

Monday February 6, 2006

## Labor and Employment Update - New Rules for Employers to Follow with Internet Job Applicants

By Donald R. Gilbert

The Office of Federal Contract Compliance Programs (OFCCP) has published a new rule for federal contractors and first-tier subcontractors to follow in collecting data on Internet job applicants. All such contractors with fifty employees or more, who are subject to affirmative action requirements, must abide by the rule, which becomes effective on February 6, 2006. Although OFCCP's regulations are not binding on all employers, all employers should be aware of this development because the OFCCP's regulations interpret the Uniform Guidelines on Employee Selection Procedures (UGESP), which do apply broadly to equal employment opportunity laws.

### Background

The UGESP was issued in 1978 to help employers comply with Federal requirements prohibiting employment practices that discriminate on the basis of race, color, religion, gender, and natural origin. These guidelines, among other things, clarified what information employers are obligated to collect and retain with regard to all hiring decisions.

In 2000, subject employers were also required to obtain "where possible, the gender, race, and ethnicity of each applicant." An imprecise way for employers to accomplish this was through visual observation of the applicant. More careful employers began requesting applicants to provide information about gender, race, and ethnicity on forms separate from the application. The objective was to collect the data but not consider it when actually selecting applicants. In the days of only paper applications, it was burdensome for employers to keep track of this information, but it was possible to do. However, as the Internet became a tool used in the hiring process, recordkeeping quickly became complicated. The influx of electronic submissions was overwhelming. Furthermore, it was unclear as to who now fit in the category of applicant, and from whom and how exactly employers were to gather this required information (especially since visual observation was sometimes impossible).

In an effort to address growing concerns, the Office of Management and Budget (OMB) directed the UGESP agencies to evaluate how use of such technology was affecting employer recordkeeping obligations. A July 31, 2000 Notice of OMB Action initiated what would become a five-year struggle to clarify how UGESP applies to employee selection in light of the new electronic technologies. After a great deal of dialogue with and interpretive guidance from UGESP agencies, federal contractors, and other interested groups, OFCCP's final rule on "Internet Applicants" was published on October 7, 2005. Other agencies, such as the Equal Employment Opportunity Commission, may issue regulations on this topic in the future, but for now, the OFCCP's rules offer the only guidance on recordkeeping for Internet job applicants.

### Definition of Internet Applicant

The final rule defines an "Internet Applicant" as an individual who satisfies all of the following criteria:

## quick links

- [Labor and Employment Attorneys](#)
- [Labor and Employment Practice](#)
- [All Fennemore Craig Updates](#)
- [Contact Us](#)
- [Acrobat Reader](#)

Phoenix  
3003 N. Central Ave.  
Suite 2600  
Phoenix, AZ 85012-2913  
(602) 916-5000

Tucson  
One S. Church Ave.  
Suite 1000  
Tucson, AZ 85701-1627  
(520) 879-6800

Nogales  
420 W. Mariposa Rd.  
Suite 200  
Nogales, AZ 85621-1074  
(520) 761-4215

Lincoln  
206 S. 13th St.  
Suite 1400  
Lincoln, NE 68508-2019  
(402) 323-6200

1. The individual “submits an expression of interest in employment” using the Internet or related electronic data technologies;
2. The employer “considers the individual for employment in a particular position”;
3. The individual’s expression of interest demonstrates the individual “possesses the basic qualifications” required for the position; and
4. Prior to receiving an offer of employment, the individual at no point removes himself or herself from consideration or otherwise indicates that he or she no longer is interested in the position.

## **Expression of Interest in Employment**

In the proposed rule, the first criterion of “Internet Applicant,” that the individual “submits an expression of interest in employment” by means of the Internet or related electronic technologies, implied that this provision pertained only to applicants who responded through electronic means, and that the existing standards pertained to applicants who responded using traditional methods. Essentially, there were two definitions for the term “applicant.” The majority of commenting on the proposed rule argued that such a dual standard would be too confusing for employers, and that, ultimately, analysis of the employee selection process would not be accurate. In response, OFCCP eliminated the dual standard, but only with regard to positions for which an employer considers applicants who apply using either electronic or traditional means. Three examples have been provided for clarification purposes:

