barriers, though the mandate is limited – actions that would impose an undue hardship are not required. Reasonable accommodation is an interactive process and the legal standard necessitates case-by-case analysis.

In contrast to the ADA’s balanced, individualized approach, CSL 55-b/c simply states that the person must be able to “satisfactorily perform the duties of the position. Although CSL 55-b/c goes beyond the ADA requirements and, therefore, is not required to adopt the ADA definition of disability, determinations of qualification should comply with the ADA requirements. In addition, once an employee is hired (as well as during any interview and other application procedures), he or she is entitled to reasonable accommodation and other ADA rights.

It is important that the Civil Service Department ensure that reasonable accommodations are made available to those individuals with disabilities who are attempting to take the competitive examinations. As the Department’s Draft Guidelines note, CSL Section 55-b/c is not the only, or the central, mechanism for employment of people with disabilities. Therefore, most applicants with disabilities will need to take the competitive examinations. Availability of accessible formats, extra time, and other reasonable modifications to those examinations, to ensure an equal opportunity to pass, are, therefore, essential. Currently, the accommodation process for the examination is complex. The examination registration provides a checkbox to identify as a person with a disability needing accommodations, but provides no guidance regarding who is a covered person with a disability or what an accommodation is. Instead, the applicant must write or call the Department and indicate what “accommodation” they require. The registration form does not indicate how accommodations will be granted or denied.

3. Other Policies Regarding Government Employment

The state currently leaves accommodation decisions and funding to each agency that hires an employee with a disability. Although research has consistently shown that accommodations generally are not costly,⁵³ fears of accommodation costs are frequently

⁵³ Blanck, P.D. (1994). Communicating the Americans with Disabilities Act: Transcending Compliance - - A case report on Sears Roebuck & Co., The Annenberg Washington Program. In J. Burns (Ed.), *Driving Down Health Care Costs* (pp. 209-241). New York, Panel Publishers; Blanck, P.D. (1996).\;

cited by managers as reasons not to hire people with disabilities. The state could reduce this disincentive to hiring and accommodating people with disabilities by centralizing funding of accommodations. Research has indicated that centralized accommodation funding, combined with localized accommodation decisionmaking (about what accommodations are appropriate) is effective at creating an inclusive workplace.⁵⁴ In addition, centralized purchasing of common accommodations can result in cost savings through bulk purchases.

In addition, New York could recognize and respond to the barriers posed by inaccessible technology provided to state government employees. In May 2010, the New York Chief Information Officer issued Policy P08-005, requiring state web-based information and applications to be accessible. The ADA and Section 504 of the Rehabilitation Act require state agencies to provide reasonable accommodations to ensure access to employment systems for applicants and employees with disabilities. The New York policy is based on Section 508 of the Rehabilitation Act, which requires all federal government technology purchased, developed, and maintained by the Federal government to be used by employees or the public to be accessible unless doing so would pose an undue burden on the agency. Standards for assessing accessibility have been developed by the U.S Access Board and are in the process of being refreshed. While web-based technology accessibility is an essential step in the process of making state employment accessible to people with disabilities, the state should now move to adopt the rest of Section 508's model by requiring all electronic and information technology used by its employees to be accessible, including office equipment, software, and multimedia.

B. Alternative Models of Affirmative Action in Public Employment

As noted in the introduction, many existing affirmative action practices are limited to basic recruitment and hiring requirements. As a basis for comparison, and for developing recommended reforms, it is useful to review alternative models. This section covers four arenas. The first sub-section reviews approaches by the U.S. federal government and U.S. states, comparable to the mechanisms in New York civil service laws and orders affecting state agencies. The second sub-section reviews elements of the United Nations Convention on the Rights of Persons with Disabilities⁵⁵ (CRPD), and models in other nation-states. The third sub-section reviews policy and practices voluntarily implemented by pro-active private employers.

Americans with Disabilities Act: Transcending Compliance – 1996: Follow up report on Sears, Roebuck & Co. Washington, D.C.: The Annenberg Washington Program. (also published as: Blanck, P.D. (1996). Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck & Co. *Mental & Physical Disability Law Reporter*, 20(2), 278-86.)

⁵⁴ Lengnick-Hall, M. L. (2007). *Hidden talent: How leading companies hire, retain, and benefit from people with disabilities*. Westport, CT: Praeger Publishers; Disability Case Study Research Consortium. (2008). *Conducting & Benchmarking Inclusive Employment Policies, Practices, and Culture*. On file with author.

