

Date: August 9, 2007 Code: HR 2007-11

To: CSU Presidents

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Subject: Employment Records Retention and Data Collection under the Internet Applicant Rule

Effective February 6, 2006, the Office of Federal Contract Compliance Programs ("OFCCP") amended two sections of the federal affirmative action regulations that apply to employers who have federal contracts or subcontracts in excess of \$10,000. Since the CSU abides by these regulations, this technical letter explains the amendment and its impact.

Under the amendment, 41 CFR 60-1.3 is revised to define a new term—"Internet Applicant." In addition, 41 CFR 60-1.12 is revised to specify which applications employers must retain and from which individuals employers must attempt to collect demographic information when employers accept applications over the Internet or a related electronic data technology. The amendment, known as "the Internet Applicant Rule,"¹ is available at <http://www.dol.gov/esa/regs/fedreg/final/2005020176.pdf>. A Frequently Asked Questions document, issued by the OFCCP, is available at <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm>.

This coded memo is intended to provide an understanding of the following:

1. The background of the Internet Applicant Rule;
2. Pertinent definitions;
3. Records retention for "Internet Applicants" and "Traditional Applicants";
4. Data collection for "Internet Applicants" and "Traditional Applicants";
5. Hire adverse impact analysis required for both "Internet Applicants" and "Traditional Applicants;" and
6. Considerations for campuses regarding recordkeeping.

Background

Prior to the Internet Applicant Rule, the OFCCP interpreted its 1978 guidelines² to mean that employers must retain all applications submitted to the employer, regardless of the job seekers' qualifications for the job or any other fact that would normally drop a job seeker from the applicant pool. In an age when most job applications were submitted in person or by mail, this regulatory interpretation went unchallenged by the employer community. With the widespread use of the Internet, job boards and related technologies, which enable people to mass mail their resumes to multiple employers or apply for multiple positions with the same employer, employers experienced a significant increase in the volume of applications they received. In that context, the OFCCP's requirement that employers retain all submitted applications caused an overly burdensome recordkeeping obligation for employers. Employers voiced their concerns and the Office of Management and Budget ("OMB") reacted by directing that the

¹ 70 Federal Register 58946.

² The 1978 guidelines are entitled the Uniform Guidelines on Employee Selection Procedures ("UGESP"). The interpretation of these guidelines is entitled Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures ("UGESP Q & A 15"). 44 Federal Register 11196. (March 2, 1979).

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1978 guidelines be updated to address use of electronic applications in cyberspace. The Internet Applicant Rule is that update.

The Internet Applicant Rule introduces a new term in the field of federal affirmative action laws: Internet Applicant. The term has a four-pronged definition. Because each prong could be used by employers to successively whittle the large pool of job seekers down to a relatively smaller group of Internet applicants, employers who have application procedures and protocols that take full advantage of the four prongs of the Internet Applicant Rule could potentially reduce the record retention and data collection burdens.

By introducing the Internet Applicant Rule, the OFCCP effectively distinguishes the concept of Internet Applicant from the concept of Traditional Applicant³ and establishes two different rules with regard to records retention, data collection and hire adverse impact analyses: (1) "The Internet Applicant Rule" and (2) "The Traditional Applicant Rule."⁴

"The Internet Applicant Rule" applies for any position where a method of accepting applications is via the Internet or a related electronic data technology. The regulatory source for this rule is the February 6, 2006 amendment.

"The Traditional Applicant Rule" applies for any position where the employer accepts applications via traditional methods. The source for this rule is Question and Answer set #15 in the Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures ("UGESP Q & A 15").⁵

Note, for any particular position, if the employer accepts at least one application via the Internet or a related electronic data technology, then "The Internet Applicant Rule" applies to all applications for that position, even if some of these applications were actually submitted via a traditional method.

Definitions

Before discussing the Internet Applicant Rule and the Traditional Applicant Rule in detail, a few key terms are defined below.

"Traditional Applicant"

A job seeker who submits an application via a traditional means and in accordance with the employer's protocols.⁶ Per the OFCCP, this includes job seekers who submit their applications in-person or via postal delivery. However, job seekers who submit their applications via fax are viewed as "Internet Applicants."

"Internet Applicant"

A job seeker

1. Who submits an application via the Internet or a related electronic data technology;
2. Whose application is considered by the employer for a particular position;
3. Whose application indicates she has all the basic qualifications of the position; and
4. Who does not remove herself from consideration prior to receiving an offer.

³ "Traditional Applicants" is our terminology. It is synonymous with the term "applicants," which the OFCCP uses to refer to job seekers who submit their applications via methods the OFCCP calls "traditional means," including postal or in-person delivery.

⁴ This is our terminology for the rule that applies when the employer does not accept applications via the Internet or related electronic data technologies. The OFCCP merely refers to this as "the traditional OFCCP recordkeeping standards."

⁵ 44 Federal Register 11196 (March 2, 1979).

