



Commission Opinion Letter: Federal Work Opportunity Tax Credit Form 8850

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Commission Opinion Letter: Federal Work Opportunity Tax Credit Form 8850

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General Topics:

Disability, Age, Race, Hiring

Summary:

This Commission Opinion Letter addresses whether an employer violates EEOC-enforced laws to take advantage of the Work Opportunity Tax Credit consistent with IRS instructions.

Citation:

Age Discrimination in Employment Act, Americans with Disabilities Act, Title VII of the Civil Rights Act, Work Opportunity Tax Credit (26 USC sec. 51)

Document Applicant:

Employers, Applicants

Previous Revision:

No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

April 29, 2020

[address]

Dear [redacted]:

This opinion letter responds to your recent inquiry about the Internal Revenue Service (IRS) Form 8850 (Form 8850) used in the Federal Work Opportunity Tax Credit (WOTC) programs. You asked whether the U.S. Equal Employment Opportunity Commission's (EEOC's) position regarding the use of Form 8850 has changed since our last correspondence with [redacted] in April 2009. Our position has not changed, and we continue to advise that proper employer use of Form 8850 would not violate the federal equal employment opportunity (EEO) laws, most prominently Title I of the Americans with Disabilities Act.

Past correspondence on this subject, including the April 2009 informal letter from EEOC staff, indicates that using the WOTC form as instructed by the IRS is lawful under EEOC-enforced laws, but that our correspondence could not be relied upon as a defense in court. We understand from your inquiry, and the past correspondence of others, that concern about liability remain for those who otherwise want to hire targeted workers and take advantage of the tax credit. To address this issue in a format that provides a safe harbor under some EEOC-enforced laws, and hopefully lays to rest recurring questions about the interaction of the WOTC and EEOC-enforced laws, this letter is a written interpretation or opinion of the Commission, approved by vote on April 29, 2020, consistent with Section 713 of Title VII and EEOC Regulations at 29 C.F.R. § 1601.93(a), and Section 7 of the ADEA and EEOC Regulations at 29 C.F.R. § 1626.20.

I. Background

As you know, the purpose of the WOTC is to encourage employers to hire and train people who are experiencing severe difficulties that are often linked to

(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn4)

B. Form 8850's Single, Broad Question is Not a Disability-Related Inquiry

The single, broad question listed at Box 2 on Form 8850 is not a disability-related inquiry and therefore is lawful under the ADA, because a "yes" or "no" answer does not reveal whether the individual marked "yes" because he or she has a disability or for one of the other listed reasons. While this broadly-framed question does require an affirmative response from workers who are qualified "by a rehabilitation agency approved by the state, an employment network under the Ticket to Work program, or the Department of Veterans Affairs," it also requires a "yes" response for workers who qualify for reasons unrelated to disability, such as receipt of food stamps or recent release from prison for a felony conviction. Thus, if asked exactly as posed on Form 8850, this inquiry is not a "disability-related inquiry" for purposes of the ADA and therefore is not prohibited by the ADA before an offer of employment.

C. Specific Questions for Disabled Veterans Are Disability-Related, but an ADA Exception Applies

The specific questions listed at Box 4 and Box 5 on Form 8850 focus on whether the job applicant is a disabled veteran and was either discharged or released from active duty in the past year or has been unemployed for at least 6 months in the past year. These questions are disability-related under the ADA because they are likely to elicit information about a disability. However, there is a relevant exception to the general ADA prohibition on pre-offer disability-related inquiries. Specifically, as explained in the ADA Pre-Employment Guidance:

An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if: the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that *requires* affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); or the employer is *voluntarily* using the information to benefit individuals with disabilities.[5]

(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn5)

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

This exception applies to Form 8850's questions asking if the job applicant is a veteran entitled to compensation for a service-connected disability. In the Commission's view, employers that choose to take advantage of the federal WOTC program, and consequently must use Form 8850 on a pre-employment basis to identify for hire veterans with service-connected disabilities, are "voluntarily using the [disability-related] information [they collect] to benefit individuals with disabilities." Additionally, Form 8850 clearly informs applicants that completion is voluntary for them. The customary practice of employers using Form 8850 is to include it among other application documents for applicant completion. If completion is in fact voluntary, and the collected information is held confidentially, **[6] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn6)** such an inquiry would be covered by this ADA exception.

D. Other Federal Laws and Equal or Greater Rights Provisions of ADA

Form 8850 also finds support in EEOC's ADA regulation that provides for an "other Federal laws defense." Specifically, the ADA regulation states that "[i]t may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation" 29 C.F.R. § 1630.15(e). Under the WOTC, employers must know whether an applicant falls into the service-connected disabled veteran eligibility category before making an offer of employment in order to receive the tax credit. It can therefore be argued that obtaining the information requested by Form 8850 is necessitated by another Federal law.