⁵⁵ A/RES/61/106, United Nations General Assembly (January 24, 2007), available at <http://www.un.org/disabilities/>.

1. Federal Schedule A Hiring Authority

The Schedule A Hiring Authority⁵⁶ allows for non-competitive hiring of persons with certain disabilities, to positions in federal agencies. Disabilities covered include cognitive impairment or (“mental retardation”), severe physical disabilities or psychiatric disabilities.⁵⁷ In addition, disabled veterans may also be considered under veteran specific programs provided the Department of Veterans Affairs certifies that there is at least 30% disability. To qualify for Schedule A hiring, an individual must provide proof of a covered disability, whether from a medical or healthcare professional, or from a federal or state agency that administers disability benefits. In addition, an individual must provide “Certification of Job Readiness.”⁵⁸ Individuals can obtain certification from a medical professional or federal or state agency that administers disability benefits, or from a vocational rehabilitation specialist.⁵⁹

Certification must indicate that the individual with a disability is prepared to perform those tasks essential to the job(s) the individual is applying for. Where an individual has proof of disability, but does not yet have adequate documentation to establish certification, a federal agency may provide a temporary appointment, allowing the individual with a disability to work until job readiness is ascertained, before potentially providing a more permanent appointment.⁶⁰ The Schedule A Hiring Authority embodies an approach to realizing employment for individuals with disabilities who are more likely to be incorrectly perceived as unemployable, or who may need an opportunity to demonstrate qualification to work, during a temporary employment period.

The Schedule A system is similar to the New York CSL Section 55-a/b/c system in that it exempts individuals with covered disabilities from the usual hiring processes. However, there are no caps on the number of positions that can be converted to non-competitive service under Schedule A.

Schedule A hiring authority has not been extensively used in the past. However, President Obama’s Executive Order in July 2010⁶¹ brought renewed attention to Schedule A by requiring agencies to increase use of the system. The Executive Order also required agencies to develop agency-specific plans for increasing employment of people with

⁵⁶ 5 C.F.R. 213.3102(u)

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ See e.g. Social Security Administration, Hiring People with Disabilities, available at: <http://www.ssa.gov/work/scheduleA/hiring.htm>.

⁶¹ Executive Order-- Increasing Federal Employment of Individuals with Disabilities, July 26, 2010, available at <http://www.whitehouse.gov/the-press-office/executive-order-increasing-federal-employment-individuals-with-disabilities>.

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disabilities, including performance targets and numerical goals. Federal agencies and the federal government as a whole have taken a variety of approaches to increasing their use of Schedule A hiring authority, including developing resume banks for applicants with disabilities,⁶² job fairs for people with disabilities,⁶³ centralized demonstration, loans, and provision of technology and other accommodations,⁶⁴ training for hiring officers and people with disabilities, and dedicated website pages.⁶⁵

2. Alternative Models in U.S. States

California has set a goal of a state government workforce that reflects the working age population with disabilities. In accordance with a 1978 statute, state agencies “ensure individuals with a disability, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population.”⁶⁶ In 2009, individuals with disabilities were 9.3% of the state government workforce,⁶⁷ that percentage increasing steadily over an economically tumultuous decade (from 7.4% in 2000⁶⁸) toward a target of 16.6%.

Measurable progress is being achieved in California by the use of concrete goals as well as the ongoing focus of the state’s Personnel Services Board (PSB) and executive agencies. The Board analyzes data on public/private employment of people with disabilities, identifies recruitment and retention strategies, and establishes standards to guide state agencies’ efforts.⁶⁹ California agencies submit annual affirmative action plans to the Board⁷⁰ with concrete targets and timetables for employment of persons with disabilities.⁷¹ Plans identify any categories of persons with disabilities excluded from positions on “non-job-related basis” and specify the actions needed to “correct that underrepresentation.”⁷² Agencies submit Corrective Action Plans if the proportion of their workforce comprised of

⁶² U.S. Department of Justice Antitrust Division, www.justice.gov/atr/contact/263880.pdf.

⁶³ U.S. Department of Labor Office of Disability Employment Policy, http://www.nads.org/pages_new/ODEP_job_fair.html.

⁶⁴ Computer/Electronic Accommodations Program, <http://cap.tricare.mil/>; U.S. Department of Agriculture TARGET Center, <http://www.dm.usda.gov/oo/target/subjects/at.html>.

