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FAQs Round Two: OFCCP Elaborates on Its Internet Applicant Regulations

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On April 4, 2006, the Office of Federal Contract Compliance (“OFCCP”) published a number of additional Frequently Asked Questions and Answers regarding the new Internet Applicant requirements. The FAQs can be found at: <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm>. In contrast to the initial FAQs that were published, which generally repeated the commentary to the final rule, the new FAQs address some of the issues with which contractors have struggled, and have been organized by topic in order to be more helpful.

We summarize the new answers and highlight the likely practical impact of the guidance below, as well as noting some unanswered questions still awaiting clarification. If you have questions that you would like answered, please let us know, as DOL has indicated that it will entertain requests for further FAQs that will help the contractor community with compliance.

Application of the Regulations:

- The guidance reminds contractors that expressions of interest made through any electronic means are considered “internet” expressions of interest. This includes resumes received by facsimile, as well as any other electronic method. The regulations apply on a position by position basis – to those positions for which the contractor accepts electronically communicated expressions of interest. The mere fact that a position is advertised over the internet or an electronic means is not relevant; the question is how expressions of interest are received or accepted. The fact that faxed resumes can be considered internet expressions of interest does not require a contractor to accept such expressions of interest. A contractor can use a consistent protocol of requiring candidates to express their interest through an apply on line system.
- The regulations became effective February 6 of this year, but for enforcement purposes, the agency decided not to cite contractors for technical recordkeeping violations for the first 90 days, as long as they were making a good faith effort to comply. We believe that this pragmatic attitude will continue to influence enforcement decisions but do not believe there will be any official reprieve or delay in the effective date of the regulations.

Basic Qualifications:

- The new FAQs reiterate that basic qualifications (“BQs”) must be established in advance, before job seekers are considered for a position. BQs cannot be modified during the selection process merely because of the size of the pool of job seekers who possess them.
- Contractors are not required to make decisions based only on the basic qualifications. The contractor can apply other comparative qualifications; however, it must define as its applicant pool for that position and keep required demographic information from everyone who possesses the basic qualifications who is considered by the contractor and meets the other criteria for an Internet Applicant.
- Contractors can use different BQs for different positions with the same job title as long as for each particular position, the basic qualifications are established in advance and meet the definition for proper BQs.
- The guidance reiterates that a pre-employment test is not a basic qualification and that demographic information must be retained about the individuals who take a test used to screen individuals for employment, whether they otherwise meet the definition of an Internet Applicant or not.
- Contractors do not have to search for all of the basic qualifications for a job at once, but instead, may search for each qualification successively. The contractor may stop searching before seeking all of the basic qualifications, and use the resulting group as its applicant pool. Demographic data must be solicited for all of the individuals that meet the subset of the basic qualifications that is used to determine who will be considered an applicant for that job.

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- In perhaps the most important aspect of the new guidance, when successive searches are done for the same position, only the results of the *last search* for basic qualifications must be retained, though information must be kept about each search itself – the position, the date, and the substantive criteria. Despite some ambiguity on this point in the regulations themselves, discussions with DOL officials suggest that only the resumes of those job seekers who have the basic qualifications and are considered by the contractor have to be retained. This makes sense and should reduce a huge amount of unnecessary duplication in resume retention.
- Contractors may screen for basic qualifications through questions in on-line applications, as long as they do so consistently and uniformly. This is an effective way to ascertain if job seekers have the basic qualifications, as it has become apparent that key word searches often are not an effective device for ascertaining whether a job seeker has certain types of basic qualifications such as a specific length of job-related experience. To the extent a key word search turns up “false positives” (i.e. resumes that appear to meet the BQs based on key word searches, but do not meet them upon review of the resume) a contractor may dispose of the candidate as “not meeting BQs” and not include the individual as an applicant in the adverse impact analysis.
- A welcome interpretation of the word “consideration” is found in the guidance. When contractors search external web sites for individuals with certain basic qualifications or by key words, job banks often send short resume summaries to the contractor. Reviewing these summaries to determine whether the job seeker actually possesses the basic qualifications is not “consideration” such that the individual becomes an Internet Applicant and his or her resume has to be retained. For example, in seeking a hedge fund manager, a contractor can review the short summary or open the resume to check to see whether the use of the word hedge has returned resumes of gardeners. If so, those can be discarded as not “considered” and not possessing basic qualifications. On the other hand, if the contractor looks at which of the job seekers are most interesting or attractive on a comparative basis, that is “consideration” of that individual and everyone who met the criteria that produced that short resume is an Internet Applicant for that position.
- The only examples of data management techniques given by the FAQs are random sampling, absolute numerical limitations, and order in which expressions of interest are received by the employer. Contractors are free to devise or adopt other data management techniques. For example, for a position where an employer would not be willing to pay travel expenses for someone to be interviewed (or moving expenses if they got the job), it may be appropriate to use a geographic limitation as a data management technique. In order not to be surprised during an audit, a contractor may choose periodically to check how the resulting job seeker or applicant pool compares with the relevant labor force, and with applicant pools for positions where data management techniques were not applied.
- The guidance *does not* say whether using a data management technique of the order in which the resumes are returned to the contractor by a third party provider, if it is based on the number of “hits” on the word search, is legitimate. This remains a concern because many if not all of the relevant search engines incorporate such a feature.

