

2006 OFCCP DEFINITION OF AN “INTERNET APPLICANT”

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A Best Practice Series

An ADP VirtualEdge White Paper

TABLE OF CONTENTS

I. Overview and Background	1
II. The New Definition of “Internet Applicant”	2
III. Implications for U.S. Employers	3
IV. Review of OFCCP Enforcement Audits	5
V. Conclusion	6



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OVERVIEW AND BACKGROUND

On October 7, 2005 the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a long anticipated official definition of an "Internet applicant" for employment. The definition was provided as an amendment to part 60-1 of Title 41 of the Code of Federal Regulations, "Obligations of Contractors and Subcontractors" under the heading of "Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes; Final Rule".¹

As the title implies, the purpose of issuing this regulation is to establish a standard against which federal contractors and subcontractors will be measured during enforcement (audit) procedures of the agency. According to this and other federal regulations, contractors and subcontractors must supply requested information upon request by the OFCCP. The new rule becomes effective February 6, 2006 and requires federal contractors and subcontractors to comply with specific identification and data tracking requirements for employment candidates meeting the new definition as an "Internet applicant".

U.S. labor law related to employment practices includes a regulation titled the Uniform Guidelines on Employee Selection Procedures (UGESP) which was issued in 1978 by the Equal Employment Opportunity Commission (EEOC), the Department of Labor, the Department of Justice, and the predecessor agency of the Office of Personnel Management. The UGESP allowed each of these agencies to provide further information, guidance or regulations as necessary to carry out their enforcement responsibilities. This new definition is an amendment to the OFCCP regulation written as an affirmation of the UGESP specifically for OFCCP enforcement purposes.

This paper offers ADP VirtualEdge's (ADP VE) interpretation of the latest developments in this area. This paper will review the specific requirements of the regulation and offer interpretations for compliance by contractors and subcontractors, referred to as "employers" for clarity throughout the remainder of the paper.

THE NEW DEFINITION OF “INTERNET APPLICANT”

The new definition for an “Internet applicant” is described as follows in the amendment to the code:

Internet Applicant. (1) Internet Applicant means any individual as to whom the following four criteria are satisfied:

- (i) The individual 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 Code of Federal Regulations (CFR) reference details several examples to illustrate how the new definition is to be applied by employers. It also includes discussion notes and responses related to comments, opinions, and objections submitted by a myriad of individuals and organizations when OFCCP requested public scrutiny and commentary of the proposed regulation amendment.

The end result for employers in the U.S. are changes in how candidate information is processed, stored, evaluated and retained for employment and compliance purposes. For purposes of this white paper, we will use two terms to describe the people considered by employers during the recruiting process:

- “Candidates” are those people an employer is considering in the sourcing portion of the recruiting process.
- “Applicants” are those people who were considered and found to meet the requirements of the new definition of an Internet applicant.

The regulation requires employers to solicit gender, race, and ethnicity information from each applicant or Internet applicant. As described below, employers who use an electronic database for recruiting purposes will likely use this new Internet applicant definition for all applicants.

IMPLICATIONS FOR U.S. EMPLOYERS

Interestingly, although the purpose of the amendment was to address who among candidates engaged in the employment process with companies through the Internet or “related electronic data technologies” would be considered an “Internet applicant” in an audit exercise, the true impact of the regulation is to affect all “applicants” for employment with any company which uses an electronic database for storing candidate and applicant information obtained in the course of recruitment. Further clarification provided by the OFCCP does not specifically define “related electronic data technologies” but provides guidance that this includes e-mail from either party, internal and external databases, job banks, electronic scanning technology, applicant tracking systems and service providers, and applicant screeners using various means to evaluate or test skills.

The regulation extends to all “applicants” including “Internet applicants” when employers consider candidates from both Internet or electronic sources and from non-electronic sources, or stores candidates from both sources in the same database and uses this “pooled” data to review, consider, and advance applicants through the recruitment process. Under the new amendment, candidates accepted and processed without Internet or electronic means will be exempted from the “Internet applicant” definition requirements if they are not merged into a pool of information from Internet or electronic sources. Also, candidates who submit their information unsolicited and do not express interest in a specific position will be exempted from the requirements if the employer has an established process for consistently rejecting unsolicited candidate information from any consideration. As with all employment practices, there is an emphasis on being consistent. However, once an employer reviews or considers any candidate using an Internet or electronic process with regard to a particular position, that candidate becomes an applicant under this new definition.

