Paul Hastings
ATTORNEYS

October 2005

StayCurrent
A Client Alert from Paul Hastings

# OFCCP Issues Final Rule: Federal Contractors Face New Record-Keeping Challenges Dealing with Internet Applicants

**Nancy L. Abell, Jon A. Geier and Catherine Caouette**

After a decade of discussion, and a full 18 months after publishing its Notice of Proposed Rulemaking ("NPRM"), on October 7, 2005, the Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") issued its final regulations on:

- the definition of Internet Applicant;[1]
- the obligations of federal contractors and subcontractors (collectively referred to as contractors) to solicit race, gender, and ethnicity data from Internet Applicants;[2] and
- record-keeping requirements for contractors who solicit or accept expressions of interest via the internet or related technologies.

*See* Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes, 70 Fed. Reg. 58,946 (Oct. 7, 2005) (to be codified at 41 C.F.R. pt. 60-1) (hereinafter the "regulations").

The regulations address issues that contractors have grappled with as technology has increasingly been used in recruitment efforts. In addition to dealing with unsolicited e-mail resumes, many contractors today (a) maintain internet web sites to solicit prospective employees, (b) utilize internal resume database software that can access hundreds of thousands of resumes at a time, and (c) identify candidates for employment via a proliferation of third party resume banks (e.g., hotjobs.yahoo.com, Monster.com). Managing the enormous volume of potential candidates while complying with the OFCCP's record-keeping requirements is a challenging burden. The regulations become effective February 6, 2006.

## Who is an Internet Applicant?

The new regulations define an "Internet Applicant" as someone who fits the following four criteria:

(1) the individual submits an "expression of interest" in employment 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 that he or she possesses the "basic qualifications" for the position; and
(4) at no point in the selection process prior to receiving an offer of employment does the individual remove him or herself from consideration or otherwise indicate that he or she is no longer interested in the position.

70 Fed. Reg. at 58,961 (to be codified at 41 C.F.R. § 60-1.3(1)). The discussion that accompanies the final regulations includes guidance as to each of these components.

### *Submitting an "Expression of Interest"*

In the new regulations, OFCCP creates a distinction between "Internet Applicants" and traditional "applicants." Contractors, however, often use both internet and related electronic technology and more traditional paper methods (e.g., resumes mailed in or paper applications) to identify candidates for the same position. Thus, the regulations provide that if a contractor uses both means to recruit, then all who make expressions of interest in that position will be considered "Internet Applicants"[3] as long as the individuals meet all remaining elements of the definition.

The only time "applicants" are not "Internet Applicants" is when the contractor solicits and accepts expressions of interest only through non-internet or related data technologies. The agency provides no definition of a non-Internet Applicant but, presumably, the basic qualifications test (discussed below) will **not** apply to traditional applicants. For those positions where no electronic technology is involved, anyone who expresses an interest in employment is in the applicant pool from which required demographic information must be solicited.

The OFCCP intentionally left the term "related electronic data technologies" undefined so that the terminology would not be quickly outmoded by new technology. The commentary states that the term includes expressions of interest submitted by e-mail and through resume databases, job banks, electronic scanning technology, applicant screeners, and applicant service providers. As new technologies enter the market, the OFCCP intends this regulation to cover those technologies.

In order to reduce and therefore more efficiently manage an applicant pool, a contractor may dictate the manner in which it chooses to receive expressions of interest for employment. Only those candidates who comply with the contractor's specified procedures will have properly "expressed interest" in a position.[4] Any such limitation must be applied uniformly and consistently. Similarly, just as a contractor may decline to consider unsolicited paper submissions, so too may a contractor refuse to consider unsolicited electronic expressions of interest, as long as this is done uniformly and consistently.

### *"Considered for" Employment*

An individual is not an "Internet Applicant" unless he or she is "considered for" a particular position. An individual is not "considered" unless the contractor assesses the substantive information the individual provides about his or her qualifications for that position.