⁶⁵ <http://www.usajobs.gov/individualswithdisabilities.asp>.

⁶⁶ California Government Code Section 19232

⁶⁷ Annual Census of Employees in the State Civil Service 2008-2009, California State Personnel Board, February, 2010 <http://www.spb.ca.gov/WorkArea/showcontent.aspx?id=5634>

⁶⁸ Email dated August 10, 2010 from Jerry Gibbons, California State Personnel Board, to Kenneth Hunt, Syracuse University, Burton Blatt Institute

⁶⁹ California Government Code § 19233

⁷⁰ California Government Code § 19232

⁷¹ Id.

⁷² California Government Code § 19234

people with known disabilities falls below 80% of the proportion of the state's working age population with disabilities. The State Personnel Board monitors the workforce composition as well as upward mobility of people with disabilities, and reports outcomes annually to the state legislature and Governor.⁷³

A key element of California's affirmative action efforts is the Limited Examination and Appointment Program (LEAP). Established by statute⁷⁴ in 1989 to "minimize the adverse impact of the traditional public employee selection process" LEAP provides an alternate means of assessing the qualifications and skills of job applicants with disabilities.⁷⁵ The mechanism involves an evaluation of the individual's education, experience and personal qualifications, followed by temporary employment for two to four months, and reasonable accommodations if requested. The person receives the standard compensation and benefits for the particular position during that period and, if he/she meets performance standards, is appointed to the regular civil service classification.

In addition to establishing formal mechanisms, California has made public employment of people with disabilities a programmatic priority. A "Model Employer Initiative" was undertaken by the PSB in 2007 with a two-day meeting to focus attention on the abilities of people with disabilities and the workforce needs of state government. Attended by several hundred job-seekers and 29 representatives from State departments, nearly 70% of attendees said they acquired useful information and 61% of the employers said they would be more likely to use the LEAP mechanism.

In 2008 the PSB and California Department of Rehabilitation (DOR) jointly held a stakeholder meeting resulting in 100 suggestions for the Initiative and in 2010 DOR hired an Initiative Project Manager who coordinates efforts through separate inter-agency task forces on training, reasonable accommodation, policy and marketing. Key activities include:

- Online Disability Awareness and LEAP Training for managers/supervisors;
- Streamlining Reasonable Accommodations procurement and provision;
- Marketing plans and formats (brochures, posters, videos, etc) designed to inform job seekers through community-based organizations;
- Identification and dissemination of best practices to State agencies

A number of other states have substantive statutory requirements related to affirmative action in public employment. Maine's Code of Fair Practices and Affirmative Action vests an

⁷³ California Government Code § 19237

⁷⁴ California Government Code, § 19240

⁷⁵ <http://www.spb.ca.gov/jobs/resources/leap/index.htm>

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affirmative action officer within state entities with the ability to make non-competitive appointments in order to ensure that affirmative action aspirations are achieved.⁷⁶ Affirmative action mechanisms may be activated based on any statistical disparity of representation in the workforce, or based on documentation of an adverse effect of a hiring practice.⁷⁷ Delaware similarly prioritizes non-competitive employment, through the use of a “Selective Placement Program,” which allows applicants with disabilities to secure non-competitive employment for a 12 month trial period, after which permanent employment may be secured based on performance and/or a competitive examination.⁷⁸

Other states have instituted concrete programs with innovative elements aimed at increasing public employment opportunities. In Vermont, every applicant with a disability who meets a job title’s basic qualification and makes a request is interviewed.⁷⁹ In addition, the Vermont Commissioner of Human Resources is vested with the power to waive qualifications which are deemed to be exclusionary of people with disabilities, related to “competitive entrance exams, provisions related to experience, or any other requirement for qualification.”⁸⁰

In Utah, requests to state agencies for reasonable accommodations are centrally reviewed and funds are set-aside to assist agencies to provide such accommodations.⁸¹ In Washington State, the commissioner of a state agency must sign-off on a denial of a request for reasonable accommodation.⁸² Also in Washington State, the Washington State Governor's Task Force on Employment of Adults with disabilities, created a clearinghouse that provides employers with a single point of contact for recruiting applicants who have disabilities and for technical assistance.⁸³ Washington also has a centralized program to assist agencies with the costs of accommodations.⁸⁴ Wisconsin has a program allowing agencies to interview applicants with disabilities who have taken the civil service

⁷⁶ 5 M.R.S.A. §783.