Thus, the first implication for employers is that this new amendment applies in reality to all applicants considered using Enterprise Recruiting Software, Applicant Tracking Software or similar electronic database automated processes. The OFCCP will apply this new definition to all applicants during compliance audits and actions.

The second implication of the new definition is that OFCCP will extend scrutiny to the process employers use to search and review candidates. The OFCCP interpretation of the new regulation defines this process of reviewing and “considering” candidates as a recruiter searches an internal database as one which supports the determination of “considered” candidates to be “applicants”.

As electronic databases became the norm for employers seeking an effective means for managing their candidate pool, recruiters became very comfortable defining a variety of search queries to review and consider candidates during the recruiting process. The OFCCP states that the new regulation requires employers to be able to produce all search queries and results after the new rules become effective on February 6, 2006. Gone are the days of free range search practices. Recruiters must document what position they are searching and considering candidates for during each search of the database; and this information must be retained for compliance purposes in the event OFCCP auditors request to review the data. Also, search criteria must fall within the definition of basic qualifications. When searching external databases such as job board databases, candidates who meet the basic qualifications of the position must be retained and documented for purposes of this definition. Whether searching an internal or external database, the information required for compliance includes retaining the resume or profile of candidates considered, recording the date the resume was added to the database, recording information identifying the candidates contacted, documentation of the position for which the search was made, the substantive search criteria used, and the date the search is conducted.

The third implication for employers in this amendment is the definition of the “basic qualifications” for each position in the company. The new amendment requires employers to be more specific in the definition, publication, and application of the “basic qualifications” they require candidates to possess in order to be hired in a position. The amendment also specifically addresses hires which occur before any formal advertising of the opening have occurred and requires employers to carefully “establish the qualification criteria by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that position.”

Whether a formal requisition exists or not, these basic qualifications must be defined before candidates are considered. Candidate screening, whether by recruiter review of a resume, test assessment, or verbal screening interviews, must be effectively related to the “basic qualifications” for the position. It is often said that when screening and interviewing, “if it isn’t job related, don’t ask”, this approach should be modified under the new amendment to say, “if it isn’t related to the basic qualifications defined for the position, don’t ask.” Thus, job descriptions, assessments, screening, and interviewing will all need to be scrutinized to ensure compliance with the new amendment.

Finally, the new amendment requires continued careful documentation of the information submitted by candidates. Candidates will not be considered “applicants” if they remove themselves from consideration by stating a requirement for a particular salary, location, or other condition of employment which is not offered for the position. However, the burden will be on employers to produce evidence that candidates withdrew from consideration on this basis.

REVIEW OF OFCCP ENFORCEMENT AUDITS

In preparation for compliance with the new amendment, employers should consider the way they may be approached by OFCCP during a compliance audit and take measures to ensure they are able to respond appropriately.

At any given time OFCCP monitors for compliance with a company's Affirmative Action Plan (AAP) and evidence of systemic hiring discrimination by evaluating the data submitted by employers on the annual EEO-1 form using statistical and other analytical techniques.

If an employer is selected for further review by OFCCP, the next step usually involves a "desk audit" which is an off-site process. OFCCP sends the selected employer a "scheduling letter" asking for specific data related to applicants and hires for a specified period of time.

Upon analysis of this data OFCCP will decide whether to conduct an on-site investigation. The latter will typically include requests for, and review of the required data for candidates who were considered whether or not they were further defined as "applicants."

In the case of either type of audit, employers must be prepared and able to submit the data requested.

CONCLUSION

The new amendment requires employers who utilize Enterprise Recruiting Software, Applicant Tracking Software, or other electronic database tools to ensure that their recruiting process includes:

- Careful definition of the basic qualifications required for each position in the company before candidates are considered
- Candidate and applicant information storage and retrieval capability
- Tracking and storage of search queries run on the database and the results obtained
- Solicitation of race, gender, and ethnicity information from applicants (on a voluntary basis)

Failure to comply with the requirements of OFCCP regulations including this amendment can result in substantial financial penalties and punitive damages for employers. Likewise, the effects of negative news coverage of such a failure could be equally or more damaging in terms of the long-term effects upon relationships with consumers, customers, and suppliers.

Careful review of current recruiting processes and practices, specific training for all participants in the recruiting process, and implementation of required changes to ensure compliance is necessary for all U.S. employers to protect the interests of their shareholders.

¹ Federal Register: October 7, 2005 (Volume 70, Number 194, pages 58945-58963. Available online: Federal Register Online via GPO access, <http://www.dol.gov/esa/regs/fedreg/final/2005020176.pdf>.



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