- In the first example, an employer advertises on its website an available position and asks interested applicants either to complete an on-line profile or send a hard copy resume. Because the employer considers both Internet and traditional expressions of interest, any individual who submits an on-line profile and any individual who sends a hard copy resume satisfies the definition of Internet Applicant.
- In the second example, an employer, on its website, encourages interested applicants to complete an on-line profile. The employer also receives unsolicited paper resumes in the mail, which are then scanned into an internal database and added to the on-line profiles. To find potential applicants for a particular position, the employer searches the database for those people who have the right qualifications. Because the employer considers both Internet and traditional expressions of interest, any individual who submits an on-line profile and any individual who sends a hard copy resume satisfies the definition of Internet Applicant.
- In the third example, an employer advertises an open position in the newspaper and instructs interested applicants to mail their resumes. Walk-in applicants are also permitted. Since the employer considers only paper resumes and paper applications, no individual satisfies the definition of Internet Applicant.

## **Consideration for Employment in a Particular Position**

An employer “considers the individual for employment in a particular position” by evaluating an applicant’s qualifications against the basic requirements for the position. Under the final rule, employers do not have to consider applications that are not submitted in the proper fashion. Also, employers are not forced to consider unsolicited applications if it is not their normal practice to do so. Furthermore, employers may use data management techniques (such as random sampling or numerical limits) to narrow down a large applicant pool.

## **Basic Qualifications for a Position**

An individual “possesses the basic qualifications” if that individual has the fundamental skills the employer requires in its advertisement for a particular position or has previously required of applicants for a particular position (if the employer has not advertised but uses an alternate method of considering individuals, such as an internal database). In both cases, “basic qualifications” must be non-comparative (e.g. requiring three years of experience as opposed to requiring that the

individual have one of the top five number of years' experience, which is comparative), objective (requiring a Bachelor's degree as opposed to requiring that the individual have a Bachelor's degree from a "good school," which is subjective), and relevant to the position.

## Removal from Consideration

An individual "removes himself or herself from consideration" if he or she states disinterest or demonstrates disinterest through non-responsiveness (e.g. failure to show up for an interview). Likewise, an employer may assume an individual's disinterest from information provided on the initial application or resume, such as salary requirements, so long as the employer has always used similar information to disqualify candidates.

## Record Retention Obligations

The final rule requires employers to preserve documentation relating to Internet Applicants. Documentation includes but is not limited to records pertaining to hiring, assignment, promotion, demotion, transfer, lay off, termination, rates of compensation, selection for training, requests for accommodation, results of physical examination, job advertisements, applications, and resumes. Employers must retain:

1. Any expressions of interest through the Internet or related data technologies that the employer considered for a particular position (such as on-line profiles);
2. Records of attempts to contact an individual concerning his or her interest in a particular position;
3. With regard to internal resume databases, a record of each resume added, a record of the date each resume was added, a record of the position for which each search of the database was conducted, a record of the date each search was performed, and a record of the criteria used for each search; and
4. With regard to external resume databases, a record of the position for which each search of the database was conducted, a record of the date each search was conducted, a record of the criteria used for each search, and records of the resumes of any individuals who met the basic qualifications for the particular position.

## Identification of Gender, Race, and Ethnicity

The final rule requires employers to maintain records that identify "where possible, the gender, race, and ethnicity of each applicant," and also each Internet Applicant. OFCCP encourages employers to put request forms into electronic formats. For example, some employers have devised electronic tear off sheets. Other employers have sent separate e-mails to individuals submitting electronic applications, requesting this information in order to process the application. Where self-identification is impractical, or should the applicant decline self-identification, information pertaining to gender, race, and ethnicity of an applicant may instead be determined through observer information.

Below is the link to 41 CFR Part 60-1, Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes; Final Rule. The exact language of the rule begins on page 17.

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-20176.pdf>

*Donald R. Gilbert co-chairs Fennemore Craig's employment and labor practice. He has represented clients in connection with a broad range of employment-related issues before the NLRB, the EEOC, the Department of Labor, the Arizona Civil Rights Division and the Arizona Department of Economic Security. He has tried more than 100 labor arbitrations, has litigated employment disputes in both state and federal courts, and counsels clients on a wide range of employment issues. He received his B.A., from Stanford University in 1968 and his J.D., from the University of California in 1971. Mr. Gilbert is listed in Chambers USA as one of the Leading Lawyers for Business.*



Donald R. Gilbert  
Director  
602.916.5306  
dgilbert@fclaw.com