⁷⁷ [Code ME ADC 18-389 ch. 8, § 5 \(B0029\)](#)

⁷⁸ [29 Del. C. § 5904A](#)

⁷⁹ http://humanresources.vermont.gov/services/eo/individuals_with_disabilities/accommodations_in_the_application_process

⁸⁰ [3 V.S.A. § 309a, \(c\)](#)

⁸¹ Email from Brian Nelson, J.D., State Loss Control Administrator. Utah Division of Risk Management to Kenneth Hunt

⁸² *Best Practices for the Employment of People with Disabilities in State Government*, U.S. Equal Employment Opportunity Commission (2005).

⁸³ Equal Employment Opportunity Commission, Final Report on Best Practices for the Employment of People with Disabilities in State Government, http://www.eeoc.gov/facts/final_states_best_practices_report.html (2005).

⁸⁴ United Nations Expert Group Meeting on Managing Diversity in the Civil Service, www.centrostudilogos.com/.../UN_Best%20practices%20in%20diversity%20management.pdf, (May, 2001).

examination, even if they would normally have been too far down the certified list.⁸⁵ Several states have programs for training agency staff and centralized monitoring of progress toward agency hiring goals.⁸⁶

3. International Models

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) attends to the issue of equity and employment on multiple counts.⁸⁷ It explicitly instructs signatories to the Convention to “Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives, and other measures.”⁸⁸ More specific description of the components of affirmative action are not identified.⁸⁹ The CRPD is the most recently passed human rights convention, but its reference to affirmative action rests on the foundation of the body of international human rights law. Within the General Comments and related scholarly analysis of UN Human Rights Conventions, affirmative action has been recognized as a necessary component of non-discrimination programs, and specific measures are identified that such programs may include, such as state-sponsored vocational and technical training and employment services.⁹⁰

CRPD General Comment 5 notes that the International Covenant on Economic, Social, and Cultural Rights (ICESCR) “requires Governments to do much more than merely abstain from taking measures which have negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.”⁹¹

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ United Nations Convention on the Rights of Persons with Disabilities, A/RES/61/106, United Nations General Assembly (January 24, 2007), Article 27, Work and Employment, available at: <http://www.un.org/disabilities/default.asp?id=287> (last visited June 17, 2010).

⁸⁸ *Id.* at 1(h).

⁸⁹ *Id.*

⁹⁰ Global Rights, Affirmative Action: A Global Perspective (2005), available at: http://www.globalrights.org/site/DocServer/AffirmativeAction_GlobalPerspective.pdf?docID=2623 (last visited June 17, 2010).

⁹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003)

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Following passage and state ratification of the CRPD, multiple state parties have begun developing National Disability Strategies or similar programs, designed to fully integrate the CRPD into domestic laws.⁹² Pursuant to Article 27, which provides for the possibility of affirmative action policies, state parties are engaging the challenge of delineating specific provisions to realize workplace equity, such as the adoption of flexible work practices, or state supported education to work transitional programs, in the interests of eliminating barriers to employment.⁹³

Various nation-states have implemented human rights or equal opportunity laws that contain provisions more expansive or specific than U.S. state or federal law. South Africa's Employment Equity Act provides protection based on race, gender, and disability, and includes requirements that affirmative action programs: a) reach all occupational levels and categories, b) identify specific barriers to employment and develop measures to eliminate them, c) provide reasonable accommodations, and d) commit to workplace diversity.⁹⁴ Notably, these provisions apply to any employers with 50 or more employees, including private employers, regardless of funding.⁹⁵

Canada's Employment Equity Act covers public employers with 100 or more employees in its affirmative action requirements; the Act notes that remedying disadvantageous conditions "requires special measures and the accommodation of differences," rather than a simplistic commitment to like treatment.⁹⁶ The Canadian model includes disability, and requires that employers employ people in protected groups in their own workplace, proportionate to their presence in the broader workforce, as indicated by national empirical data.⁹⁷

C. Voluntary Private Affirmative Action Models

A number of interesting approaches to voluntary affirmative action and workplace equity manifest in the private sector. Examples include:

- Integration of work-life balance and family-friendly programs in tandem with disability and affirmative action initiatives, in order to improve employee retention.⁹⁸

⁹² See e.g. National Disability Strategy: Australian Human Rights Commission, available at: http://www.hreoc.gov.au/disability_rights/commonwealth/NDS.htm (last visited June 17, 2010).

