



OFCCP'S NEW APPLICANT REGULATIONS:

FAVORABLE PRACTICAL IMPLICATIONS FOR CONTRACTORS

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The Office of Federal Contract Compliance Programs' (OFCCP's) new regulations afford contractors increased flexibility in complying with applicant recordkeeping and data analysis requirements. In determining the best approach, contractors will have to evaluate tradeoffs in recordkeeping burdens and exposure risks.

I. SUMMARY OF THE NEW REGULATIONS

A. Applicable Definition Depends on Recruiting Process for Each Position

The definition of “Internet Applicant” applies to both Internet expressions of interest and the more traditional paper expressions of interest, so long as the contractor accepts both types as expressions of interest for a particular position. If the contractor considers only paper expressions of interest for a position, then the Internet Applicant definition does not apply. Only one definition applies for each position – “Internet Applicant” or “Applicant”.

B. Four-Part Definition of “Internet Applicant”

The new definition of Internet Applicant involves four parts, and OFCCP has offered additional guidance to help contractors understand the intent behind parts (2), (3) and (4) of the definition.

An individual is an Internet Applicant if:

- (1) He or she submits an expression of interest in employment;**
- (2) The contractor considers the individual for employment in a particular position;**

The contractor can implement a protocol under which it does not consider expressions of interest that are not submitted in accordance with the employer’s standard procedures. Individuals who submit such expressions of interest do not qualify as Internet Applicants if the contractor does not actually consider the expression of interest and does not consider other expressions of interest in the same form by other similarly situated individuals. A contractor considers an expression of interest by reviewing the content of the expression of interest.

Contractors can use random sampling or absolute numerical limits to limit the number of expressions of

interest that are considered, “provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.”

(3) The expression of interest indicates that the individual possesses the “basic qualifications of the position”; and

“Basic Qualifications” means:

Qualifications that are either “advertised” or “established”:

Advertised: telling potential applicants that they must possess the qualification in order to be considered for the position.

Established: making a record of the qualifications before considering any expression of interest for that particular position.

The qualifications must be objective, non-comparative, “relevant to performance of the particular position, and enable the contractor to accomplish business-related goals.”

Tests are not basic qualifications.

(4) At no point in the selection process prior to receiving an offer of employment has the individual removed himself or herself from consideration or otherwise indicated that he or she is no longer interested in the position.

Contractors can use random sampling or absolute numerical limits to limit the number of potential applicants to be contacted to determine whether the individuals remain interested in the particular position, “provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.”

Contractors can rely on information contained on the expression of interest, such as salary requirements or preferences as to type or location of work to determine whether the individuals remain interested in the particular position, as long as the contractor has “a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.”

C. Recordkeeping

Contractors must retain:

- All expressions of interest through the Internet or related electronic data technologies considered for a particular position;
- For internal resume databases: a record of each resume added to the database, the date each record was added, the position for which each search of the database was made, and for each search, the search criteria and the date of the search; and
- For external resume databases: a record of the position for which each search was made, the date of each search, the search criteria, and all resumes of individuals who met the basic qualifications for the position.

D. Adverse Impact Analysis

OFCCP will require adverse impact analysis only of hiring procedures relating to Internet Applicants. Contractors will not be required to conduct adverse impact analyses on basic qualifications searches. However, OFCCP may assess the impact of basic qualifications searches by comparing the percentage of women and minorities who meet the basic qualifications with percentages obtained from “appropriate Census and other labor market data.”

II. PRACTICAL IMPLICATIONS FOR CONTRACTORS

Under the new regulations, contractors using external databases, like Monster.com, need only obtain race and gender information on individuals who meet the “basic qualifications” of the position. Contractors can limit the burden if there are a large number of individuals meet the basic qualifications through “data management” techniques such as random sampling or absolute numerical limits. Lastly, contractors can determine that some individuals who meet the basic qualifications would not be interested in the position because of stated preferences as to location, type of work or salary requirements.

As with external resume databases, contractors can take advantage of the reduced recordkeeping obligations by using internal resume databases as a means of organizing expressions of interest. Internal databases can be populated with expressions of interest that arrive through a variety of sources, including searches of external databases, on-line profiles, emailed submissions, and paper submissions that are scanned into the internal database. Under the new regulations, the terms “basic qualifications” and “data management,” and most other provisions applicable to external databases, afford

contractors an opportunity to reduce recordkeeping burdens in the context of internal resume databases as well.

