

Who Is An Applicant? The Mystery Revealed...

October 10, 2005

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently issued its final rule on "Internet applicant" data collection and recordkeeping requirements. The final rule, which will become effective on February 6, 2006, establishes new "minimum standards for applicant recordkeeping in the context of the Internet and related electronic technologies." Designed by OFCCP as an aid in the identification of discrimination, the final rule applies only to covered federal government contractors.

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently issued its final rule on "Internet applicant" data collection and recordkeeping requirements. The final rule, which will become effective on February 6, 2006, establishes new "minimum standards for applicant recordkeeping in the context of the Internet and related electronic technologies." Designed by OFCCP as an aid in the identification of discrimination, the final rule applies only to covered federal government contractors.

Definition of "Internet Applicant"

OFCCP requires contractors to obtain, when possible, gender, race, and ethnicity data on applicants and employees. OFCCP's final rule adds to this requirement by requiring that the same information be obtained from "Internet applicants." A job seeker becomes an "Internet applicant" if he or she satisfies all four of the following criteria:

- The job seeker submits an expression of interest in employment through the Internet or related electronic data technologies (such as e-mail, resume databases, job banks, electronic scanning technologies, applicant tracking systems and service providers, and applicant screening vendors);
- The employer/contractor considers the job seeker for employment in a particular position by reviewing the content of the expression of interest;
- The job seeker's expression of interest indicates that he or she possesses the "basic qualifications" for the position; and

- Prior to receiving an offer, the job seeker does not remove him or herself from further consideration or indicate that he or she is no longer interested in the position.

The final rule defines “basic qualifications” as qualifications that the employer either advertises to potential applicants that they must possess to be considered for the position or those which already have been established prior to considering expressions of interest. “Basic qualifications” must be objective, non-comparative and “job-related” – they must be relevant to the performance of the position at issue and must enable the contractor to accomplish business-related goals. The final rule specifically states that employment tests are not “basic qualifications.”

Note that if a contractor considers expressions of interest through both the Internet and traditional means, the Internet applicant regulations apply to both types of submissions. For those positions for which the contractor does not accept electronic submissions, however, these regulations do not apply. Moreover, through the use of methods such as random sampling or absolute numerical limits, contractors may limit the number of expressions of interest considered and the number of applicants contacted.

Recordkeeping

Contractors must retain for a period of two years all expressions of interest through the Internet or related electronic data technologies which were considered by the contractor. Specific information on internal and external resume databases must also be retained. The final rule specifically allows contractors not to consider – and not to log as applicants – expressions of interest which are not submitted in accordance with the contractor’s standard procedures. For example, untimely or non-specific expressions of interest or unsolicited resumes – if submitted contrary to the contractor’s established procedures – need not be considered or logged. Contractors are also not required to retain records of individuals never considered for a particular position. The final rule makes clear, however, that contractors cannot log as applicants only those job seekers who are interviewed; all “Internet applicants” who meet OFCCP’s 4-pronged definition must be logged by contractors.

A Final Note

The Equal Employment Opportunity Commission (EEOC) and other agencies are considering regulations similar to the final rule promulgated by OFCCP. The possibility exists that these agencies will issue regulations applicable to the broader employer community that differ from OFCCP’s rules for federal contractors. In any event, OFCCP clearly anticipates that its enhanced recordkeeping requirements will assist the agency in identifying discrimination. OFCCP touts the eradication of systemic discrimination as one of its primary goals and notes in the final rule its plan to target workplaces based on a contractor’s rejection rate of qualified applicants – the definition of which will soon include “Internet applicants.”

Those employers subject to OFCCP regulations are therefore encouraged to evaluate their selection procedures and recordkeeping processes in order to comply with the agency's new requirements by early 2006. A consistent and defensible recruiting and hiring process will be critical to surviving OFCCP scrutiny during a compliance review.

Should you have any questions or require any additional information, please contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at 404-881-1300 or via e-mail at clientservices@ogletreedeakins.com.

Note: This article was published in the [October 10, 2005 issue](#) of the *National eAuthority*.

TOPICS

[Employment Law](#), [Governmental Affairs](#), [OFCCP Compliance](#), [Government Contracting](#), and [Reporting](#)