The regulations provide a number of ways in which the contractor may limit the candidates that meet the "considered for" prong of the definition. In addition to establishing standard procedures for the consideration of candidates for employment (e.g., the individual must indicate a particular position on the expression of interest and follow the application procedures specified), the regulations permit the use of data management techniques. Thus, a contractor may use random sampling or absolute numerical limits (e.g., taking the first 30 expressions of interest posted on hotjobs.yahoo.com or Monster.com), so long as the technique does not depend upon an assessment of an individual's qualifications.[5]

After the contractor applies its standard procedures and undertakes its data management strategies, the remaining pool of people will be deemed to have been "considered" for the position. Once an individual is "considered" for a position by the contractor, certain record-keeping obligations created by the new regulations (discussed below) are triggered, regardless of whether the individual qualifies as an Internet Applicant.[6]

### *Meeting "Basic Qualifications"*

An individual's expression of interest must reveal that the candidate meets the contractor's established "basic qualifications" in order for him or her to be an Internet Applicant. Basic qualifications mean qualifications that

(a) the contractor advertises for a position (e.g., posts on its web site) or
(b) the contractor establishes in advance before considering any expressions of interest, *and*
(c) are: (i) non-comparative; (ii) objective; and (iii) relevant to performance of the particular position and that "enable the contractor to accomplish business-related goals."

Requiring three years of relevant experience is non-comparative; being among the candidates with the top five number of years of experience is comparative. Basic qualifications are objective if a third-party, who has the benefit of the contractor's technical knowledge, would be able to evaluate whether the candidate possesses the qualification. Relevant to the performance of the particular position does not mean "job related" as that term is used in the Civil Rights Act of 1991, but rather is intended to provide a reasonable limit on the nature of what constitutes a basic qualification.[7]

Basic qualifications are the core innovation of the new regulations, and represent the OFCCP's recognition that qualifications can be used by a contractor to limit the number of candidates who become "Internet Applicants." One key example set out in the commentary provides that a contractor may add basic qualifications sequentially when searching a resume database for candidates for a position in order to reduce a candidate pool to a manageable size. Thus, a contractor can initially key word search (i) a Master's degree in engineering, (ii) certification in avionics engineering, and (iii) fluency in an advanced computer language, then add three years of experience to further reduce the pool, and, thereafter, add one year of supervisory experience to narrow the pool still further. All five of these qualifications would have to have been identified in the job posting or otherwise established in advance of the keyword search, in order to be deemed "basic qualifications" under the regulations.

### *Removal from Consideration*

An individual is not an Internet Applicant if the contractor concludes that he or she has removed him or herself from further consideration or is otherwise no longer interested in the position. The new regulations provide that a contractor is permitted to conclude that an individual is no longer interested in the position on the basis of statements made in the expression of interest that conflict with the features of the position. This includes geographic limitations, salary requirements, or other work requirements that are incompatible with the position.[8] Further, if a candidate is repeatedly non-responsive to inquiries from the contractor about interest in the position, the individual has removed him or herself from consideration. In order to remain in compliance, a contractor must consistently exclude from consideration individuals who indicate disinterest in the position in one of the ways described above. Records demonstrating the attempted contacts should be retained.

## Record-Keeping Requirements

A contractor must maintain certain records of all individuals who make "expressions of interest" through the internet or related electronic technologies whom the contractor "considers for" a position, not just those that ultimately qualify as Internet Applicants.

For internal resume databases a contractor must

- keep records identifying candidates contacted regarding their interest in a position;
- keep a record of each resume added to the database and the date it was added; and
- maintain a record of each search of the database, including:
  - the position for which the search was made;
  - the substantive search criteria; and
  - the date of the search.

For external resume databases,[9] a contractor must retain for each

position for which it uses the database:

- a record of each search;
- the substantive search criteria used;
- the date of the search;
- the resumes of any candidates who meet the basic qualifications for the position and who were "considered" by the contractor; and
- records identifying candidates contacted regarding their interest in the position.