⁶ UGESP Q & A 15 states, "The precise definition of the term 'applicant' depends upon the [employer's] recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring . . . This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice." 44 Federal Register 11196 at 11998.

Internet or related electronic data technologies include, but are not limited to: emails; resume databases⁷; job banks⁸; electronic scanning technology (i.e., a software that scans a resume database to identify individuals with certain criteria); applicant tracking system/applicant service providers (i.e., a software or an Internet service provider that receives and evaluates electronic resumes/applications on behalf of employers); and applicant screeners (i.e., executive recruiting sites).

A job seeker removes herself from consideration if she expressly states she is no longer interested in the position or she has taken another position. In addition, the employer may conclude a job seeker is no longer interested in the position if she declines the employer's invitation for a job interview or fails to respond to the employer's telephone or email inquiries. The employer may also infer a lack of interest based on information in the application such as the type of position, the location of work, the work schedule and the salary requirement the person seeks.

"Consider an application"

To have a person assess the substantive information contained in the application with respect to any qualification of a particular position.

The employer may refuse to "consider" applications that are not submitted with respect to a particular position (i.e., unsolicited applications), or in accordance with established protocols (such as requiring applications be submitted before a specified deadline).

Where there are a large number of applications, the employer may reduce the number of applications it will consider by using data management techniques that do not depend on the assessment of qualifications, such as random sampling or absolute numerical cut-off (e.g., employer only reviews the first 100 applications received).

"Basic qualifications"

The requisite (not preferred) qualifications of the position. In addition, basic qualifications must be:

- Advertised/posted or established and recorded (where the opening is not advertised/posted) before the employer begins "considering" any job seeker for that position;
- Non-comparative (e.g., 3 years experience in clerical support; not the top 5 job seekers with the greatest number of years of experience in clerical support);
- Objective (e.g., a Bachelor's in Accounting, not a Bachelor's from a good school. A basic qualification is objective if a third-party, with the employer's technical knowledge of the job, company, and industry, would be able to evaluate whether the job seeker possesses the qualifications of the position without more information about the employer's judgment); and
- Relevant to the performance of the position.

Employment tests used to narrow down the pool of job seekers are not "basic qualifications" so the employer cannot transform a particular test into a "basic qualification" by inserting in the job advertisement/posting the requirement of passing that test. Where employment tests are used as selection mechanisms, the employer must solicit race, ethnicity and gender information from all test takers, whether or not they are Internet Applicants.

⁷ Either internally maintained by the employer or externally maintained like Monster.com.

⁸ Either internally maintained by the employer or externally maintained like America's Job Bank.

Records Retention

Employers are required to maintain certain records related to the recruitment and selection process. Which records must be maintained depends on whether the employer is subject to the Internet Applicant Rule or the Traditional Applicant Rule.

The Internet Applicant Rule

If the employer accepts at least one application for a position via the Internet or a related electronic data technology, then, under the Internet Applicant Rule, the employer must retain all applications the employer considers for that position. If the employer pulls resumes from an internal resume database, the employer must retain all resumes added to the database. If the employer uses an external resume database, then the employer must retain only the considered resumes that meet the basic qualifications of the position.

If, in filling a position, the employer culls resumes from an internal resume database (i.e., a database maintained in-house by the employer rather than maintained by an external provider like Monster.com), the employer must retain the following records: each resume in the database, the date on which each resume was added to the database, the position for which each search of the database was made; and for each search, the date of the search, the search criteria used (i.e., basic qualifications for the position), and the records identifying the job seekers who were contacted to ascertain interest in the position. A resume downloaded from an external resume database into an internal resume database becomes an internal database resume.

If the employer culls resumes from an external resume database (e.g., Monster.com), the employer must retain the following records: the position for which each search of the database was made; and for each search, the date of the search, the substantive search criteria used (i.e., basic qualifications for the position), the resumes of all job seekers who were considered by the employer and who met the basic qualifications for the particular position, and the records identifying the job seekers who were contacted to ascertain interest in the position. Note, an employer need not search the resume database for all of the "basic qualifications" for a particular position, but then the employer is required to maintain the resumes of more job seekers than would be the case if the search criteria included all of the "basic qualifications" for the position.

As dictated by the OFCCP regulations, employers with 150 employees or more must retain these employment records for two years. The two-year period begins to run on the date the employment record is created or the date the employment action associated with that record is taken, whichever is later.⁹

The Traditional Applicant Rule

If the employer only accepts applications for a position via mail or in person delivery, then the Traditional Applicant Rule applies. In that instance, the employer must retain all applications submitted in accordance with the employer's protocols even if some of these people may later drop out of the applicant pool for various reasons such as lack of further interest in the position.¹⁰

Data Collection

Aside from records retention, federal affirmative action laws require the employer to attempt to collect demographic information from a subset of the job seekers who submit an application. Which subset depends on which rule applies, the Internet Applicant rule or the Traditional Applicant Rule.

⁹ 41 CFR 60-1.12(a).

