



New EEO Guidelines Define “Internet Applicant” for Government Contractors

Employers now have three conflicting definitions of an applicant and a great many questions.

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The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) administers and enforces Executive

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Order 11246, as amended, which prohibits federal contractors who do more than \$10,000 in government business in one year from discriminating in employment decisions on the basis of race, color, religion, gender, or national origin. The executive order also requires government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment.

Accordingly, government contractors with 50 or more employees and \$50,000 or more in one year in government contracts must develop a written affirmative action program

for each of its establishments.

This annual affirmative action program must include, *inter alia*, data on employment applicants by race and gender. It is through this process of tracking “applicant flow” that the government determines whether government contractors are adhering to the nondiscrimination requirements imposed by Executive Order 11246. Failure to adhere can result in fines and even debarment from the federal contracting process. The government’s definition of “applicant,” therefore, is of some significance to federal contractors.

In 1979, the government released a definition in the Uniform Guidelines on Employee Selection Procedures (UGESP), along with a set of questions and answers. Unfortunately, most employers found it so lacking in clarity as to afford no comfort to them

in their efforts to comply with the executive order and corresponding regulations.

Contractors have been waiting 25 years for a new definition. Earlier this year, the government released not one but two new and differing definitions that do not clarify how to effectively track applicants and probably will result in employers needing to track applicant flow in three different ways.

Under the new proposed UGESP guidelines issued jointly by four civil rights enforcement agencies on March 4, 2004 (Adoption of Additional Questions and Answers to Clarify Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies, 69 Fed. Reg. 10152 [Proposed March 4, 2004] [To be codified at 29 CFR, Part 1607 and 41 CFR, Part 60-3]), and those issued by the OFCCP on March 31, 2004 (Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes, 69 Fed. Reg. 16445 [Proposed March 31, 2004] [To be codified at 41 CFR, Part 60-1]). A distinction was created between individuals who apply for employment through the Internet or other related technologies and those who apply through traditional hardcopy means.

After waiting 25 years for clarification of the term applicant, there are now two separate and different definitions applicable to electronic applications but no clarification of traditional hardcopy applications. The interagency task force assigned to review the definition of an applicant for purposes of record keeping under the UGESP took three years to study the issue.

It reported its findings and the new definition for electronic applicants in new supplemental guidelines that were published in the March 4, 2004, *Federal Register* (Questions 94-98 were added to the UGESP). The task force consisted of the OFCCP, the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor's Civil Rights

Division, and the Office of Personnel Management.

Why Is the Definition Important?

Under the record-keeping obligations created by these proposed regulations, the definition of applicant is critical for determining which applicants an employer must track for the purposes of adverse impact analysis of race, gender, and ethnic groups for selection procedures. In addition, having a clear and easily applied definition is critical to minimizing the potential exposure of OFCCP proceedings and Title VII exposure to federal government contractors.

Before the issuance of the new applicant definitions, agencies defined "applicant" based on the 1979 UGESP definition in the context of traditional recruitment and selection techniques, that is, hardcopy resume and application submissions.

The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest may be expressed by completing an application form, or might be expressed orally, depending on the employer's practice.¹

Unfortunately, this definition has been largely unworkable for many employers. Among employers' documented concerns is the lack of a "minimum qualifications" requirement to be considered for an applicant and the voluminous amount of unsolicited resumes received through electronic recruitment tools. This lack of clarity created substantial record-keeping problems for employers, as well as uncertainty of who to include for the purposes of applicant flow tracking. The significance of this uncertainty could lead to a finding that employers are discriminating against minorities in their hiring practices, resulting in fines and even debarment from federal contracting.

Employers have been hoping for clarity on this issue for 25 years. Yet,

to the surprise of most employers, both the UGESP joint agencies' and the OFCCP's proposed definitions apply exclusively to those individuals who apply for employment through the Internet or other related technologies, now known as "Internet applicants." Such applicants include those who apply through e-mail, Internet resume banks and job boards, employment Web pages, electronic scanning technology, applicant tracking systems, and internal databases.

EEOC chair, Cari M. Dominguez, stated that "[w]ith the daily on-line transmission of hundreds of thousands of resumes, there is a critical need to provide supplemental guidance that is aimed at protecting the rights of applicants, while relieving employers of onerous record-keeping requirements."² Not covered by these new definitions are the millions of resumes that are mailed to employers or given to them at job fairs throughout the United States each year.

What Are the New Guidelines?

UGESP Guidance

For the purposes of record-keeping under the UGESP, an "Internet applicant" exists when (1) the employer acted to fill a particular position, (2) the individual followed the employer's standard procedures for submitting applications, and (3) the individual indicated an interest in the particular position. By way of example, the second requirement means that if the employer requires all on-line applicants to complete an on-line personal profile, only those individuals who do so can be Internet applicants. Similarly, only those individuals who meet an employer's specified application deadline can be considered Internet applicants.

OFCCP Guidance

The recent UGESP guidelines anticipated that "[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations

that allow each agency to carry out its specific enforcement responsibilities.”

Accordingly, the OFCCP amended its record-keeping requirements, by proposing that an individual would be considered an “Internet applicant” when (1) the individual submitted an expression of interest in employment through the Internet or related technologies; (2) the employer considered the job seeker for employment in a particular open position; (3) the job seeker’s expression of interest indicated the individual possessed the advertised, basic qualifications for the position; and (4) the job seeker did not subsequently indicate no longer having an interest in the position.