Removal From Consideration:

- The FAQs provide many ways in which contractors may structure their processes to put the onus of expressing interest in a particular position on the job seeker him or herself. The contractor can set up a protocol under which all job seekers must go to the employer website and apply for a particular position in order to be considered for employment. Those who do not do so, because they are not interested in working for the contractor or are not interested in the open positions on the website, are not applicants, and their resumes need not be retained. Contractors who send emails to those who come up in external or internal word searches or whose resumes are reviewed to ascertain whether they possess the BQs for certain generic types of jobs that the contractor frequently fills are not “considering” them for a particular position by doing so, and the individuals do not become internet applicants unless and until they express an interest in a particular position by following the contractor’s protocol and they are found to possess the BQs for that particular job.
- Requiring online application for a particular position is an effective protocol for recruiting and managing expressions of interest. The key is that the contractor may not consider anyone who does not go to the website and apply for a specific position. Managers must be trained to follow the rule and not to consider individuals who have not gone to the website and followed the protocol.
- The FAQs indicate that employers may require candidates who express interest in employment at job fairs to apply for specific positions online as well. If that job seeker does not do so, he or she is not an Internet Applicant for that position. Employers must consistently and uniformly follow this procedure. If they make comparative assessments at the job fair or make job offers at that time, then all of the job seekers who attended the fair would arguably be applicants for that position.

Data Management:

- The FAQs note that under normal OFCCP document retention rules, contractors must retain records that they create memorializing data management techniques, even though there is no specific mention in the Internet Applicant regulations of this point. The contractor can decide how many expressions of interest it will consider, as long as the resulting pool is appropriate for the job and for the size of the original pool. If the pool that is moved forward to the next step is not reflective of the demographic mix of the relevant labor force, OFCCP will try to determine whether the reduction of the pool through data management has been accomplished in some way that raises concerns.

- Another way that contractors may properly reduce the applicant pool is to conduct telephone interviews to determine whether an individual is interested in the location, salary, hours or other features of the position prior to “considering” that applicant. Thus, a telephone screening interview may allow the contractor to determine which individuals have removed themselves from consideration. Any statement of withdrawal, any demographic information already collected, and test results for such an individual must be kept. If the contractor does not solicit demographic information until after a telephone screen that removes the individual from consideration, it need not collect such information from those who have withdrawn and therefore do not meet the definition of an Internet Applicant.

Recordkeeping:

- Records must be kept of all who are contacted with respect to a particular position, which would include the screening interview of Internet Applicants to ascertain interest.
- The guidance says that expressions of interest that were considered must be retained even if the Internet Applicant later withdraws. Therefore, if the determination of the individual’s lack of interest is made after he or she becomes an Internet Applicant, the expression of interest must be retained though the individual will not appear in the adverse impact analyses for that position.

Enforcement:

- In addition to reviewing contractors’ selections from their Internet Applicant pools, the guidance makes clear that OFCCP intends to check the application of basic qualifications for adverse impact on protected groups. The agency will compare a contractor’s Internet Applicant pools with the available labor pool to determine whether a disparate impact was caused by the imposition of the basic qualifications. If there is a disparate impact, the agency will demand that the contractor show the necessity for the qualification causing the impact. As noted above, the OFCCP will evaluate the adverse impact of data management techniques in a similar fashion, to assure itself that its definitions and the techniques it permits contractors to use in creating applicant pools are not improperly eliminating disproportionate numbers of female or minority job seekers from consideration.

If you have any questions regarding OFCCP’s new FAQs on Internet Applicant Regulations, please don’t hesitate to contact any of the following attorneys:

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