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## New Web hiring rules create alarm Federal contractors worry about suits.

By Tresa Baldas

STAFF REPORTER

EMPLOYMENT ATTORNEYS say corporate America is having a panic attack over a new federal rule that requires federal contractors to keep better track of whom they hire from the Internet.

On Feb. 6, all federal contractors will be required to have new record-keeping protocols in place that will let the government know, among other things, exactly what Internet resumes they looked at, whom they hired—and didn't—and the race and gender of qualified applicants. For the first time, corporations will have clear guidelines in place dictating which Internet applicants they have to keep records of.

The goal is to make sure companies are not discriminating against minorities and women who apply for jobs on the Internet.

Employment attorneys argue that the new rule creates a record-keeping nightmare for companies, which will have to sift through thousands of resumes to determine which they need to keep, as well as create a good statistical basis to prove they are not discriminating.

But more than that, they argue, the new rule will trigger more hiring discrimination lawsuits as plaintiffs' lawyers and the government will now have a paper trail—in this case, newly enhanced, hard statistical data—to prove discrimination.

"The government is getting the federal contractor community ready, through this regulation, for large-scale class action prosecutions," said employment attorney John Fox, who last week held a seminar

in Northern California for roughly 125 companies on how to prepare for the new regulations.

"Before this regulation, what an employer would typically have is a filing cabinet or computer file of lots of people expressing interest in a job. Now it's all going to be sorted and tidied up—at great expense to the company—and ready for harvest by the plaintiffs' lawyers or the [government]."



WILLIAM E. DOYLE JR.:  
*Labor & Employment Law Practice Group partner in Morgan, Lewis & Bockius' Washington office.*

Victoria Lipnic, an assistant secretary of labor for employment standards who oversees the Office of Federal Contract Compliance Programs (OFCCP), maintains that the regulations were long overdue, particularly given the explosion in Internet recruiting in recent years. For example, Monster.com, the nation's biggest online resume service, now has 52 million resumes in its database, compared with 7 million resumes five years ago.

With all these resumes floating in cyberspace, and given the popularity of online recruiting and hiring by federal contractors, Lipnic said that there's been a growing concern on the part of the U.S. Department of Labor that contractors are not keeping accurate records of all the Internet applicants whose resumes get looked at.

For example, she said, past audits by the OFCCP have shown that some companies kept records only on the Internet applicants that they actually interviewed, and have weeded out numerous other resumes that were looked at. She also noted that many companies have readily admitted over the years that they're simply confused about whose records they had to save—just

the applicants they interviewed, or every person that expressed interest in a job over the Internet.

"The reality was that no one really knew what the rules were because it was always going to be completely impractical and overly broad to suggest that 7 million people on Monster.com are people that an employer would have to keep records on," Lipnic said. "Employers were prompting the agency and asking for guidance."

Well, they got it, and now the confusion is over, Lipnic said. Under the new guidelines, she added, federal contractors now know exactly which Internet applicant's data they have to save. Under the new definition of an Internet applicant, an individual must meet the following four criteria:

- The person expresses interest in employment through the Internet or related technologies.

- The person is considered by the contractor for employment in a particular position.

- The person's expression of interest indicates that he or she possesses the basic qualifications for the job.

- The person at no point in the selection process, prior to receiving a job offer, removes himself or herself from further consideration or indicates no further interest in the post.

The new guidelines also require companies to ask Internet applicants who meet the basic qualifications of a job to identify their race and gender. Another new requirement is that employers who use search functions to hunt for jobs, such as one for an engineer, will have to retain information about the search, the date of the search, the criteria used and the names of all the individuals that were produced during the search.

"Keep in mind that the actual obligation

to keep these records is not new," Lipnic said. "The only thing that's new is now we're saying when you have to keep the records, and who you have to keep the records on."

### **Heads are spinning**

But these record mandates are making corporate heads spin, said Kris Meade, a partner at Crowell & Moring in Washington who has been inundated with phone calls from clients seeking guidance about the new regulations. Meade said that when he starts telling clients about all the record-keeping requirements, "there's a stunned silence on the end of the phone."

Companies are especially stunned about a new provision requiring companies to keep on file for two years the resumes of anyone considered for employment.

"I do think the record-keeping obligations are greater than they need to be and that the agency blew it in part," said Meade, whose firm has scheduled a January seminar to help clients prepare for the new regulations.

However, Meade added, he believes federal contractors are better off with these new rules because businesses now have some definite guidelines.

"I certainly think it adds clarity where we didn't have it before," Meade said.

But along with clarity came "a horrendous record-keeping obligation" that federal contractors did not bargain for, argued Fox, who said that many recruiters who took part in his recent California seminar on the new regulations were blindsided. "You should have heard all the gasps. Some said, 'What if we just don't do this? What if we just lie? Nobody is ever going to do this,'" said Fox, who is national chairman of the employment and labor group of Los Angeles' Manatt, Phelps & Phillips.

"You could hear people 15 to 20 rows back gasping and saying, 'You're kidding?

How are we going to do that?'" said Fox, of Manatt's Palo Alto, Calif., office.

Employment attorney William E. Doyle Jr., a past deputy director of the OFCCP who helped draft the new regulations, agreed that there are some downsides to the new rules. But they don't involve data collection.

That part will be easier for companies, he argued, because the rule narrows the pool of applicants on whom they must keep data. Contractors no longer have to collect gender and racial data on every applicant who expresses interest in a job on the Internet, just those who meet the company's basic requirements, he said.

**But that's where the downside kicks in, said Doyle. He believes that given the refined pool of applicants now being analyzed, plaintiffs' attorneys will have access to better evidence that will be used to prove hiring discrimination claims. Specifically, he said, companies will no longer be able to argue that a specific Internet applicant doesn't meet the basic requirements because the candidate has already been identified as qualified.**

**"Private plaintiffs' attorneys will have some good data there that they will be able to obtain. It will be discoverable in private litigation," said Doyle, who left the Department of Labor in June and is now a partner in Morgan, Lewis & Bockius' Washington office.**

### **Wave of Webcasts**

A week after the regulations went into effect, Doyle's firm held a series of Webcasts for hundreds of clients, counseling them on how to prepare for the new rule. One of Doyle's key suggestions is for companies to apply rules consistently, particularly when it comes to deciding qualifications for a job.

For example, he said, if a company is seeking a logistics manager and requires

a candidate to have an MBA and five years of experience, it can't make an exception for, say, a Harvard graduate with a high grade point average but only four years' experience.

"You can't make exceptions for basic qualifications," Doyle said. "If you say let's make an exception...you've basically destroyed your credibility."

Employment attorney Thomas Shirley, a partner at Choate Hall & Stewart in Boston, said that if the new rules will give plaintiffs' attorneys new ammunition, the same is true for defense counsel. He believes that the new regulations and all the data collected will also help companies prove that they are not discriminating in hiring.

"I also think it could help employers defend against claims. The whole issue here is the extent to which there is any pattern of disparate rejection of minority or female applicants. This is one more way of showing that you either do or don't have such a disparate hiring policy," Shirley said. "Then you're ultimately left with the more serious underlying question of whether or not, based upon numbers alone, the government or private plaintiffs should be able to pursue a claim of discrimination."

Employment lawyer Kristine Dunne, a lawyer in the employment and government contracts practices at Arent Fox in Washington, said she recently issued an alert on her Web site about the new regulations and listed some recommendations on how to get into compliance by Feb. 6. They include reviewing the minimum qualifications of job positions and ensuring that there is accurate record keeping for all job openings. **NLI**

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