Although the new applicant regulations offer contractors the opportunity to reduce recordkeeping burdens in comparison to the enforcement policies OFCCP has adopted in the past, this flexibility carries with it some additional responsibilities. For example, under the new regulations, contractors who choose to rely on basic qualifications and data management techniques will face several new responsibilities.

- **New Administrative Burdens:** If the contractor advertises for the position (which includes announcing position openings through the contractor’s website), it must include the basic qualifications for the position in the advertisement.
 - ❖ How basic is “basic”? In the preamble to the new regulations, OFCCP explains that “[t]he term ‘basic’ is not intended to provide any substantive limit on the type or range of qualifications that could meet this definition.” Thus, the term “basic” was not meant to enlarge the pool of candidates by understating the qualifications necessary to fill the position for which the employer seeks candidates. If the job qualifications are complicated and sophisticated, list them “up front.” Do not add them later in the process.
 - ❖ It is acceptable to describe a position “generally” in an initial announcement, like a confined print ad, and refer the candidate to a website link where the candidate will find a more complete and thorough description of the basic qualifications.
- **New Recordkeeping Burdens:** If the contractor does not advertise for the position, it must document the basic qualifications for each position before it reviews any resume or uses the qualifications as criteria for searching an internal or external resume database.
 - ❖ For example, if the contractor has an internal database that it wishes to query, and does not wish to advertise or “readvertise” for a position for which it suspects it has qualified candidates, the job description or requisition form for the position must be prepared in advance of the query, not after the employer has seen the resume of the candidate it wishes to hire.
 - ❖ Other recordkeeping burdens include the obligation to retain each successively narrower word search the contractor uses to refine the initial query results, and the results of the query. If the first word search query identifies 200 candidates, and a modified query identifies 50 candidates, the contractor must retain the keyword search for the 200, the results of the first query, the keyword search for the 50, and the results of the second query.

- **New Liability Exposure:** Contractors will have to establish that the basic qualifications are job related and consistent with business necessity if the qualifications have an adverse impact on women or minorities. Contractors do not have to conduct adverse impact analyses of basic qualifications, but OFCCP will use labor force and Census data to determine whether basic qualifications have an adverse impact on women or minorities.
 - ❖ Contractors that solicit race and gender at the point of entry onto an Internet site, and not after having determined that the candidate met all four components of the definition, are required to retain that initial solicitation of race and gender information. OFCCP can ask for it in an audit. If statistically significant proportions of women and minorities are being eliminated through the use of “basic qualifications,” the employer may be called upon to justify its use of the criteria.
- **New Technical Requirements:** Contractors must record the specific absolute numerical limits (e.g., reviewing the first 50 applications based on some neutral ordering, such as alphabetically or by submission date) prior to implementing them for a particular position and/or ensure that any random sample drawn is “appropriate in terms of the pool of those submitting expressions of interest,” which means that the random sample is drawn from the entire pool and is of sufficient size to constitute a representative sample.
- **New Process Requirements:** If the contractor relies on information in the expression of interest (such as salary requirements or preferences as to type or location of work) to determine if the potential applicant remains interested in the particular position for which he or she meets the basic qualifications, then the contractor must establish a “uniformly and consistently applied policy or procedure of not [further] considering similarly situated job seekers” for the particular position. Likewise, the contractor must adopt a uniform procedure for determining whether candidates will be considered for a type of position, and that procedure must treat candidates the same if they are “similarly situated” with respect to the manner in which they submitted an expression of interest.

These new responsibilities may present challenges for some current recruiting practices.

- **Obtaining Potential Applicants from a Variety of Different Sources.**

Many employers use recruiting systems that obtain potential applicants from a variety of internal and external sources, but these employers have no standard procedure for determining which sources will be used for which types of positions and no procedures for tracking which potential applicants obtained from particular sources constitute the pool for any particular position. For example, a contractor may search an external database using qualifications that might be necessary for several types of positions. The collected resumes are downloaded into an internal resume database, perhaps with some designation for each type of position. In

addition to those resumes, the contractor may accept submissions on its website which are then added to the internal resume database with similar designations. However, the contractor may decide to load all emailed or faxed resumes into the internal database as well, but with no designations as to the types of position.