⁹³ *Id.*

⁹⁴ Employment Equity Act, No. 55 of 1998, available at: http://www.workinfo.com/free/sub_for_legres/data/equity/Act551998.htm (last visited June 17, 2010).

⁹⁵ *Id.*

⁹⁶ Employment Equity Act (1995), available at: <http://laws.justice.gc.ca/eng/E-5.401/index.html> (last visited June 17, 2010).

⁹⁷ *Id.*

⁹⁸ US Equal Opportunity Commission, Best Practices of Private Sector Employers, available at: <http://govinfo.library.unt.edu/npr/library/Best-Practices.htm> (last visited June 17, 2010).

- Establishment of affirmative action officers and/or advisory committees to coordinate and monitor workplace practices and policy applications.⁹⁹
- Integrating representation of affirmative action target populations into all occupational levels, as an identified element of the company strategic plan.¹⁰⁰
- Integration of affirmative action plan objectives as an explicit element of consideration for promotion.¹⁰¹
- Implementation of learning or training centers that allow individual employees to engage in skills development at their own pace, and based on their own work styles.¹⁰²
- Development of review practices or schedules in order to ensure that job qualification requirements are consistent with business necessity, job-related, and/or necessitated to ensure workplace safety.
- Development and monitoring of reasonable accommodation policies and procedures.
- Review and tracking of advancement of employees with and without covered disabilities, in order to assess whether advancement rates of employees with disabilities are proportionate.
- Provision of training to staff regarding affirmative action and non-discrimination policies.

While these examples are not exhaustive, they are indicative of the degree to which employers can engage the challenge of realizing workplace equity. They also help to establish a standard that New York state employers, who bear a higher burden under state law, should be equally committed to realizing.

In addition to the above, public employees, including supervisors working alongside employees with disabilities hired under a Section 55 designation should also receive training in disability etiquette, understanding the value of accommodations in the workplace, and be given opportunities to discuss concerns they may have about apparent preferential treatment. Working with supervisors and co-workers to create a more welcoming and accommodating work environment helps the employee with a disability establish effective natural supports that can improve workplace integration.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² DBTAC Southwest ADA Center, Best EEOC Policies, Programs and Practices in the Private Sector, available at: <http://www.bcm.edu/ilru/dlrp/html/publications/employment/general/best.html> (2001)(last visited June 17, 2010).

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II. Affirmative Action in Private Employment

As noted above, some private employers have adopted their own voluntary affirmative action programs. These programs can serve as models for both government and private employers. These programs also demonstrate that businesses can effectively implement affirmative action to increase employment of people with disabilities. New York state government can encourage more such programs among private employers.

A. New York State Law and Policy

New York has substantial leverage to encourage private employment of people with disabilities through its government contracts. In New York there are 2,500 centralized state government contracts, amounting to over \$5 billion dollars, in addition to individual agency contracts.¹⁰³

Currently, New York does not require its state contractors to implement affirmative action in employment. However, under Article 15-A, state contractors are required to “make good faith efforts to solicit” certified minority- and women-owned business enterprises in their selection of subcontractors.¹⁰⁴ In addition, Article 15-A requires state contractors to comply with equal employment opportunity laws and to submit plans to the Division of Minority and Women Business Development regarding equal employment of women and minorities.¹⁰⁵ New York could extend the Minority and Women Owned Business Enterprise program to include disability-owned businesses, as discussed in the New York Makes Work Pay Report on State Contracting Procurement Preferences for Disability-Owned Small Businesses in New York.¹⁰⁶

B. Federal Model

Employers who accept contracts from the U.S. government have affirmative action obligations. Section 503 of the Rehabilitation Act requires that contractors who accept federal contracts of at least \$10,000 take “affirmative action to employ and advance in employment qualified individuals with disabilities.”¹⁰⁷ If an individual with a disability believes that a covered employer has not complied with Section 503, s/he can file a complaint with the U.S. Department of Labor.¹⁰⁸ However, as implemented and enforced by the U.S. Department of Labor, Section 503 has been critiqued by scholars and disability

¹⁰³ “Doing Business with New York State: A Guide to Understanding the State’s Procurement Process,” available at www.empire.state.ny.us/.

¹⁰⁴ N.Y. Exec. L. Art. 15-A §313(2).

¹⁰⁵ Id. See <http://www.nylovesmwbe.ny.gov/Program%20Mandates/SummaryofArticle15A.htm>.