## Solicitation of Race, Gender and Ethnicity Data from Internet Applicants

The new regulations require contractors to solicit race, gender, and ethnicity data from all Internet Applicants (or from all applicants using traditional methods of expressing an interest, for those openings where those are the sole methods of making an expression of interest) – but does not specify a particular point in the hiring process when this must be done. Contractors may use the same methods of collecting this data on Internet Applicants that they have used for traditional applicants, including e-mail, a post card, or an electronic "tear-off sheet." The commentary to the new regulations reaffirms that self-reporting or self-identification is the preferred method for collecting race, gender, and ethnicity data. If an Internet Applicant declines to self-identify, but appears in person during the hiring process, the contractor may gather the data through visual observation.[10] Significantly, during a compliance evaluation, when reviewing a contractor's adverse impact analysis with respect to internet hiring, the OFCCP will require only the records related to the analysis of Internet Applicants. Where employment tests are used as an employee selection procedure, however, the OFCCP will require records necessary to determine the impact of the test, regardless of whether the tested group are all Internet Applicants.

## Strategic Considerations for Contractors

Although the record-keeping obligations of the new regulations are significant, many contractors have developed technology internally or have purchased products from vendors that will facilitate compliance with many of the new requirements, including an ability to track decisions at each step in the selection process (e.g., key word searches, selection of individuals for interview, offer decision). A number of important strategy considerations will require immediate attention:

- Contractors should review existing policies or put in place policies governing unsolicited resumes or other expressions of interest and application procedures, and make sure such policies and procedures are understood and consistently applied. Permitting exceptions to such policies and procedures may prohibitively expand the need for demographic data solicitation and record-keeping obligations for all positions.

- Contractors should immediately review their job postings and requisitions for the description of the basic qualifications of each job, to ensure they are non-comparative, objective, and relevant to the performance of the job. The careful construction of such descriptions will assist contractors in managing applicant flow.

- Contractors who rely on tests in their hiring process may want to re-examine the role or sequence of use of tests. In large applicant pools, contractors may want to avoid using tests before they review the basic qualifications of candidates. Otherwise, the test will be considered a selection procedure, and the obligation to solicit demographic data will attach to everyone tested.

- Contractors will want to consider the point at which the race, gender, and ethnicity data will be solicited from candidates. Many contractors that recruit online solicit this information from candidates when they enter the system. Although it may require significant systems modifications, contractors may want to consider delaying the solicitation of this information, consistent with the new regulations, until a candidate's basic qualifications are reviewed and the candidate has become an Internet Applicant.

- Contractors should carefully consider appropriate strategies for their use of external resume databases. Development of appropriate random sampling techniques or an absolute limit on the number of resumes obtained from an external database should be decided upon in advance of visiting an internet job bank/resume site. Alternatively, even though greater record-keeping burdens may result, contractors may choose to use comparative qualifications when searching external databases, when identification of the most qualified candidates available is paramount.

- Contractors will want to pay particular attention to their adverse impact analysis of hiring. The OFCCP's commentary provides that it will use census and other labor market data to assess a contractor's hiring practices. In the context of the new regulations, the focus of the OFCCP's scrutiny will be the contractor's rejection rate of qualified Internet Applicants and the race/gender mix of Internet Applicants as compared to the availability of women and minorities for the particular jobs in the relevant recruiting market. The agency affirmed in the new regulations that two standard deviations will continue to be considered "statistically significant," but stated that it may focus its investigative resources based on factors such as larger statistical disparities or a larger potential affected class. Thus, contractors with large numbers of applicants for a particular job may want to compare their hiring for the job with the relevant external labor market availability.

- The new regulations become effective on February 6, 2006. Contractors who use calendar year Affirmative Action Plan years may want to consider either extending their 2005 plans though that effective date, or implementing the new rules at the start of a 2006 calendar plan year.

The new regulations raise as many questions as they answer. Contractors will need to approach compliance with the new definition and record-keeping requirements strategically. SC