The third requirement of the OFCCP’s guidance fills the hole left by the interagency task force’s definition that did not address whether those individuals who are not minimally qualified must be considered applicants for affirmative action purposes. Further explanation of “advertised, basic qualifications” provides that such qualifications must be noncomparative features of an interested candidate.

In other words, an employer cannot compare the relative qualifications of candidates. In addition, the “advertised, basic qualifications” must be objective and cannot depend on the employer’s subjective judgment. Lastly, the “advertised, basic qualifications” must be job related. Under this standard, those qualifications must be relevant to performance of the job at hand and enable the employer to accomplish business-related goals.

Under the joint commission’s UGESP definition, it is not clear what “acted to fill” means in actual practice. The example provided in the revised UGESP appears to indicate that an employer has acted to fill a particular position by identifying a pool of potential applicants. Unfortunately, this example does little to clarify the standard for threshold action that must be taken by an employer.

Under the OFCCP definition, one complication arises as a result of the

lack of clarity regarding whether being “considered” for the job under the second requirement means (1) that the employer must track the hundreds of thousands of qualified (i.e., those who meet the “advertised, basic qualifications”) individuals in a resume database used by an employer to seek candidates for a particular position, or (2) that being considered only means those resumes that were actually reviewed by the employer. If it means the former, employers would have to obtain a copy of every resume for a qualified candidate that was in the database at the time of the search.

Further, under the OFCCP’s definition, it is not clear what constitutes “an expression of interest.” Is something formal such as a resume or completed application the threshold? Or is a more informal submission, such as an unsolicited e-mail, sufficient to satisfy this standard? In addition, because the previously released guidelines will continue to apply to traditional applicants, the proposed rules create different standards for data collection for the same position, depending on what tool the individual used to apply for the position.

The OFCCP has acknowledged that it is “unsure whether this dual standard will provide OFCCP with meaningful contractor data to assess in determining whether to commit agency resources into the investigation of a contractor’s employment practices.”³ As a result, the agency is expressly soliciting comments on this issue. Such comments are due to the OFCCP 60 days after March 29, 2004.

Have Employers’ Concerns Been Adequately Addressed?

The new standards for Internet applicants help to minimize the volume of applicant data that must be tracked and retained from e-applications. The guidance provided, however, is still much narrower than employers desired or anticipated. First, it addresses applicants only in the con-

text of electronic transmissions and does not resolve the 25-year-old problem of defining who is an applicant for hardcopy transmissions.

Therefore, employers are left without guidance for the hundreds or even thousands of hardcopy resumes and applications received through mass mailings and on-site job fairs. The problems associated with hardcopy submissions are similar to those of electronic submissions, but the employer is now left with inconsistent standards.

Second, the agencies have not addressed the “minimal qualifications” debate for traditional applicants. Applicants who apply through hardcopy transmissions are still defined broadly as including those who merely express an interest (expressed by submission of a resume or application). As a result, employers are still required to retain records for thousands of unqualified individuals, leaving employers with burdensome record-keeping obligations. Additional unnecessary burdens are created by individuals who apply to a particular company for a multitude of advertised positions for which they are not qualified but clearly have expressed an interest.

Given that the “advertised, basic qualifications” requirement of the OFCCP definition of Internet applicant is the only guidance that recognizes minimal qualifications, most lawyers will advise their clients to drive all applications to electronic format only. The interesting dilemma created by advising clients to go paperless, however, will be that many of the minorities the government seeks to protect may be less likely to have access to the Internet and e-mail and may therefore be discriminated against as a result of these new regulations.

Finally, employers are now left with three conflicting definitions of an applicant. There are two different definitions of electronic applicants—one for EEOC purposes and one for OFCCP record-keeping purposes. Open questions include whether the

OFCCP's advertised, basic qualifications requirement will be the standard for OFCCP affirmative action audits, but not for EEOC complaints and investigations. If so, how should employers keep records for these two different standards for an e-applicant?

The third definition for individuals who apply for positions using traditional hardcopy submissions creates an additional source of confusion for employers. How should employers track "applicants" for a particular position when some interested candidates apply through the Internet and some apply using hardcopy resume?

What Should Employers Do Before the Final Rules Are Issued?

Here are some steps you can take to track applications:

- Establish a formal application process for all positions.
- Require all applicants to identify the

specific position that they seek, instead of allowing them to submit a resume for any and all positions available.

- Make sure the position advertisement clearly states the basic minimal qualifications for the position. In addition, these qualifications should not involve comparing the qualifications of one person to another, should be job-related, and should be objective.
- Establish a policy regarding the time in which applications will be considered and publish any deadline in the advertisement for the particular position.
- To the extent feasible, drive all applications to the Internet only.

Conclusion

The official public comment period allowed employers until May 3, 2004, to comment on the UGESP definition

to be used by EEOC, and until May 28, 2004, to comment on the OFCCP definition.

Given the potential exposure to employers from this continued and, in fact, increased lack of clarity, employers should continue to contact their representatives in the Congress and various trade groups to resolve this issue in something less than the 25 years they have been kept waiting. The principle purpose of having laws is to permit those governed by them to adjust their behavior to known standards and thereby to bring predictability to the participants in commerce. These proposed regulations take a step backward. **CM**

Endnotes

1. Question and Answer #15, 44 Fed. Reg. 11998 (March 2, 1979).
2. Press Release, "U.S. Equal Employment Opportunity Commission, Recordkeeping Guidance Clarifies Definition of "Job Applicant" for Internet and Related Technologies" (March 3, 2004).
3. 69 Fed. Reg. 16445, 16448.