¹⁰⁶ <http://www.ilr.cornell.edu/edi/nymakesworkpay/rpm-employment.cfm>.

¹⁰⁷ 29 U.S.C. § 793(a).

¹⁰⁸ 29 U.S.C. § 793(b).

advocates for failing to adequately delineate and enforce the affirmative action requirement.¹⁰⁹

On the other hand, federal contractors have significant affirmative action requirements related to race and gender, providing numerical goals against which to assess whether adequate action has been taken to employ or advance women and minorities. Executive Order 11246 and its implementing regulations¹¹⁰ require numerical placement goals, changes to qualification standards, quantitative analyses, measurable action steps, reporting, and accountability. Contractors who are found to be out of compliance can be sanctioned, including losing government contracts and being debarred from future federal contracts.¹¹¹ As noted above, such affirmative action requirements for racial and ethnic minorities and women have been shown to make a positive difference in the employment of those groups.¹¹²

Currently the U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP) is considering strengthening its affirmative action requirements under Section 503, modeling them on the requirements for women and minorities under Executive Order 11246.¹¹³ Selected elements of the expanded Section 503 model currently under consideration include:

- Requiring federal contractors to conduct utilization analysis and establish hiring goals for people with disabilities;
- Requiring contractors to invite applicants to voluntarily self-identify as having a disability for the purpose of implementing hiring goals;

¹⁰⁹ See e.g. Robert Silverstein, *Modernizing the Affirmative Action Provisions of the Section 503 and VEVRAA Regulations* (2010), Report to the U.S. Department of Labor Office of Disability Employment Policy, available at <http://www.econsys.com/disabilityresearch.htm>.

¹¹⁰ 41 C.F.R. Chapter 60.

¹¹¹ U.S. Department of Labor, Office of Federal Contract Compliance Programs, <http://www.dol.gov/ofccp/regs/compliance/fs11246.htm>.

¹¹² “In the contractor sector affirmative action has increased the demand relative to white males for black males by 6.5%, for nonblack minority males by 11.9%, and for white females by 3.5%. Among females, it has increased the demand for blacks relative to whites by 11.0%. For a program lacking public consensus and vigorous enforcement, this is a surprisingly strong showing.” Leonard, J., “The Impact of Affirmative Action on Employment,” *Journal of Labor Economics*, 2(4), pp. 439-463 (1984)

¹¹³ See *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Evaluation of Affirmative Action Provisions*, <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b1fd5a>. (July 23, 2010).

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- Requiring contractors to make their information and communication technologies used by applicants and employees accessible to people with disabilities.¹¹⁴

The U.S. Department of Labor is currently considering comments received in response to its Advance Notice of Proposed Rulemaking regarding changes to Section 503.

C. State Models

Minnesota has implemented a model for private employment comparable to the federal Section 503, that imposes affirmative action requirements on private employers accepting state contracts.¹¹⁵ The Minnesota Commissioner for Human Rights is charged with the responsibility to oversee and enforce implementation of affirmative action plans in state contracts.¹¹⁶

III. Disability, Gender & Race-Based Affirmative Action

The issue of affirmative action has been recognized as among the more politically controversial subjects in the U.S. legal system.¹¹⁷ A number of higher court decisions have focused on the question of when or whether an affirmative action policy may violate the U.S. Constitution, by explicitly considering and weighting demographics, in areas such as educational admissions. In similar vein, California was the first of several states to pass a voter-sponsored initiative prohibiting affirmative action in education and employment, on the basis of race and gender.¹¹⁸ Although affirmative action was conceived and structured to serve as a remedy to existing forms of structural exclusion, within debates about the issue, the charge that affirmative action is a form of “discrimination” against dominant groups remains a vexing question. Without attempting to resolve the controversy relative to race and gender policy, it is helpful to acknowledge legal differences between the treatment of disability affirmative action and other types of affirmative action under the U.S. Constitution, legal precedent, and state initiatives.

The Supreme Court decisions in *Grutter v. Bollinger*,¹¹⁹ *Regents of the University of California v. Bakke*,¹²⁰ and *Gratz v. Bollinger*¹²¹ engaged the question of affirmative action,

¹¹⁴ *Id.*

¹¹⁵ M.S.A. §§ 363A.36-37

¹¹⁶ *Id.*

¹¹⁷ JAMES D. TORR, *CIVIL RIGHTS* (2006); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law* 101 *Harv. L. Rev.* 1331 (1988).

