

AFFIRMATIVE ACTION UPDATE

*****NEWS FLASH*****

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WHO'S AN APPLICANT?

Effective Friday, October 7, 2005, OFCCP published its final regulation aimed at clarifying the definition of “Who is an Internet applicant?” for affirmative action record keeping purposes. The regulation identifies the pool of individuals for whom contractors must collect demographic data.

The regulation states that: “(1) Internet applicant means any individual who: (i) Submits an expression of interest in employment through the Internet or related electronic data technologies; (ii) The contractor considers the individual for employment in a particular position; (iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and (iv) 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 that he or she is no longer interested in the position.”

The first prong of the definition, per the regulation, applies to individuals who are identified through the Internet or related electronic technologies. Examples of these include email, resume databases, job banks, electronic scanning technology, applicant tracking systems/applicant service providers, and applicant screeners.

Contrary to the wishes of contractors, OFCCP did not standardize the rules for all applicants. As such, the regulation applies *only* to those individuals who express interest through electronic means or who express interest through traditional means (mailing/faxing in a resume or coming in and filling out an application) for positions for which the contractor is *also* using the Internet or other electronic means. The regulation *does not* apply to positions for which expressions of interest are *only* being taken by traditional means. This means that there is a dual standard in place; one for positions being filled utilizing electronic means and another for those being filled only through traditional means.

In essence, there will be a “basic qualifications” standard applied to Internet applicants that will not be applied to traditional applicants. In other words, for positions being filled through traditional means, an applicant for the purpose of collecting data will be anyone who expresses

interest in a particular position, whether or not the individual meets the basic qualifications for the position.

In regard to the second prong of being considered for a particular position, the regulation provides that when a contractor “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.” The regulation provides that “considers” includes reviewing the expression of interest to confirm that the job seeker meets the basic qualification for the position. For example, if a position requires a degree in Mechanical Engineering and three years of automotive industry experience, then reviewing the submissions of interest to confirm that they have the required degree and experience will be sufficient to meet the “considers” prong of the test.

Employers *can* refuse to consider expressions of interest that are not submitted in accordance with established standard procedures. For example they are considered to be unsolicited with respect to a particular position or the contractor has established protocols for limiting the number of expressions considered (e.g. data management techniques such as random sampling of resumes or absolute numerical limits as long as they are facially neutral and do not produce adverse impact).

It is important to note that the published regulation eliminated the word “open” in connection with “particular position.” This appears to mean that if an individual sends an email expressing interest in a position in HR and the resume is not immediately deleted without any assessment as to suitability for a future position in HR, then the candidate is an applicant and records must be kept. As such developing and strictly adhering to “established standard procedures” for recruiting and hiring is now critical. If a contractor intends to rely on its policies and procedures as a means of controlling and limiting its applicant pool, having formal procedures and then sticking to them will be essential.

Regarding the third prong of the definition, the regulation states that “basic qualifications” means qualifications that the employer advertises (e.g., posts a description of the job and necessary qualification on its website) to potential applicants that the applicant must possess in order to be considered for the position, or “...for which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest; and that meet all of the following three conditions: (i) The qualifications must be noncomparative features of a job seeker...; (ii) The qualifications must be objective...; and (iii) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.”

The comments to the regulation specify that employment tests are not considered basic qualifications. So, passing a pre-employment test is not a basic qualification. For example, if the contractor tests 100 individuals and then evaluates the basic qualifications of the 50 who score the highest, then all 100 test takers would be considered applicants for the purposes of data collection. However, should the contractor test 100 individuals then regardless of score, looks at basic qualifications which are possessed by only 50 of the test takers, only the 50 individuals possessing the basic qualifications would be considered applicants. This appears to indicate that

contractors may want to rethink their use of employment tests. For example, it may make more sense to evaluate basic qualifications before administering employment tests.

OFCCP provided two examples regarding “basic qualifications” that were advertised. The first involved a hospital looking for an emergency room nurse. The hospital advertises for registered nurses with hospital experience. Fifty individuals respond who are registered nurses who have worked in hospitals. The hospital finds that of those 50, twenty have emergency room experience and of those 20, ten have three or more years of experience. In the hypothetical, the hospital wanted to claim that it had 10 applicants. OFCCP however states that there would be 50 applicants as 50 met the advertised basic qualifications.