The ADA also permits employers to comply with any laws that afford individuals with disabilities equal or greater rights. 42 U.S.C. §12201(b) and 29 C.F.R. § 1630.1(c) (2). Because the WOTC program requiring employers to invite voluntary pre-offer identification to receive a tax credit allows applicants to self-identify for the purpose of benefitting from potential affirmative action in a hiring decision, the employers' invitation for this purpose does not violate the ADA.

E. Limited Use of Information

Recognition that Form 8850's inquiries about whether an applicant is a disabled veteran is permissible does not, however, extend ADA protection to employers who misuse the information that Form 8850 provides. An employer using Form 8850 must understand that it is obtaining disability-related information along with the WOTC information. Such information may not be used to make a discriminatory employment decision in violation of the ADA and employers who obtain it must abide by ADA confidentiality requirements.[7]

(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn7) As noted above, it is proper use of Form 8850, meaning use that benefits applicants with disabilities and not discriminatory use, that prevents the form from running afoul of the ADA.

III. The Age Discrimination in Employment Act and Title VII

The age-related questions on Form 8850 do not violate the Age Discrimination in Employment Act (ADEA) because the ADEA does not prohibit employers from asking age-related questions.[8] **(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn8)** Moreover, although three of the nineteen targeted groups that benefit from the WOTC program are limited to individuals under 40 years of age, sixteen of the groups include older individuals. Indeed, older job seekers are disproportionately represented in one of the targeted groups - the long-term unemployed.[9]

(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn9) Because applicants who are hired to enable an employer to qualify for the WOTC tax credit include both individuals under age 40 and individuals 40 and over, without identifying whether the applicant falls into one of the relevant groups in which age plays a role, any hiring decision an employer makes based on the desire to obtain the WOTC tax credit is not based on age, but on the availability of the tax credit.[10] **(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn10)** As recognized in informal discussion letters issued in the past, the WOTC therefore does not violate the ADEA.[11] **(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn11)**

In addition, use of Form 8850 does not put the employer in the position of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII does not expressly prohibit pre-employment inquiries that disclose an applicant's race, color,

or national origin. In any event, the current Form 8850 does not ask whether an individual belongs to a particular Title VII protected group.

This letter was approved by vote of the Commission on April 29, 2020 as a written interpretation or opinion of the Commission. Pursuant to Section 713 of Title VII and EEOC Regulations at 29 C.F.R. § 1601.93(a), "in any action or proceeding based on any alleged unlawful employment practice, no [employer] shall be subject to any liability or punishment" for actions taken "in good faith, in conformity with, and in reliance on" the matters addressed in this letter. 42 U.S.C. § 2000e-12(b). If such a defense is established, it "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, [the opinions expressed in this letter] is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.* Similarly, with respect to the ADEA issues addressed herein, this letter constitutes a formal opinion letter as defined in EEOC Regulations 29 C.F.R. § 1626.20, which may be relied upon for defensive purposes pursuant to ADEA section 7(e) (29 U.S.C. § 626(e)). The ADA does not provide for formal Commission opinion letters, and therefore this letter does not itself provide a defense to ADA claims, although the ADA positions stated herein were approved by a vote of the Commission when they approved the letter as a whole.^[12]

(https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftn12)

We hope this information is helpful to you. If you have any questions or would like to discuss this or any related matter in more detail, you may reach Assistant Legal Counsel Raymond Peeler at 202-663-4537, or Senior Attorney-Advisor Kerry Leibig at 202-663-4516.

Sincerely,

/s/

Andrew F. Maunz
Legal Counsel

[1] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref1) The most recent changes to Form

8850 include the addition of a new targeted group (qualified long-term unemployment recipients who began work after 2015) and the extension of empowerment zones to cover 2015 and 2016. See Instructions for Form 8850 (Rev. March 2016) at <https://www.irs.gov/pub/irs-pdf/i8850.pdf>

(<https://www.irs.gov/pub/irs-pdf/i8850.pdf>). For a list of all of the revisions made to Form 8850 since 1996, see

<https://apps.irs.gov/app/picklist/list/priorFormPublication.html?resultsPerPage=200&sortColumn=sortOrder&indexOfFirstRow=0&criteria=formNumber&value=8850&isDescending=false>

(<https://apps.irs.gov/app/picklist/list/priorFormPublication.html?resultsPerPage=200&sortColumn=sortOrder&indexOfFirstRow=0&criteria=formNumber&value=8850&isDescending=false>).

[2] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref2). In several informal discussion letters issued since 2004, the EEOC has discussed Form 8850 and stated that proper employer use of the form does not violate federal EEO laws. Unlike this letter, however, they were not formal opinions of the Commission. They are available at <https://www.eeoc.gov/laws/guidance/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850> (<https://www.eeoc.gov/laws/guidance/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850>).

