



OFCCP Issues Regulation Defining "Internet Applicant"

Insights

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On October 7, 2005, the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) issued new regulations defining "internet applicant" and amending the recordkeeping requirements for federal contractors with regard to internet-based job applications. This Article addresses some of the frequently asked questions regarding these new regulations.

Is the "Old" Definition of "Applicant" Gone?

Absolutely not. Before focusing solely on the new term "internet applicant," government contractors should note that the OFCCP also will continue to enforce its regulations regarding "traditional applicants." While the OFCCP never had a regulatory definition of the term "applicant" prior to the new regulations, the OFCCP long relied on interim (oral) policy, the EEOC's Uniform Guidelines on Employee Selection Procedures and case law in determining who was an applicant. The "traditional applicant" is an individual who is minimally qualified for the opening at issue, applied for the opening and was considered by the employer for the opening. This definition remains alive and well for any employer who does not accept an "expression of interest" through electronic means for a particular job. For example, an employer who runs an advertisement in the newspaper and only accepts hard copy applications, only has "traditional applicants" and does not have any "internet applicants." Thus, the long standing practices regarding "traditional applicants" applies to this particular employment transaction.

Under the New Regulations, Who is an "Internet Applicant"?

An "Internet Applicant" is any individual as to whom the following four criteria are satisfied:

- (1) the individual submits an expression of interest in employment through the Internet or related electronic data technology (i.e., email, resume database, job bank, electronic scanning technology, applicant tracking systems, applicant screening services);
- (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 that he or she is no longer interested in the position.

What is “An Expression of Interest in Employment”?

An “expression of interest” in employment includes all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the Contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection process for that particular position.

Some examples include:

(1) **Contractor A** posts on its website an opening for a Mechanical Engineering position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. The website also advises potential applicants that they can send a hard copy resume to the HR Manager with a cover letter identifying the position for which they would like to be considered. Because Contractor A considers both Internet and traditional expressions of interest for the Mechanical Engineer position, both the individuals who completed a personnel profile and those who sent a paper resume and cover letter to Contractor A meet this part of the definition of an Internet Applicant for this position.

(2) **Contractor B** posts on its website an opening for an Accountant II position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. Contractor B also receives a large number of unsolicited paper resumes in the mail each year. Contractor B scans these paper resumes into an internal resume database that also includes all the on-line profiles that individuals have completed for various jobs (including possibly for the Accountant II position) throughout the year. To find potential Applicants for the Accountant II position, Contractor B searches the internal resume database for individuals who have the basic qualifications for the Accountant II position. Because Contractor B considers both Internet and traditional expressions of interest of the Accountant II position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to the employer meet this part of the definition of an Internet Applicant for this position.

(3) **Contractor C** advertises for Mechanics in a local newspaper and instructs interested candidates to mail their resumes to the employer’s address. Walk-in applications are also permitted. Contractor C considers only paper resumes and application forms for the Mechanic position. Therefore, no individual meets this part of the definition of an Internet Applicant for this position.

How will the OFCCP define “Basic Qualifications”?

Under the new regulations, “basic qualifications” means qualifications that either the Contractor advertises or posts on its website to potential applicants 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 for that particular position. Where the Contractor does not advertise but instead uses an alternative device such as an external resume database to find individuals for consideration, the qualifications must be 1) non-comparative, 2) objective and 3) relevant to the performance of the particular position. By way of explanation, a qualification of three

years experience is non-comparative (allowed) while having the most years of experience of a pool of five applicants is a comparative qualification (not allowed). An example of an objective, non-comparative qualification would be a "Bachelor's Degree in Accounting" whereas "A Technical Degree from a good school" is not objective.

What new recordkeeping requirements have been added by the new Regulations for Contractor's Own Resume Databases?

For internal databases, Contractors must retain:

- (1) each resume added to the database,
- (2) the date each resume was added to the database,
- (3) the position for which each search of the database was made,
- (4) the substance of search criteria used for all searches, and
- (5) the date of all searches.

For external databases, Contractors must retain:

- (1) the position for which each search of the database was made,
- (2) the substance of search criteria used for all searches,
- (3) the date of all searches, and
- (4) the resumes of job seekers who met the basic qualifications of the particular position who are considered by the Contractor.

How long do the Contractors have to retain these records?

(1) If a Contractor has more than 150 employees and government Contract of at least \$150,000, the Contractor must maintain the employment records for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later.

(2) If the Contractor has fewer than 150 employees or does not have a government contract of at least \$150,000, the minimum record retention period is one year from the date of the making of the record or the personnel action involved, whichever occurs later.

When do these new regulations take effect?

These new regulations take effect on February 6, 2006; 120 days after the final regulations were issued on October 7, 2005.

What employment practices need to be reviewed before these regulations take effect?

Contractors need to review and evaluate their existing recruitment and selection processes. At a minimum, this review includes, such practices as:

- (1) How "basic qualifications" for positions are established prior to initiating recruitment efforts;

- (2) How and when in the process to solicit the required demographic information;
 - (3) How to evaluate “expressions of interest” for “basic qualifications”;
 - (4) How to structure and conduct job searches when using internal or external databases;
- and
- (5) How to store the required documentation.

What kind of steps can a Contractor do to ease the burden of these new regulations?

Among other things, Contractors can consider the following actions:

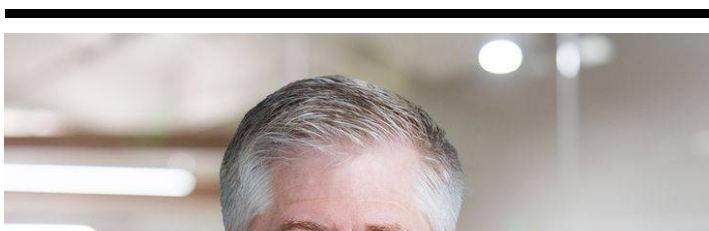
- (1) establishing and strictly following a protocol for accepting applications or “expressions of interest” for a particular position;
- (2) setting “basic qualifications” narrowly;
- (3) using data management techniques, such as random sampling or absolute numerical limits to reduce the number of individuals who meet the basic qualifications that the employer must consider. For example, the Contractor may decide to review the first 50 resumes based on some neutral ordering of that first 50, such as alphabetically by name or by submission date;
- (4) excluding candidates where the requisite “expression of interest” is lacking. For example, by setting salary requirements, Contractors can exclude applicants whose demands are outside the desired range; or by defining the location or type of work, Contractors can exclude applicants who on the face of their applications or submission indicate they would not be willing to work in such locations or types of work; and
- (5) excluding all unsolicited resumes.

Of course, these policies or procedures must be in place in advance and be applied consistently to avoid running afoul of these regulations.

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Numerous regulations, interpretations, and other authorities must be evaluated in applying these principles. This article is intended for general information purposes only. It is not a complete or all-inclusive explanation and it should not be construed as legal advice on any specific facts or circumstances. You are urged to consult legal counsel concerning your situation and any specific legal questions you might have.

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