¹¹⁸ See e.g. Proposition Against Discrimination or Preferential Treatment by State or Other Public Entities. (1996), available at: <http://vote96.sos.ca.gov/bp/209.htm> (last visited June 17, 2010).

¹¹⁹ 539 U.S. 306 (2003).

¹²⁰ *Regents of the University of California v. Bakke* 438 U.S. 265 (1978)

¹²¹ 539 U.S. 244 (2003).

measuring whether explicit consideration of race might violate the Equal Protection Clause of the U.S. Constitution. Under a formal equality model, treating individuals differently on bases such as race or gender could be read as discrimination, as opposed to a more substantive conception of equality that presumes that differing treatment may be necessary as a remedy for entrenched inequities.¹²² In theory, this debate has substantial implications for all forms of affirmative action, including disability affirmative action.

However, each of the aforementioned higher court decisions can readily be distinguished from the case of disability affirmative action. A primary reason lies in established Constitutional standards of review. Race is subject to the highest scrutiny, meaning racially differential treatment can only be justified by compelling interests, accompanied by narrowly tailored remedies.¹²³ Gender involves an intermediate standard, less strict, but still restrictive.¹²⁴ In contrast, differential treatment based on disability need only be rational, and specific measures need only be reasonable, in order to be acceptable within the bounds of the equal protection clause of the Constitution.¹²⁵ Therefore, unlike race affirmative action, the Constitutional validity of disability affirmative action is not in question.

State voter initiatives designed to roll back or prohibit affirmative action programs also are, without exception, not inclusive of or applicable to disability affirmative action. In this regard, it is important to consider that, as written, most of these state laws would come into conflict with the Americans with Disabilities Act¹²⁶ if they were expanded to include disability,¹²⁷ because the ADA explicitly requires consideration and differing treatment (e.g. reasonable accommodations) based on disability.¹²⁸

In sum, while perceptions of disability affirmative action certainly may be influenced by the broader discourse about equality and affirmative action in race and gender contexts, legally, disability affirmative action operates in a discrete sphere, and is less likely to be subject to legal challenge.

The question of the relationship between disability, race, and gender-based affirmative action is not limited to their comparative legal statuses. A second concern deals with the

¹²² JOHAN RABE, *EQUALITY, AFFIRMATIVE ACTION & JUSTICE* (2001); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law* 101 Harv. L. Rev. 1331 (1988).

¹²³ *United States v. Carolene Products*, 304 U.S. 144 (1938); STEVEN EMANUEL & LAZAR EMANUEL, *CONSTITUTIONAL LAW* (2008)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 42 U.S.C. §§ 12101 *et seq.*, available at: <http://www.ada.gov/pubs/ada.htm> (last visited June 10, 2010).

¹²⁷ See e.g. Proposition Against Discrimination or Preferential Treatment by State or Other Public Entities. (1996), available at: <http://vote96.sos.ca.gov/bp/209.htm> (last visited June 17, 2010).

¹²⁸ 42 U.S.C. §§ 12101 *et seq.*, available at: <http://www.ada.gov/pubs/ada.htm> (last visited June 10, 2010).

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extent to which affirmative action policies based on race and gender are as helpful to people with disabilities within the beneficiary groups, as to people without disabilities. In lived experiences of workers, disability, race, and/or gender discrimination may be intersecting and compounding dynamics, affecting women and people of color with disabilities in specific terms. Very few U.S. legal mechanisms make any explicit acknowledgment of the interactive or intersectional effects of discrimination in employment,¹²⁹ or the commensurate need for affirmative action that fully meets the needs of disadvantaged groups, within disadvantaged groups. This dynamic can become a particular problem when, for instance, race- or gender-based affirmative action policies are implemented with no consideration for whether their provisions reach people with disabilities within the affected populations. This inequity can be partially remedied by ensuring that affirmative action programs always contain a particular priority to include disability, and further ensured by monitoring and assessment of affirmative action policy or program impact, attuned to demographic variations among beneficiaries.

IV. Conclusion: Recommendations for Legal and Policy Reform

If people with disabilities are to be proportionally represented in employment, there is a clear need for New York State to revise its approach to affirmative action for people with disabilities. In 2005, the federal Employment Opportunity Commission, in a useful if somewhat dated report on best practices in public employment of people with disabilities, commended efforts initiated by legislative or executive action, as they send a clear message “from the top” about an important state priority.¹³⁰ New York government should be a model in expanding individual opportunity for the economic participation and independence achievable through working.

