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OFCCP Issues Final Rule on Definition of an Internet Job Applicant and Advance Notice Letters of Compliance Evaluations for 1500 Federal Contractors

The Definition of an Internet Job Applicant

On October 7th, the Office of Federal Contract Compliance Programs (OFCCP) published its final rule regarding who satisfies the definition of an internet job applicant for covered federal contractor recordkeeping and data collection purposes. The new rule goes into effect on February 6, 2006 and will require all contractors to identify, where possible, the gender, race and ethnicity of each job applicant, regardless of the method used in applying for the position. For the most part, the final rule retains much of the same text that appeared in the OFCCP's proposed version of the rule. The changes reflected in the final rule were made largely in response to public comments the OFCCP received during the comment period last year.

Background

The OFCCP requires covered federal contractors and subcontractors — employers that contract with the federal government and employ 50 or more employees — to maintain records on “job applicants,” including resumes and demographic information. Due to the dramatically changing nature of the job marketplace in recent years, the OFCCP's definition of a job applicant had failed to keep pace with the times. In response to this shortcoming, the Office of Management and Budget (OMB) in 2000 instructed the federal agencies responsible for drafting the Uniform Guidelines on Employee Selection Procedures (UGESP) to address the issue of how employers' use of the internet to solicit job applicants was impacting their recordkeeping obligations under Executive Order 11246 and other federal civil rights laws.

In March 2004, the federal agencies (including the Equal Employment Opportunity Commission, U.S. Department of Labor, U.S. Department of Justice's Civil Rights Division and the Office of Personnel Management) issued proposed revised guidelines to address when internet job seekers

become job applicants for federal reporting and recordkeeping purposes. Later on that same month, the OFCCP issued its proposed rule on who is an “Internet Applicant” and outlined what records must be retained for job applicants applying through the internet or related electronic technologies. Although a final version of the underlying uniform guidelines have yet to be issued and are apparently still under consideration, the OFCCP decided to go ahead and issue its final rule.

Who is an Internet Applicant?

The definition of an internet applicant is largely the same as it appeared in the OFCCP's proposed version of the rule. An individual must meet the following four criteria to satisfy the definition of an “Internet Applicant”:

- ♦ The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- ♦ The contractor considers the individual for employment in a particular position;
- ♦ The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and
- ♦ The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

In its final rule, the OFCCP eliminated its proposed dual standard for collecting data on job applicants based on the manner in which the application was made — *i.e.*, by way of the internet, by mail or facsimile. The final rule makes it clear that even job applicants who utilize traditional methods to respond to a job posting (e.g., mail, facsimile or personal delivery) will be treated as Internet Applicants if they learned

of the vacancy on the employer's website and the employer advised potential applicants that they could submit a resume via these traditional avenues. An Internet Applicant would also include individuals who submitted unsolicited resumes by mail that were subsequently reviewed by the employer for a position it had posted on its website.

The rule allows an employer to refrain from considering an "expression of interest" if it has not been submitted in accordance with established procedures (e.g., an employer who specifies that it will only consider resumes submitted via its website) or has not been submitted in response to a specific job posting. The rule also permits an employer to utilize data management techniques, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, as long as the techniques utilized are facially neutral. Thus, the individual who failed to submit his or her resume in accordance with the employer's stated procedures, (for example, by submitting an unsolicited resume to an employer that does not consider unsolicited resumes, or whose resume was not reviewed due to random sampling), would not meet the definition of an Internet Applicant, because the employer had not in fact considered the individual for a particular position.

The OFCCP modified its definition of the phrase "basic qualifications" for the position in response to concerns that the phrase was confusing. The rule defines "basic qualifications" as those that either have been advertised in the employer's job posting or established for the position, and recorded as such, prior to considering anyone for a vacancy. Furthermore, the qualifications must meet the following conditions. They must be: 1) non-comparative, 2) objective, and 3) relevant to the performance of the position in question and enable the employer to accomplish business-related goals. Employment tests used as employee selection procedures are not considered basic qualifications. However, employers who utilize such tests to screen out applicants for employment are required to retain records regarding the gender, race and ethnicity of all test takers, regardless of whether they meet the definition of an Internet Applicant.