¹⁰ UGESP Q & A 15 states, "Records should be kept for persons who were Applicants . . . at any stage of the process." 44 Federal Register 11996 at 11998.

The Internet Applicant Rule

When the Internet Applicant Rule applies, the employer must, at a minimum, solicit race, ethnicity and gender data from all Internet Applicants (i.e., job seekers who submitted an application, were considered for the position, met all the basic qualifications of the position, and did not remove themselves from consideration prior to receiving an employment offer).

The regulations do not mandate when in the recruitment process employers must solicit the demographic data.¹¹ Thus, the campuses may choose to collect this data:

1. After the offer has been accepted (i.e., only from Internet Applicants); or
2. Immediately after the applications are received (i.e., from everyone who submits an application, regardless of whether they are an Internet Applicant); or
3. Sometime after the applications are received, but before the offer is accepted.

Options 2 and 3 above may yield a higher response rate from job seekers willing to provide their demographic information than Option 1, but they will also result in more records that must be retained by the employer and that are subject to scrutiny by the OFCCP.

The Traditional Applicant Rule

With the Traditional Applicant Rule, the OFCCP has not been consistent in specifying when in the recruitment process employers must solicit race, ethnicity and gender data from job seekers. However, at minimum, the employer must obtain this information from job seekers who submit an application in accordance with the employer's application protocols and who have not shown disinterest in the position in any manner. This is because the employer is required to include these individuals in the hire adverse impact analysis; without these individuals' demographic information, the hire adverse impact analysis cannot be conducted.

Hire Adverse Impact Analysis

Employers are required by federal affirmative action laws to analyze their hire decisions for adverse impact along race and gender lines.¹² To properly conduct the hire adverse impact analysis, the employer must know which subset of job seekers to include in its analysis as applicants.

The Internet Applicant Rule

Under the Internet Applicant Rule, the employer must only include Internet Applicants in the hire adverse impact analysis.

The Traditional Applicant Rule

Under the Traditional Applicant Rule, the employer must include in the hire adverse impact analysis all job seekers who submit an expression of interest in accordance with the employer's protocols and who do not affirmatively or passively remove themselves from the selection process.¹³

¹¹ However, the OFCCP has asserted it has regulatory authority to require the employer to change the timing of the solicitation if the employer has delayed the solicitation so long that it was no longer feasible to effectively solicit the information.

¹² 41 CFR 60-3.4.

¹³ UGESP Q & A 15 states an applicant is "a person who has indicated an interest in being considered for hiring. . . A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an Applicant . . . for purposes of computing adverse impact." 44 Federal Register 11196 at 11998. The terms "voluntarily," "formally" and "informally" are not defined, but they appear conceptually equivalent to the terms "express statement" and "passive demonstration of disinterest," which are used in the Internet Applicant Rule. Thus, it is reasonable to conclude that, under the Traditional Applicant Rule, the employer may exclude from the hire adverse impact analysis any job seeker who indicates disinterest in the position being filled either in an express manner (e.g., clearly stating she is no longer interested) or in a passive manner (e.g., her application indicates a salary requirement higher than what is budgeted for the position).

What steps should campuses consider taking?

Below is an illustrative, not exhaustive, list of actions campuses should consider taking:

- For each recruitment, determine whether the Traditional Applicant Rule or the Internet Applicant Rule applies.
- For each recruitment, map out the steps in the recruitment process. Identify the point in the process where the obligation to retain applications arises and the point where the obligation to solicit demographic information arises.
- Draft application protocols and apply the protocols consistently and uniformly. A protocol of not accepting unsolicited applications is strongly encouraged since applications that fail to reference a requisition number or identify a specific job vacancy could then be discarded.
- Give each position a requisition number and require job seekers to reference this number on their applications to facilitate tracking applications.
- Decide whether to develop data management techniques to limit consideration of job seekers for positions that generate a large number of applications. Document the techniques used.
- Draft or update written job descriptions for all positions to ensure that the descriptions contain a full and complete statement of the basic qualifications. At the very least, when an opening or requisition is created and before considering any application, establish and document the basic qualifications that will be used to fill the position. Basic qualifications must be consistently and uniformly applied. Do not allow job seekers who do not have the basic qualifications to continue through the recruitment process.
- Decide whether to request information from job seekers such as minimum salary requirements and geographic preferences, so as to help determine whether the job seekers would continue to be interested in the position for which they are being considered.
- Devise a list of disposition codes to record why job seekers are removed at various stages of the recruitment process. Review the records to ensure the codes are applied appropriately.
- Review whether current recordkeeping capabilities capture all the data the OFCCP requires.
- Provide training to staff with roles in the recruitment process to ensure they are processing applications and are collecting and recording information in accordance with OFCCP regulations.

Questions regarding this information may be directed to Campus Relations & Dispute Resolution at (562) 951-4425. This document is also available on the Human Resources Administration's Web site at: <http://www.calstate.edu/HRAdm/memos.shtml>.

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