When a particular position opens, the contractor's recruiter runs a variety of searches on different segments of the database to obtain candidates for the position. Under the new applicant regulations, the contractor may limit the potential applicants it considers (in this example, by having designated subsets within its internal resume database), but it must do so through a uniformly and consistently applied policy that treats all potential candidates for a position the same, as long as they are "similarly situated" with regard to the manner in which the contractor obtained the individual's resume. In addition, the contractor must be able to identify the actual pool of potential applicants from which the contractor identified the potential applicants who met the basic qualifications for the particular position. This will require many contractors to implement standard protocols for determining sources of potential applicants for each position, as well as protocols for tracking the potential applicants who constitute the pool for assessing basic qualifications.

- **Using "Recruiter's Intelligence" to Determine Which Candidates Should Be Sent on for Further Consideration.**

Many employers rely on internal recruiters to "mine" a variety of internal and external sources to determine which candidates should be referred to hiring officials for further consideration for a particular position. Under the new regulations, the basic qualifications must be assessed on a noncomparative basis, which means that a contractor cannot determine basic qualifications by comparing the relative qualifications of potential applicants. But these comparative judgments are precisely what makes "recruiter's intelligence" so valuable to the contractor's recruiting and hiring process.

- **Obtaining Race and Gender Information from Potential Applicants When They Complete Online Profiles on the Contractor's Website.**

Many contractors invite potential applicants to complete online profiles on the contractor's web site. Contractors often find that these online profiles offer a convenient opportunity to solicit race and gender information. All of the profiles are then assembled into an internal database and a contractor's recruiters run searches on the database or pertinent segments of the database to identify potential applicants for a particular open position. Under the new regulations, the contractor would be permitted to solicit race and gender information only from individuals who qualified as Internet Applicants for the particular position. If, for convenience, the contractor solicits the information from anyone who completes the on-line profile, it should use the potential applicants' race and gender information in conducting impact analyses of basic qualifications. While not

required to conduct the analyses, it risks unknown exposure if it does not conduct them if it has collected race and gender information. OFCCP will certainly ask for this data and run these analyses during a compliance review. In addition, many contractors also consider unsolicited emails or paper expressions of interest, which are loaded into an internal resume database. These contractors typically will choose to solicit race and gender information only from Internet Applicants drawn from searches of the internal database. But because these contractors have obtained race and gender information at different points in the process based on the submission of the expressions of interest (i.e., solicited from all individuals who completed an online profile, but only solicited from those individuals who emailed, faxed or mailed their resumes if they met the basic qualifications of the job), the records available to OFCCP during a compliance review may present a misleading picture of the impact of the contractor's recruiting and hiring processes.

III. WHAT SHOULD CONTRACTORS DO?

Contractors have until February 6, 2006 to consider their options. This is not a lot of time, especially if changes need to be made in data systems or software. Therefore, contractors will do well to immediately conduct a systematic assessment of their current recruiting practices against the new regulations, identify areas where their current practices might be problematic under the new regulations, and explore options for addressing those areas. In determining how to comply with these new regulations, contractors must evaluate the responsibilities accompanying the new flexibility the regulations afford, as well as the exposure risks of different compliance options under the new regulations. Following is a preliminary checklist of items to consider.

1. Identify the Positions for Which the Contractor Does Not Consider Individuals Who Submit An Expression of Interest Through the Internet or Related Electronic Data Technologies.

Under the new regulations, there are two different recordkeeping standards, depending on whether the contractor considers expressions of interest from the Internet or related electronic data technologies as part of the recruiting process for the position. If the contractor does not consider expressions of interest through the Internet or related electronic data technologies for a position, the "old" definition of applicant applies to the position. To avoid having to comply with two different applicant definitions, a contractor should identify those positions for which it does not consider expressions of interest through the Internet or related electronic data technologies and should revise its recruiting procedures for such positions to take advantage of the new regulations.

2. Map Out a Recruiting Process That Meets Each Contractor’s Operational Needs. If This Varies by Position, List the Processes That Are Suitable for Each Position.

Contractors will benefit from outlining the steps in their current recruiting and hiring processes. This may point out discrepancies in the process and variations in procedures that are used for similar positions. Contractors should also determine whether the current recruiting practices are efficient and effective from an operational perspective. If changes must be made in response to the new regulations, it may be an opportune time to explore changes that would improve the process.

3. Identify the Points in the Recruiting Processes where the Contractors Have Recordkeeping or Data Analysis Obligations Under the New Regulations.

Contractors should compare their current recruiting practices with the requirements of the new regulations. They should identify the point in the current processes where individuals will qualify as Internet Applicants under the new regulations. Contractors should also assess the extent to which their current practices treat otherwise similarly situated expressions of interest differently. As noted above, the new regulations require that contractors have uniformly and consistently applied policies or procedures for treating similarly-situated expressions of interest alike, as a condition of taking advantage of reduced recordkeeping obligations. Finally, contractors should identify steps in the recruiting and hiring processes where the contractor may benefit from data management techniques to reduce the effort required to process large numbers of expressions of interest.