**NOTES**

1. Three weeks before the OFCCP issued its NPRM, the so-called Uniform Guidelines agencies (OFCCP, EEOC, DOJ and OPM) issued their own Notice of Proposed Rulemaking seeking to add four questions to the Q&As on the Uniform Guidelines, all related to the handling of Internet Applicants by all employers subject to Title VII of the Civil Rights Act. These Q&As have not yet been issued in final form. The new regulations apply only to federal contractors.
2. A federal contractor ("contractor") is an entity that contracts with an Executive branch agency, department, establishment, instrumentality or wholly owned Government corporation for the purchase, sale, or use of personal property or non-personal services, valued at over $10,000. See 41 C.F.R. §§ 1.3, 1.5 (2004). A subcontractor is an entity or person that provides a federal contractor with personal property or non-personal services which, in whole or in part, are necessary to the performance of any one or more federal contracts. 41 C.F.R. § 1.4 (2004)
3. This was a modification from the NPRM, which would have required a contractor to deal separately with electronic expressions of interest and traditional expressions of interest, even if they related to the same identified position.
4. Although there is no guidance precisely on point, there is nothing in the regulations that would prohibit a contractor from establishing a uniform and consistent procedure governing internet expressions of interest, and a different, but still uniform and consistent procedure governing expressions of interest through traditional methods.
5. The commentary to the regulations provides that data management techniques are not "appropriate" if they are either not facially neutral or if they produce disparate impact based on race, gender, or ethnicity. More significantly, the commentary provides that the agency may compare the percentage of women and minorities in the final applicant pool with labor force statistics in the relevant labor market to assess the contractor's recruitment and hiring practices. Data management techniques used by a contractor will likely come under scrutiny in such an assessment.
6. This is one of the areas where the new regulations speak to pre-employment testing programs. Contractors may be required to solicit and retain records of the demographics of individuals who take a test used to screen them for employment, even if they fail to qualify as Internet Applicants. The commentary to the final regulations provides the following example. First, if 100 people take an employment test, but the contractor only considers the test results of the fifty candidates who otherwise meet the basic qualifications for the job, the employer must only solicit race, gender, and ethnicity data from the fifty candidates whom it then considered. In contrast, if the employer only reviews the basic qualifications of those candidates who passed the test, then the contractor must solicit the demographic data for all 100 who took the test, because in this situation the employer used the test as a selection procedure.
7. The OFCCP specifically deleted the term "job-related" which appeared in its NPRM. The commentary to the regulations expressly rejects the position of public interest groups who advocated the incorporation of the "job-related" and "consistent with business necessity" standard in the definition of Internet Applicant. The agency stated that it did not intend to limit qualifications that would be considered "basic qualifications" only to those that would meet the "business necessity" standard.
8. The commentary to the regulations states that salary or geographic requirements do not constitute a basic qualification, but rather enter into the definition only as a means by which a candidate removes him or herself from consideration.
9. External resume databases is not a term defined by the regulations, but certainly includes databases like hotjobs.yahoo.com, Monster.com or America's Job Bank.
10. In April 2004, the OFCCP issued a Policy Directive regarding "Contractor Data Tracking Responsibilities." *See* OFCCP Order ADM 04-1. In that directive the agency clarified that a contractor is not required to guess at the race, gender, or ethnicity of an applicant who refused to self-identify. Such applicants should be logged as unknown and should not be included in any adverse impact analysis.

*If you have any questions regarding affirmative action compliance, or employment related matters in general, or if you would like Paul Hastings to prepare your affirmative action programs, please don't hesitate to contact any of the following attorneys:*

**Atlanta**
Maureen O'Neill (404) 815-2219
maureenoneill@paulhastings.com

**Los Angeles**
Nancy Abell (213) 683-6162
nancyabell@paulhastings.com

Holly Lake (213) 683-6179
hollylake@paulhastings.com

**New York**
Cheryl Saban (212) 318-6022
cherylsaban@paulhastings.com

**Orange County**
Steve Berry (714) 668-6246
steveberry@paulhastings.com

**Palo Alto**
Brad Newman (650)320-1827
bradfordnewman@paulhastings.com

**San Diego**
Mary Dollarhide (858) 720-2660
marydollarhide@paulhastings.com

**San Francisco**
Kathryn Kettler (415) 856-7060
kathrynkettler@paulhastings.com

Sana Swe (415) 856-7090
sanaswe@paulhastings.com

**Stamford**
Kenneth Gage (203) 961-7475
kennethgage@paulhastings.com

**Washington, D.C.**
Barbara Berish Brown (202) 551-1717
barbarabrown@paulhastings.com

Jon Geier (202) 551-1722
jongeier@paulhastings.com

StayCurrent is published solely for the interests of friends and clients of Paul, Hastings, Janofsky & Walker LLP and should in no way be relied upon or construed as legal advice. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. Paul Hastings is a limited liability partnership. Copyright © 2005 Paul, Hastings, Janofsky & Walker LLP.