In the second example, the hospital searched an external database that had 50,000 registered job seekers for a bi-lingual emergency room nursing supervisor’s job (4-year nursing degree, state certification as an RN, fluency in English and Spanish, three years of emergency room experience and two year of supervisory experience). The initial screening (4-year degree, RN certification and bi-lingual) results in 10,000 potential candidates. The second level screen (3 years emergency room experience) narrows the pool to 1000 and the third level screen (2 years supervisory experience) narrows the pool to 75. Under the regulation, there would be 75 applicants. Note that none of these 75 even knows that the job is available nor have any of these 75 expressed an interest in the position. Under this example, there is no requirement that the candidate express interest in this particular nursing supervisor’s position. The candidates apparently are deemed to have satisfied the first prong of the regulation by having posted their resume to the external database. The second prong is satisfied by the hospital considering them for the particular position.

This brings us to the fourth and final prong of the test, being the individual does not, “prior to receiving an offer of employment, remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in the position.” A contractor can conclude that an individual is no longer interested in the position through either express or passive actions on the part of the individual. An express indication would be where the individual says, “I’m no longer interested in being considered for this position.” A passive expression is where the individual demonstrates “repeated non-responsiveness” to the contractor’s inquires regarding interest in the position (e.g. failing to respond to phone calls to schedule an interview; failing to show up for an interview.) The regulation does not provide any specific guidance on what constitutes “repeated” non-responsiveness.

The regulation also provides that an individual may also passively withdraw himself or herself from consideration by expressions of interest as to particular salary requirements, work preferences or location of work, so long as the contractor has a uniformly applied policy or procedure on not considering similarly situated job seekers.

The regulation also provides that OFCCP may use census or labor market data to verify that a contractor's applicant process is, itself, not having a discriminatory effect on applicants by dissuading them from expressing interest in employment. OFCCP will analyze recruiting practices to ensure their non-discriminatory affect by comparing the composition of the applicant pools to the relevant labor markets.

Lastly, under 60-1.12. Record Retention, contractors will now be required to maintain records of "...any and all expressions of interest through the Internet or related electronic technologies, as to which the contractor considered the individual for a particular position...regardless of whether the individual qualifies as an Internet applicant..." For example, the regulation reference on-line resumes, internal resume databases and records identifying job seekers contacted regarding their interest in a particular position.

In regard to internal resume databases, contractors must "...maintain 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." These records must be made and maintained regardless of whether the individual qualifies as an Internet applicant.

Much the same is true of searches of external resume databases. However, for external resume databases (i.e. "Monster"), the regulation "...requires contractors to retain resumes only of job seekers who met the basic qualifications for the particular position who are considered by the contractor, and records identifying job seekers contacted regarding their interest in a particular position, along with 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."

Once an individual is identified as an Internet applicant, the regulation also requires, "(ii) Where possible, the gender, race and ethnicity of each applicant or Internet applicant as defined...whichever is applicable to the particular position." To comply with this requirement, contractors are directed to utilize self-identification as the preferred methodology. Contractors are encouraged to use tear off sheets, post cards or short forms to request demographic information from applicants. Contractors are also encouraged to adapt these methods to electronic formats. Applicants are to be notified that providing this information is voluntary. In those instances where an applicant appears in person and he/she has declined to self-identify, visual observation of the gender, race or ethnicity of the applicant is permissible.

Let's consider three different scenarios under the regulation. In the first scenario, the contractor manufactures truck transmissions which are sold to a truck builder who in turn sells the trucks to the Army. The contractor has an opening for a senior level Mechanical Engineer to support the design and manufacturing of the transmissions. The contractor identifies the basic requirements as a degree in Mechanical Engineering with three years of experience designing transmissions.

