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OFCCP ISSUES FINAL RULE ON DEFINITION OF INTERNET JOB APPLICANTS

On October 7, 2005, the Office of Federal Contract Compliance Programs ("OFCCP") of the United States Department of Labor issued a Final Rule on the definition of "Internet Applicant," which impacts recordkeeping and data collection requirements for covered federal contractors.¹ The Final Rule addresses the challenges of federal contractors to retain job applicant records when using the Internet for the recruitment and hiring of applicants.

Pursuant to Executive Order 11246 and its implementing regulations, covered federal contractors are required to take steps to ensure equal employment opportunities through nondiscriminatory recruitment and employment practices. To ensure compliance, the OFCCP requires federal contractors to retain, for identified timeframes,² all application-related records along with other personnel and employment records. Federal contractors, to the extent possible, are also required to identify the gender, race and ethnicity of each job applicant.

The Final Rule will become effective on February 6, 2006, at which time covered federal contractors, when complying with the record retention and data collection requirements set forth in the regulations, will apply the requirements to both job applicants *and* "Internet Applicants" as defined therein.³

• *Definition of "Internet Applicant"*

Prior to the issuance of the Final Rule, a "Job Applicant" was considered a person who had indicated an interest in being considered for hire, other

¹ Specifically, the Final Rule amends 41 C.F.R. Part 60-1, the regulations that set forth the obligations of covered federal contractors to promote and ensure equal employment opportunities under Executive Order 11246.

² Federal contractors are required to preserve "any personnel or employment record made or kept by the contractor" for a minimum period of two (2) years, unless the contractor has fewer than 150 employees or does not have a government contract of at least \$150,000, in which case any such record must be preserved for one (1) year.

³ For the full text of the Final Rule, go to:
www.dol.gov/esa/regs/fedreg/Final/2005020176.htm.

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employment opportunities, and covered federal contractors were required, where possible, to identify the gender, race and ethnicity of such applicants. The definition was long criticized by federal contractors because it failed to address the burdens borne by contractors in collecting and analyzing the ever growing number of applications (both solicited and unsolicited) received over the Internet.

Recognizing the difficulties facing contractors, after many years of study, with proposed changes to the regulations issued and public comments received and considered, the OFCCP has presented its solution. The Final Rule adds the definition of “Internet Applicant,” making a distinction between applicants applying either in person, via the U.S. mail, or using other traditional methodologies, and those applicants applying for jobs using the Internet or related technologies. While contractors are still required, where possible, to obtain gender, race, and ethnicity data of each applicant, the Final Rule reduces the burden placed on contractors in obtaining this data where applicants can be identified as “Internet Applicants.”

For an individual to be considered an “Internet Applicant,” the following four (4) criteria must be met:

1. The individual must submit an expression of interest in employment through the Internet or related electronic data technologies;
2. The contractor must consider the individual for employment in a particular position;
3. The individual’s expression of interest must indicate that he or she possesses the basic qualifications for the position; and,
4. The individual must at no point in the selection process prior to receiving an offer of employment from the contractor, remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in the position.

For direction and guidance, the Final Rule expounds on each of the criterion, and enables contractors to significantly reduce the burdens placed on them by the avalanche of interest expressed through the Internet and related electronic data technologies. For example, under the first criterion, the term “submits an expression of interest in employment through the Internet or related electronic data technologies,” includes ***all expressions of interest made for a particular position, including expressions of interest made in person, via the U.S. mail, or using other traditional methodologies, if a contractor considers expressions of interest made through the Internet or related technologies for that position.*** Therefore, anytime a contractor accepts expressions of interest for jobs via the Internet and related technologies, such as e-mail, commercial and internal resume databanks, and employer websites, all applicants are considered “Internet Applicants,” including applicants who express their interest through traditional methodologies. In such instances, the same criteria are applied to all applicants, and a contractor will not have to identify the gender, race and ethnicity of those applicants that do not meet the four criteria above. This will undoubtedly reduce the number of records maintained by the contractor that must identify the applicants’ gender, race and ethnicity. Where, however, a contractor does not use the Internet or related technologies, and does not accept any electronic submissions, existing recordkeeping standards will apply.

Under the second criterion, the term “considers the individual for employment in a particular position” means that the contractor ***assesses the substantive information*** provided in the expression of interest with respect to any qualifications involved with a particular position. Contractors therefore do not have discretion to

assess information about an applicant's credentials without thereby having "considered" the applicant. Because of this, the Final Rule permits contractors to establish protocols and data management techniques to reduce the number of expressions of interest to be considered, provided the reduced pool of applicants is appropriate, thereby reducing the number of records maintained by the contractor that must identify the applicants' gender, race and ethnicity.

Thus, beginning February 6, 2006, federal contractors no longer have to attempt to obtain the gender, race and ethnicity of the hordes of applicants that submit expressions of interest through the Internet or related electronic data technologies. Rather, a contractor will only have to identify the gender, race and ethnicity of those applicants that meet the four criteria, provided the contractor accepts expressions of interest via the Internet or related technologies for that particular job.

- ***Recordkeeping requirements with respect to internal and external resume databases***

The Final Rule also specifies what specific recordkeeping is required with respect to the maintenance and review of internal and external resume databases. With regard to internal resume databases, a covered federal contractor must maintain (1) a record of each resume added to the database, (2) a record of the date each resume was added to the database, (3) the position for which each search of the database was made, and corresponding to each search, (4) the substantive search criteria used and (5) the date of the search. With regard to external resume databases, a contractor must maintain (1) a record of the position for which each search of the database was made, and corresponding to each search, (2) the substantive search criteria used, (3) the date of the search, and (4) the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor.

Recommendations

Covered federal contractors should carefully review both their traditional and Internet application processes to ensure that information on gender, race and ethnicity is being properly gathered and maintained. In addition, because the Final Rule gives federal contractors greater ability to control the number of applicants considered for a particular position, thereby reducing the number of records maintained by the contractor that must identify the applicants' gender, race and ethnicity, those contractors who do not currently accept expressions of interest through the Internet and related electronic data technologies may want to consider doing so. In addition, such contractors should consider establishing protocols and implementing data management techniques to further reduce the number of expressions of interest considered for a particular position.

While the Final Rule is similar in many respects to the proposed rule presented for comment by the OFCCP, there are significant differences. Covered federal contractors should therefore carefully read the OFCCP regulations, as modified, and should consult with their counsel to ensure a proper understanding and application of the Final Rule.

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