

## THE “APPLICANT” ACCORDING TO THE OFCCP

As we reported last week, on October 7, 2005, the OFCCP issued its much-anticipated final rule on the definition of “Internet applicant.” While the final rule does not differ significantly from the proposed rule, the OFCCP did incorporate some important clarifications and distinctions in the final rule. Recognizing that contractors may need some time to bring their practices into compliance, OFCCP gave us **a little** time before compliance with the final rule is required; contractors will have to begin to comply with the new definition and record-keeping requirements by February 6, 2006.

### *The History:*

Prior to November 13, 2000, when Executive Order 11246 was amended, the OFCCP’s regulations did not expressly require that contractors maintain information about the gender, race, and ethnicity of applicants and employees. The 2000 regulations, however, required that covered contractors be able to identify, where possible, the gender, race, and ethnicity of each applicant for employment. As use of the Internet for job-seeking purposes skyrocketed, so did confusion about the applicability of this requirement to those who seek employment through non-traditional means. The OFCCP published its proposed rule defining “Internet Applicant,” on March 29, 2004.

### *The Final Rule:*

Under the new rule, an “Internet applicant” is one who:

1. Submits an expression of interest in employment through the Internet or other electronic data technologies;
2. The contractor considers for employment in a particular position;
3. By his or her expression of interest indicates that he or she possesses the “basic qualifications of the position;” and
4. At no point in the selection process (prior to receiving an offer of employment) removes himself or herself from consideration or otherwise indicates that he or she is no longer interested in the position.

### *Point-By-Point Analysis:*

***(i) “The individual submits an expression of interest in employment through the Internet or related electronic data technologies.”***

Perhaps the most difficult concept to grasp in the final rule is this: while the final rule appears at first glance to concern only “Internet applicants,” in actuality its coverage is more broad. If a search for a position yields applicants through both the Internet and traditional means, *this rule applies*. Here’s how:

In developing the final rule, the OFCCP addressed the concern that it would be difficult keeping up with two separate definitions of “applicant” – traditional “applicants” versus “Internet applicants” – with only the means that a job-seeker uses to apply for a position determining which definition applies. A provision in the final rule eliminates the “dual standard” for Internet versus paper applicants, but **only** with regard to positions where the contractor considers both Internet and paper expressions of interest. The net result is, if the contractor considers **only** paper expressions of interest for a position, then the Internet applicant definition does not apply. If **both** traditional applications and Internet expressions of interest are considered, the Internet applicant definition applies.

It is important to remember that **either** the “applicant” standard or the “Internet applicant” standard would apply for a position; one position cannot include applications maintained under both standards.

***(ii) “The employer considers the individual for employment in a particular position.”***

The final rule establishes that “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 agency explained that nothing in this rule would preclude a contractor from engaging in multiple searches of a resume database, as long as each of the search criteria fall within the definition of “basic qualifications” (basic qualifications are discussed in more detail below). Importantly, once a contractor conducts **any form** of comparative review of qualifications, the contractor has considered those potential applicants.

The rule goes on to explain: “A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position.” Thus, just as it has been important in the past to develop your company’s definition of “applicant,” it is now important to consider what protocols and procedures your company will utilize to deal with unsolicited technology-based resumes or applications that do not comply with posted requirements.

However, importantly, the OFCCP emphasizes that it is the contractor’s **actual practice** that determines whether the contractor has “considered” an expression of interest (and other similar expressions of interest). Therefore, the most carefully drawn protocols and procedures may not offer any certainty regarding which job-seekers a contractor actually considers for a position if the contractor makes exceptions to those protocols. In developing protocols, consider what your company can actually live with and abide by. Otherwise, you will be relying on a level of certainty based on your protocols that the OFCCP will not honor if your company has from time to time considered the unsolicited resume and thereby undermined the integrity of its protocols.

The OFCCP has established clearly that a contractor does not “consider the individual for employment in a particular position” by using data management techniques that do not depend on assessment of qualifications. Data management techniques would include random sampling or establishing numerical limits (such as considering only the first 30 applications received). Of course, OFCCP will not consider valid any data management technique that has an adverse impact on a protected group. Moreover, the protocol has to be uniformly and consistently applied to similarly-situated job seekers.

*(iii) “The individual’s expression of interest indicates the individual possesses the basic qualifications for the position.”*

The final rule provides a detailed definition of “basic qualifications.” Qualifications are “basic qualifications” if they are noncomparative, objective, and both relevant to performance of the job as well as allowing the contractor to accomplish a business-related goal. However, the final rule makes clear that employment tests used as employee selection procedures, including on-line tests, are not considered basic qualifications under the final rule (and thus, contractors are required to retain records about the gender, race, and ethnicity of employment test-takers who take an employment test used to screen them for a position).