Recommendations for Affirmative Action in Public Employment:

Expand the Scope of Affirmative Action Programs

1. Eliminate the Section 55-a/b/c caps on the number of positions that can be converted to non-competitive service, using the federal Schedule A system and California’s LEAP program as models. Alternatively, change the numerical caps to reflect the population of covered people with disabilities based on Census American Community Survey data.
2. Issue an Executive Order requiring agencies to increase their use of CSL Section 55-a/b/c, in coordination with the lifting of caps on conversion of positions and a public and intra-governmental education campaign regarding benefits and techniques of Section 55.

¹²⁹ For a discussion of the significance of intersectional dynamics in affirmative action, see Amy C. Steinbugler et al, *Gender, Race & Affirmative Action: Operationalizing Intersectionality in Survey Research*, 20:6 *Gender & Soc’y* 805 (2006).

¹³⁰ Best Practices for the Employment of People with Disabilities in State Government, U.S. Equal Employment Opportunity Commission (2005) 37

3. Increase the incentives for agencies to use CSL Section 55, such as exempting CSL Section 55 positions from requirements for advertising and certification.
4. Expand CSL Section 55 to include promotion and higher-level jobs, rather than restricting it to entry-level positions, in order to address underrepresentation of people with disabilities at the higher levels of government employment.
5. Establish meaningful goals and timelines for state agency affirmative action pursuant to EO6 to ensure proportionate representation of people with disabilities in the government workforce, based on Census data.

Improve Understanding of Affirmative Action Programs

1. Include disability-specific, comprehensive research, reporting, and recommendations in all work of the Commission on Increasing Diversity in the State Government Workforce and the Affirmative Action Advisory Council.
2. Increase marketing/outreach to agencies, service providers, community-based organizations and people with disabilities regarding how to use CSL Section 55 and the benefits of doing so.
3. Establish an outreach program and cooperation with VR and operators of sheltered work centers to help participants in those programs move into government employment via the CSL Section 55-a/b/c program.
4. Make clear that CSL Section 55 applicants are entitled to reasonable accommodations and other ADA rights, during the application process and on the job.

Improve Implementation of Affirmative Action Programs

1. Develop a resume bank of Section 55-eligible individuals for agencies to access when interested in filling positions.
2. Host periodic regional job fairs for prospective employees with disabilities to meet hiring officers of state and local government agencies, with the expectation that agencies will both recruit for open and expected positions and utilize the Section 55 system.
3. Establish a Disability Affirmative Action Project Manager within each state agency charged with the responsibility to improve hiring, reasonable accommodation, and retention of workers with disabilities and report annually on progress to the Affirmative Action Advisory Council and the Legislature.
4. Establish internship programs throughout state government for New York State college graduates with disabilities that last for 12 months and allow a direct path to hiring.
5. Establish a link between Disability Student Services Offices and Career Development Offices at public and private universities statewide to have a direct streamlined path to application and hiring for open state positions.

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6. Create a statewide centralized reasonable accommodation funding mechanism, centralized expertise on accommodations and tracking of accommodations, in order to reduce agencies' and supervisors' concerns that hiring or accommodating a person with a disability will reduce their budgets. Such centralized funding also creates opportunities for cost-savings by purchasing or contracting for common accommodations in bulk.
7. Clarify what accommodations are available on the Civil Service competitive examination and how accommodation decisions are made.
8. Require all forms of electronic and information technology purchased, developed, used, or maintained by state agencies intended for use by their employees (including office equipment, software, and multimedia) to be accessible, applying Section 508 standards.

Improve Accountability for Affirmative Action

1. Require county and local governments to report on their efforts and results in implementing CSL Section 55-1.
2. Improve agency reporting regarding hiring, retention, and promotion of individuals with disabilities – what agencies with how many people with disabilities; type of disability; level of job (e.g., administrative, entry-level, management).
3. Implement centralized monitoring of agency progress toward hiring goals under a revised Article 15-A and under CSL Section 55, including comprehensive data collection, desk audits and on-site monitoring.
4. Incorporate assessment of progress toward diversity goals in performance evaluations of agency leaders, hiring officers, and supervisors.

Recommendations to Encourage Affirmative Action in Private Employment:

1. Expand Article 15-A's employment requirements for state contractors to include affirmative action requirements for employment of women, minorities, and people with disabilities, using new federal proposals under Section 503 of the Rehabilitation Act as a model.

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