[3] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref3). The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) amended various sections of the ADA effective January 1, 2009 but did not alter the rules concerning disability-related inquiries and medical examinations.

[4] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref4). See *EEOC Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations*, available at <https://www.eeoc.gov/policy/docs/preemp.html> (October 10, 1995).

[5] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref5). *Id.*

[6] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref6) The EEOC's above-referenced ADA Pre-Employment Guidance further provides that applicants should be informed that the information will be kept confidential, that no adverse consequences flow from a decision not to provide the information, and that it will be used in a manner consistent with the ADA. Form 8850 meets these requirements: it notes that the information is covered by IRS confidentiality provision, 26 U.S.C. § 6103; the form advises applicants that completion of the form is voluntary; and it informs applicants that the Form's use is to "assist members of targeted groups in securing employment." The Instructions for Form 8850 further note that the purpose of the questions about service-connected disabilities is "to support the hiring of certain disabled veterans" See Instructions for Form 8850 (Rev. March 2016), page 2, *supra* n. 1.

[7] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref7) See *supra*, n.6.

[8] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref8) 29 C.F.R. § 1625.5 ("A request on the part of an employer for information such as *Date of Birth* or *Age* on an employment application is not, in itself a violation of the [ADEA]" but it generally prohibits employers from making employment decisions based on that information to the detriment of workers age 40 and older).

[9] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref9) See Kosanovich and Sherman, *Trends in Long-term Unemployment* U.S. Bureau of Labor Statistics: Spotlight on Statistics, at 5, (March 2015), available at <https://www.bls.gov/spotlight/2015/long-term-unemployment/pdf/long-term-unemployment.pdf> (finding that "older people are more likely than younger people to be unemployed long term"). Historically, older workers have long struggled with long-term unemployment at disproportionate rates compared to younger workers, and so this eligibility criteria is particularly helpful for older workers. See EEOC, Chart data for The Older American Worker: Age Discrimination in Employment, Chart 5, <https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment> (<https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment>). (revealing that in 1964, workers age 45-64 experienced higher rates of unemployment lasting 27 weeks or longer).

[10] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref10) Even if WOTC eligibility were generally correlated with relative youth, decisions based on WOTC eligibility, without more, would not be "because of" age so as to trigger potential liability under the ADEA because workers 40 and over also can be WOTC-eligible. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (finding an employer action based on pension eligibility, while correlated with age because older workers were more likely to have the necessary years of service, was not age-based absent evidence that the employer used it as a proxy for age or targeted the group based on assumptions that it would negatively affect older workers). Further, one of the WOTC targeted groups, "summer youth employees," is eligible for an exemption to ADEA coverage. See Instructions for Form 8850 (Rev. March 2016), 2, <https://www.irs.gov/pub/irs-prior/i8850--2016.pdf> (<https://www.irs.gov/pub/irs-prior/i8850--2016.pdf>) (identifying one group eligible for WOTC credit as "summer youth employees" who are 16 to 18 year olds and live in empowerment zones). Thus, hiring that prefers this specific WOTC group is covered by an EEOC exemption to the ADEA for programs "under federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively . . . to encourage the employment of [various groups including] youth." 29 C.F.R. § 1625.31(a). However, this exemption does not otherwise allow employers to favor younger WOTC-eligible workers over WOTC-eligible applicants who are 40 or older. Cf. 29 C.F.R. § 1625.30 (explaining that the EEOC's exemption authority will only be exercised "with caution and due regard for the remedial purpose of the statute to promote employment of older person based on their ability rather than age and to prohibit arbitrary age discrimination in employment.").

[11] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref11) See supra, n. 2.

[12] (https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref12) This letter is a "pre-enforcement ruling" as defined by Executive Order 13891, section 2(d), because it was written in response to an inquiry from a person concerning compliance with legal requirements under a specific set of facts. Therefore, it is exempt from the notice and comment requirements and Office of Management and Budget review otherwise potentially required by the Executive Order. See E.O. 13891, sec. 4(b), 84 Fed. Reg. 55,235, 55,237 (exempting pre-enforcement rulings from sections 4(a)(iii) and 5 of the Executive Order). "This document is intended only to provide clarity to

the public regarding existing requirements under the law or agency policies." See 84 Fed. Reg. 55,235 (October 9, 2019); Office of Management and Budget, M-20-02, *Guidance Implementing Executive Order 13891, Titled "Promoting the Rule of Law Through Improved Agency Guidance Documents"* (Oct. 31, 2019) (instructing agencies to modify otherwise mandated guidance disclaimer language if "binding guidance is authorized by law"). It further is an opinion of the Commission that may be relied upon as a defense to liability consistent with the statutory authority described above.