Breaking down the definition of “basic qualifications” further, first, those qualifications must be either advertised to potential applicants or developed in advance, before considering any expression of interest. In the proposed rule, this prong of the definition was, “The individual’s expression of interest indicates the individual possesses the **advertised**, basic qualifications for the position.” However, recognizing that contractors may not advertise every position, the OFCCP removed “advertised” from the definition and the final rule provides an alternative way to address this element. If the contractor does not advertise for the position, the contractor can use “an alternative device to find individuals for consideration (for example, through an external resume database),” and the contractor can establish qualifications by making and maintaining a record of those qualifications for the position before considering any expression of interest.

Second, the qualifications established must be non-comparative. Requiring a set number of years of experience would meet this definition. On the other hand, a qualification that an individual have one of the top five number of years’ experience among a pool of job-seekers would be comparative and would not meet the OFCCP’s definition of “basic qualifications.”

Third, the qualifications must be objective. The final rule explains this prong by example: “‘a Bachelor’s degree in Accounting’ is objective, while ‘a technical degree from a good school’ is not.” Thus, if a third-party possessing the same technical knowledge as the contractor would be able to evaluate whether the job-seeker possesses the qualification without obtaining more information regarding the contractor’s judgment, preferences, etc., then the qualification is objective.

Fourth, the qualifications must be relevant to the performance of the particular position and, essentially, be business-related. In the proposed rule, the OFCCP had provided that basic

qualifications must be “job-related,” and then defined “job-related” as “relevant to performance of the job at hand and enabl[ing] the employer to accomplish business-related goals.” However, because the term “job-related” is also used in the Civil Rights Act of 1991, OFCCP determined that its use might create confusion and uncertainty, and instead simply used the language from the definition of “job-related.”

***(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.”***

This section of the definition is intended to provide affirmative guidance for how contractors can treat such indications of non-interest. According to the OFCCP, the wording of this element does not mean that there is a presumption that every individual who meets the definition of Internet applicant is deemed to be interested in the particular position. The indication that a job seeker has removed himself or herself from consideration could come in the form of the job seeker’s passive demonstration of disinterest or through an express statement of disinterest. It could also come in the form of statements on an application that indicate the job seeker’s salary requirements, relocation standards, or travel requirements are incompatible with the position.

Importantly, however, if the job seeker withdraws from further consideration **after** the point at which he or she has already qualified as an “Internet applicant,” the contractor must retain any race, ethnicity, or gender information which the individual already provided, as well as the individual’s expression of interest.

### ***Record-Keeping Requirements:***

Under the final rule, contractors must retain records of any and all expressions of interest received through the Internet or other electronic data technologies, including records such as on-line resumes or internal resume databases, and records identifying job seekers that were contacted regarding their interest in a particular position. With regard to internal resume databases, the contractor must maintain a record of (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 substantive search criteria used with regard to each search, and (5) the date of the search.

With regard to external resume databases (such as Monster.com), the contractor must retain the electronic resumes of job seekers who met the basic qualifications for the particular position and who were considered by the contractor along with records identifying (1) job seekers contacted regarding their interest in a particular position, (2) a record of the position for which each search of the database was made, (3) the substantive search criteria used, and (4) the date of the search. These records must be maintained, regardless of whether the individual qualifies as an Internet applicant under the definition in the final rule.

The OFCCP explicitly rejected the suggestion that contractors should only be required to maintain records related to individuals who were actually considered for a particular position. The OFCCP explained that part of the purpose of the record-keeping requirement is to ensure that the OFCCP will have the data available to determine whether the contractor is actually complying with the definition of Internet applicant.

***Obligation to Solicit Race, Ethnicity and Gender Data:***

In case there was any confusion, OFCCP has declared in a way that leaves no doubt that contractors are **required** to solicit race, ethnicity, and gender information from both applicants and Internet applicants; this is a “mandate, not an option.” The invitation to self-identify must state that the provision of race, gender, and ethnicity data is voluntary. Visual observation of these characteristics can be used when the applicant appears in person and declines to self-identify.

***For What It’s Worth:***

In the OFCCP’s extensive Introduction to the final rule, the agency states repeatedly that its rule has no affect on substantive hiring issues and that “[n]othing in the final rule alters contractors’ discretion to determine their own recruitment and selection practices and procedures.” As the OFCCP explains, “the final rule simply requires contractors to maintain sufficient records to allow both the employer and OFCCP to monitor the contractor’s selection practices for potential discrimination.”

*This Affirmative Action e-Bulletin was prepared by Donna Eich Brooks, an attorney with the law firm of Lehr, Middlebrooks, Price & Vreeland. She can be reached for questions or further information at [dbrooks@lmpv.com](mailto:dbrooks@lmpv.com) or at 205-226-7120.*

Lehr Middlebrooks Price & Vreeland, P.C.  
P.O. Box 11945  
Birmingham, AL 35202-1945  
(205) 326-3002  
<http://www.lmpv.com/>

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