The contractor posts the job on its own website. The posting lists the basic requirements and asks that interested parties email a resume to HR within two weeks of the date of the posting. Three weeks later, the contractor has 300 responses. The contractor reviews all 300 resumes. Of the 300 resumes received, 25 were received in the third week following the posting. All of these meet the basic qualifications. Of the 275 received during the two weeks following the posting, 200 meet the basic qualifications. The contractor did not list salary requirements or location but they intend to hire a candidate for no more a than \$55,000 annual salary. The job is also located in Davenport, Iowa. Of the 225 who met the basic qualifications, 10 indicate that they are looking for a starting salary of \$60,000 or more. Five others indicate that they are looking for employment in the southwest.

The question is how many applicants does the contractor have? As always, the answer is “it depends.” If the contractor *never* considers expressions of interest outside of the posting dates, then the 25 resumes received during the third week would not be candidates. The 75 resumes from individuals who do not meet the basic qualifications would be not applicants. The resumes of the 10 individuals looking for \$60,000 and the 5 individuals looking for work in the southwest would not be applicants. This would leave the contractor with 185 individuals who properly expressed interest through the Internet, who were considered for a particular position and who met the basic qualifications for the position and who did not, prior to receiving an offer of employment, either expressly or passively, indicate that they were no longer interested in employment. As such, demographic data must be sought from 185 applicants.

In the second scenario, all of the same facts as above are present *except* that the contractor does not post the job electronically but instead, runs an ad in the paper asking the interested parties mail or fax a resume. In this scenario, from how many applicants will the contractor have to solicit demographic data? Answer: “it depends.” If the contractor does evaluate (consider) all 300 resumes received, the 25 resumes received in the third week would be applicants because they were considered, they were qualified, and they did not withdraw their indication of interest in employment. Of the 275 resumes received in the first two weeks, all 275 would be considered applicants as basic qualifications are not relevant to traditional applicants nor are passive expressions of disinterest. Accordingly, demographic data would have to be solicited from all 300 applicants.

In the third scenario, let’s go back to the example of the emergency room nursing supervisor where the contractor identified out of a database of 50,000 individuals, 75 who meet the basic requirements. The question is how many applicants are there from whom the contractor must solicit demographic data? And the answer is: It appears that we do not yet have enough information with which to make that determination. This is due to the fact that we do not know whether all 75 would continue to be interested in the position. It would be recommended that the contractor contact all 75 individuals and inform them of the available position. Those individuals who indicate that the position is of interest to them would be applicants. Those who indicate either expressly or passively that they would not be interested would not be applicants.

So the bottom line is: what does the above mean for contractors? First and foremost, it will mean a lot more work. For contractors who post jobs on their own websites, post jobs on external websites, or search external and internal websites for candidates, systems and processes will have to be developed, formalized, communicated, and then strictly adhered to in order to maintain conformance with the regulation.

Secondly, contractor must develop and adhere to a “good” application process.

It is recommended that a “good” application process have all of these characteristics:

1. Always list all jobs electronically (even if continuing to use traditional recruiting methods) so to be able to apply the “basic qualification” standard to identifying applicants.

2. Only accept applications when an opportunity exists.
3. Only accept applications for a particular position.
4. Use a “period active” on the application.
5. Define how applications will be accepted.
6. Require proper completion of the application.
7. Formalize the basic qualifications; make sure that they are job related.
8. Carefully screen applications/resumes against the basic qualifications.
9. Provide opportunities to self-identify.
10. Maintain accurate and complete records.

Only those applications/resumes that are properly completed and meet basic qualifications are applicants and should be included in the applicant flow log.

Ultimately, the definition of who’s an applicant, for Internet or electronic purposes, now appears to be as follows:

An applicant is an individual who properly expresses interest in a particular position through the contractor’s standard application process (using electronic and/or traditional means), who is considered by the contractor and who meets the basic qualifications of the position, and who maintains interest in employment throughout the selection process.

The regulation is to become effective 120 days following their publication on October 7, 2005. As such, contractors have until February 6, 2006 to put all of the systems in place to comply with these requirements.

If there are any questions or comments concerning anything contained above, they can be directed to this office at the address shown on page one, by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. This discussion of this matter is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.