The rule provides several scenarios in which an employer may conclude that an individual is no longer interested in the position and, therefore, would not meet the definition of an Internet Applicant. Aside from the individual's express statement of disinterest, an employer may conclude that an individual is no longer interested through his or her repeated non-responsiveness to inquiries from the employer, or based on information the individual provided about his or her salary requirements, type of work or willingness to relocate.

The Internet Applicant definition does not apply in the case where an employer does not post jobs on-line but relies on traditional methods of advertising a job (e.g. newspaper ad) and asks that interested applicants respond by mail or in person.

Record Retention Requirements

The rule requires that an employer retain records pertaining to any expression of interest made by an individual, through the internet or related electronic data technologies that the employer considered for a particular position. The rule distinguishes what records must be maintained by the employer if it is utilizing an internal resume database versus an external resume database, such as Monster.com.

If the employer utilized an **internal resume database**, the following information must be retained:

- ◆ A record of each resume added to the database;
- ◆ A record of the date the resume was added to the database;
- ◆ The position for which each search of the database was made; and
- ◆ For each search conducted, the date of the search and the search criteria used.

If, on the other hand, the employer utilized an **external resume database**, the following information must be retained:

- ◆ A record of the position for which each search of the database was made;
- ◆ For each search conducted, the date of the search and the substantive search criteria used; and
- ◆ The resumes of all job seekers who met the basic qualifications for the particular position and were considered by the employer, *without regard* to whether the individual met the definition of an Internet Applicant, along with any tests, test result, and interview notes.

In its remarks accompanying the final rule, the OFCCP explained that the new rule, along with its existing recordkeeping requirements, will ensure that it has "adequate information to assess whether employers are selectively 'considering' only certain candidates or imposing qualification standards that do not meet the definition of 'basic qualifications' under the final rule."

Although the final rule does not specify at what point in the employment process an employer should collect race, ethnicity and gender information from job applicants, the OFCCP makes clear that, as of February 6, 2006, the collection of this data is no longer optional.

The OFCCP has recently issued a policy directive on the collection of race, ethnicity and gender data on job applicants. This directive can be obtained through <http://www.dol.gov/esa/regs/compliance/ofccp/directives/dir265.htm>. Most employers have adopted a self-identification questionnaire that is part of the on-line, electronic applicant process. If individuals do not self-identify, they should be recorded as "unknown" until such time as a visual identification may be made.

Summary and Practical Consequences of Final Rule

This is a more expansive definition of an Internet Applicant than was originally proposed and means that simply by placing job openings on your website, the Internet Applicant definition will be triggered.

The clarification of “basic” qualifications allows employers to use what everyone has known as the “minimum qualification” standard.

The additional detail acknowledging various ways persons remove themselves from consideration, and therefore from applicant status, means that most employers will be able to reduce their applicant pools significantly provided they use disposition coding in their applicant tracking system.

Perhaps the most significant amendment in the Final Rule is the specific recordkeeping provisions pertaining to the memorialization of searches of internal and external databases. For years the absence of such information has prevented the OFCCP from understanding the actual screening process used by employers. Contractors must now train their recruiters and other persons sourcing candidates from these databases to keep details about how each search was conducted. We expect the OFCCP to scrutinize these records during future audits.

Advance Notice Letters for 1500 Compliance Evaluations Mailed October 7th

Pursuant to the OFCCP’s Federal Contract Selection System, the agency has begun mailing 226 “advance notice” letters to corporate headquarters notifying them that some of their establishments may receive compliance evaluations or audits. The actual scheduling letters addressed to 1500 establishments will be mailed beginning the week of October 10th.

For more information about the Final Rule, OFCCP Compliance Evaluations or any other affirmative action compliance related matter, please contact Valerie Hoffman at vhoffman@seyfarth.com, Bob Nobile at rnobile@seyfarth.com, Bill Perkins at wperkins@seyfarth.com or any attorney on our website at www.seyfarth.com.

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