4. Consider Options for Meeting Operational Objectives While Complying with the New Regulations.

Contractors should identify options for complying with the new regulations in a way that still accomplishes operational objectives. Contractors should explore the pros and cons of each option. This should include an assessment of how the option will position the contractor during an OFCCP compliance review. In making these assessments, contractors should keep in mind that “OFCCP uses applicant data broadly to deter all contractors under its jurisdiction from engaging in systemic hiring discrimination, either in the form of disparate impact or disparate treatment discrimination.” 70 Fed. Reg. 58955 (Oct. 7, 2005). Therefore, contractors should carefully consider compliance options in the context of how OFCCP will evaluate the data during a compliance review. Contractors may benefit from consultation with counsel on these issues.

5. Review the Appropriateness of Availability Calculations in Affirmative Action Plans (AAPs).

Under the new regulations, OFCCP will look at Census and labor force statistics to assess whether basic qualifications have an adverse impact on female and minority job seekers. It is likely that OFCCP investigators will rely on a contractor's own availability statistics to make initial assessments about whether basic qualifications have an adverse impact. Accordingly, contractors should review the availability estimates in their AAPs and ensure that they are accurate.

IV. SHOULD CONTRACTORS WORRY ABOUT COORDINATION BETWEEN OFCCP AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) OBLIGATIONS?

Probably not, for three reasons:

1. EEOC has already formally acknowledged that the current rules are unclear about applicant recordkeeping obligations in the context of the Internet and related electronic data technologies. *See* 43 Fed. Reg. 10153 (Mar. 4, 2004) (“The advent of the Internet and related technology raises questions about how to monitor employment practices when employers and job seekers use online resources. . . . UGESP provides for the maintenance of records or other information on ‘applicants.’ A 1979 guidance in Question and Answer format, issued by the EEOC, DOL and sister UGESP agencies, provides a general definition of ‘applicant.’ The document focuses on interpreting the definition of ‘applicant’ in the context of the Internet and related electronic data processing technology. With this interpretation, the UGESP agencies are providing guidance about when employers should identify the race, gender, and ethnicity of their applicant pool when they use the Internet and related technologies.”).
2. Because of the admitted lack of clarity about applicant recordkeeping obligations in the context of Internet recruiting, it is unclear whether EEOC has legal authority to pursue an enforcement action against an employer that did not conform to a standard that the EEOC has not yet announced. An Agency generally must provide public notice of an obligation before it may seek enforcement against an entity for failing to meet the obligation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 471-72 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress. . . . [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *cf. Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals

should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”). Title VII does not contain an express conveyance of power authorizing the EEOC to promulgate retroactive rules. *See* 42 U.S.C. § 2000e-8 (2005). Indeed, Title VII appears to mandate prospective recordkeeping requirements by obligating the EEOC to conduct a public hearing before adopting such requirements, and the law expresses a congressional intent that EEOC recordkeeping requirements be consistent with requirements imposed by other federal agencies. *See* 42 U.S.C. § 2000e-8(c) & (d) (2005).

3. As a practical matter, we doubt that EEOC would pursue enforcement actions. The EEOC has not historically pursued enforcement of the Uniform Guidelines on Employee Selection Procedures (UGESP) applicant recordkeeping obligations, and we are not aware of any agency intention to change that historical practice. An employer that complied only with the OFCCP regulation is unlikely to be a target in light of the pending proposed Additional Questions and Answers and the fact that the Department of Labor—which is a party to UGESP—has formally stated (apparently with the Office of Management and Budget’s approval) that OFCCP’s new applicant definition is consistent with the Proposed Additional Questions and Answers. *See* 70 Fed. Reg. 58947 (Oct. 7, 2005). It is noteworthy that OFCCP has committed itself in the new regulations to interpreting its own UGESP regulations (41 C.F.R. Part 60-3) in a way that avoids inconsistent recordkeeping and data analysis requirements. In particular, the new regulation adds a new section 41 C.F.R. 60-1.12(d), which provides that “[w]hen evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under part 60-3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants, as defined in 41 CFR 60-1.3, and those records relating to the impact of employment tests that were used as employee selection procedures” 70 Fed. Reg. 58,963 (Oct. 7, 2005).

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