



Internet Applicant Guidelines

Rules for the collection of race and gender data for Internet and related electronic data technologies were published in the Federal Register 41 CFR Part 60-2 on October 7, 2005.

In 2000, the Office of Management and Budget (OMB) instructed agencies that were utilizing the Uniform Guidelines on Employee Selection Procedures (UGESP) to address the “issue of how use of the internet by employers to fill jobs affects employer record-keeping obligations” under UGESP. These agencies included the Equal Employment Opportunity Commission (EEOC), The Department of Labor (DOL), The Department of Justice (DOJ) and the Office of Personnel Management (OPM).

In March of 2004, the Office of Federal Contract Compliance Programs (OFCCP) proposed to amend their regulations governing applicant record keeping requirements. After an obligatory period for comments from interested parties, the final proposal was submitted to OMB for approval.

The new rules, effective February 6, 2006, attempt to clarify how employers with affirmative action obligations must track applicants obtained through the internet or related electronic data technologies.

Four criteria must be met to be considered an “Internet Applicant:”

1. The individual submits an expression of interest 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 the individual possesses the basic qualifications for the position; and
4. 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 the he or she is no longer interested in the position.

If an individual meets the criteria, the contractor must track the race and gender of the applicant.

What does **criteria #1** mean by “an expression of interest through the Internet or related electronic data technologies?” This term was intentionally defined broadly because technology is constantly changing. Currently it would include e-mail, resume databases, job banks, electronic scanning technology, applicant tracking system/ applicant service providers, and applicant screeners.

Criteria #2, “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 may establish standard procedures that applicants must follow to be considered.

Criteria #3 allows contractors to screen out as applicants those individuals who do not possess the “basic qualifications” for the position. The qualifications must be advertised or established by making and maintaining a record of such qualifications prior to considering any applicants for the position. A “basic qualification” is “any qualification that is non-comparative, objective, and relevant to the performance of the particular position and enabling the contractor to accomplish business related goals.” Note that employment tests are not considered basic qualifications. All applicants who take an employment test must be tracked and recorded.



Finally, **criteria #4** lets the contractor remove an individual from consideration as an applicant if the individual “removes himself or herself from further consideration.” This could include failing to answer repeated e-mails, failing to follow established procedures, or rejecting an inadequate salary or location of the work requirements prior to a job offer.

One concern expressed by contractors was how to handle situations where applicants are considered through electronic data technology and others are considered through traditional means. The regulations make it clear where applicants for a particular position are considered from both electronic and traditional sources, the contractor need only consider as applicants those that meet the new Internet applicant criteria. Determining whether to use the new Internet applicant criteria depends on the means by which an expression of interest is made for a particular job. What happens if you normally receive applicants for engineering positions through your web site and also accept paper resumes, but for this particular opening, you receive only paper resumes? The regulations appear to say you cannot apply the Internet applicant criteria for this job because you received only paper resumes. This results despite the fact that every other time you have openings for this job you used the new Internet applicant criteria because you receive on-line and paper applicants.

The OFCCP recognized the possibility that applying different data collection of traditional applicants vs Internet applicants might lead to a “dual standard” but failed to fully address the problem through the regulations. Contractors who have Internet applicants for some jobs and traditional applicants for others are left applying two different standards.

Contractors are free to establish a protocol under which they refrain from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, contractors need not consider as applicants everyone included in a search using data management techniques that do not depend on assessment of qualifications. Techniques such as random sampling or absolute numerical limits may be used to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

OFCCP clarified that, when a contractor uses a third-party resume database, the contractor must retain the electronic resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor, not all the resumes contained in the third-party resume database, along with records identifying job seekers contacted regarding their interest in a particular position, a record of the position for which each search of the database was made, the substantive search criteria used, and the date of the search.

Another section of the Preamble stresses that the OFCCP may choose not to “rely on record-keeping definitions to frame the appropriate analysis for liability or remedy purposes when alleging a violation...” They go on to say the “OFCCP will rely on Census and other labor market data to assess contractors’ hiring practices for potential discrimination.” In light of these insights into OFCCP audit strategy, contractors would be well advised to compare the percent of women and minority applicants and hires to their respective job group availability before submitting data for an audit. Particular attention should be given to applicants and hires compared to the local availability listed as factor #1 on the Availability Analysis. Where the percentage of women or minority applicants and hires are significantly less than availability, expect the OFCCP to closely scrutinize your recruitment and hiring practices for those jobs.