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Compliance with OFCCP's New "Internet Applicant" Final Rule

The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently issued its Final Rule regarding Internet Applicants. It is imperative that employers who are government contractors familiarize themselves with the Final Rule. Particular attention should be paid to the actions that trigger record keeping requirements and what the OFCCP calls "consideration of applicants." The following is a summary of the guidance the OFCCP has issued explaining the Final Rule; the full text is available on the OFCCP's website under the "Frequently Asked Questions." (<http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm>)

What is the purpose of the Internet Applicant Final Rule?

Established record keeping requirements for Federal contractors and subcontractors with regard to the Internet hiring process and the solicitation of information concerning the race, gender, and ethnicity of Internet Applicants.

When does this Internet Applicant Rule become effective?

February 6, 2006, however, the OFCCP has stated it will not cite a contractor for 90 days if the contractor can demonstrate it is taking reasonable steps to comply with the Final Rule and is in compliance with the pre-existing rules.

How does this Internet Applicant Rule change existing rules?

The Final Rule:

- Defines "Internet Applicants" as job seekers applying for work through the Internet or related electronic data technologies from whom contractors must solicit demographic information;
- Prescribes the records contractors must maintain about hiring done via the Internet or related electronic data technologies; and,
- Explains the records OFCCP will require contractors to produce when evaluating whether a contractor has maintained demographic information and conducted an adverse impact analysis.

What is the definition of an "Internet Applicant" in the Final Rule?

All four of the following prongs must come within the regulatory definition of an Internet Applicant:

- 1 The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- 2 The contractor considers the individual for employment in a particular position;
- 3 The individual's expression of interest indicates s/he possesses the basic qualifications for the position; and,
- 4 At no point in the contractor's selection process, prior to receiving an offer of employment from the contractor, does

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the individual remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in the position.

What if a contractor considers both electronic and traditional paper expressions of interest for the same position?

The Final Rule applies to the solicitation of demographic information from all applicants for that position.

What is the definition of "basic qualifications" under the third requirement?

- Qualifications that the contractor advertised to potential applicants or criteria which the contractor established in advance. In addition, the qualifications must be:
- Non-comparative features of a job seeker (e.g., three years' experience as opposed to one of the top five among the candidates in years of experience);
- Objective (e.g., a Bachelor's degree in accounting, but not a technical degree from a good school); and
- Relevant to performance of the particular position.

EXAMPLE: A contractor initially searches an external job database with 50,000 job seekers for 3 basic qualifications for a bi-lingual emergency room nursing supervisor job (a 4-year nursing degree, state certification as an RN, and fluency in English and Spanish). The initial screen for the first three basic qualifications narrows the pool to 10,000. The contractor then

adds a fourth, pre-established, basic qualification, 3 years of emergency room nursing experience, and narrows the pool to 1,000. Finally, the contractor adds a fifth, pre-established, basic qualification, 2 years of supervisory experience, which results in a pool of 75 job seekers. Under the Final Rule, only the 75 job seekers meeting all five basic qualifications would be Internet Applicants, assuming the other three prongs were met.

If after establishing the basic qualifications for a position more applications were received than expected, how can the pool of applications be narrowed to a manageable size?

- Use data management techniques, such as random sampling or absolute numerical ceilings, to limit the number of candidates to be contacted for purposes of gauging their interest in the position, assuming the sample is appropriate in terms of the pool of those meeting the basic qualifications.
- Screen expressions of interest to determine whether some job seekers have removed themselves from consideration. See below.
- Screen the pool of job seekers possessing basic qualifications for additional preferred qualifications. However, demographic information must be solicited from all job seekers meeting the basic qualifications originally established prior to qualification screening, assuming they meet the other elements of the Internet Applicant definition.

What is the definition of “considers the individual for employment in a particular position” for purposes of identifying an “Internet Applicant”?

- Assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.
- If there is a protocol, this does not include expressions of interest submitted outside of standard procedures, i.e., unsolicited resumes.
- Does not include individuals who do not specify a particular position, so long as that is the contractor's consistent practice.
- Does not include applicants rejected by data management techniques provided the sampling procedure is appropriate, and the applicant's resume is not opened or reviewed.

PRACTICE POINTER: The definition of “considers” is *broad* and fails to take into account whether the job seeker meets the basic qualifications, applies for an open position, or whether the employer ever contacts the job seeker. Thus, a brief review of a resume in any manner may trigger the record keeping requirement. Further, contractors should expect the OFCCP to inspect records of those job seekers that were “considered” but lacked the basic qualifications for the position. Given the proliferation of resumes and relative ease of making “expressions of interest” in the electronic age, contractors need be wary of how they “consider”

individuals for employment. The goal here is to limit the number of applicants the contractor actually “considers” to reduce the burdens of record keeping and potential liability.

When is an individual “no longer interested in the position”?

- An express statement.
- Passive demonstration of disinterest, i.e., declining a job interview or job offer, or repeatedly failing to respond to a contractor's telephone inquiries or emails.
- Presumed disinterest from expressions of interest in specific positions, types of positions, location of work, or salary requirements, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.

PRACTICE POINTER: Contractors should consider soliciting salary and location requests as a mechanism for limiting Internet Applicants.

What records must be retained?

- For Internet Applicants no longer interested in the position: expressions of interest and any demographic information already obtained.
- For individuals “considered”: expressions of interest, even for those individuals who are not Internet Applicants.
- For external database searches: regardless of “Internet Applicant” status, a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date

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of the search, and the resumes of any job seekers who met the basic qualifications for the particular position who are considered by the contractor.

PRACTICE POINTER: For external database searches, it is essential that contractors establish a comprehensive list of qualifications for all positions, and that these qualifications actually match job requirements. Moreover, the term "considers" has particular salience—if a contractor receives 100,000 responses using a single qualification, and opens just one resume, perhaps for quality control, it has just "considered" all 100,000 responses. The practical reality is that contractors are better off using all basic qualifications in the initial search, thereby preventing accidental "consideration." If qualifications alone do not result in a manageable number of results, a contractor may similarly use random sampling or a numerical limit at this stage in the search.

- For internal database: a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search.

When must a contractor solicit demographic information?

- For individuals meeting the four prong definition of Internet Applicant. Self-identification is preferred.

PRACTICE POINTER: Contractors should carefully consider their method for soliciting demographic information. Although most employers and some external database companies ask job seekers to complete a self-identification form when submitting a resume, all information submitted must be retained and may be reviewed by the OFCCP. This procedure also creates an administrative burden if the employer wants to subsequently exclude job seekers who do not meet the definition of Internet Applicant from adverse impact analysis. And some job seekers simply may not want to make this information publicly known through a source like Monster.com. Waiting until there is clarity as to which job seekers are Internet Applicants requires contractors to have a tickler in place alerting them of the need to identify an applicant's race, gender, and ethnicity.

Should you have any questions about the Final Rule or need assistance tackling record keeping and compliance practices, please contact John Zandy, Robin Clark or Marlowe Mitchell in our Labor, Employment and Benefits Department.

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