

Law Trends

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New OFCCP Regulations Regarding Internet Applicants

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On February 6, 2006, new regulations went into effect imposing new obligations on federal contractors and their dealings with “internet applicants.” The Office of Federal Contract Compliance Programs (OFCCP) promulgated the regulations in an attempt to provide guidance to federal contractors who utilize the internet for recruiting and hiring. Federal contractors governed by these regulations are those contractors meeting the OFCCP’s jurisdictional threshold of a federal contract of at least \$10,000. Federal contractors should be aware that the regulations also apply to “traditional applicants,” or those job seekers who submit paper resumes, if traditional applicants and internet applicants are considered for the same job.

The OFCCP developed a four-part definition of internet applicant. A job seeker is an internet applicant only if:

1. The job seeker submits an electronic “expression of interest in employment” either through the internet or other electronic technology (e.g., e-mail).
2. The federal contractor considers the job seeker for employment in a particular position.
3. The job seeker meets the basic qualifications of the job.
4. At no time during the process the job seeker removes his or her name from consideration.

This definition triggers two different reporting requirements for federal contractors. First, if the job seeker submits an electronic expression of interest and the employer reviews it (meeting the first two prongs), the federal contractor must retain the expression of interest for two years from the date of the record or the date of the personnel action involved. Second, if the job seeker meets all four prongs of the definition, thereby becoming an internet applicant, the federal contractor must solicit the applicant’s race, ethnic and gender information.

An electronic expression of interest is any type of resume or application that is transmitted electronically, typically via the internet or e-mail. This would also include a contractor’s use of an online job application. It does not include job postings listed on the internet which require the job seeker to submit a paper resume or application (unless, of course, the paper resume is commingled with electronic resumes). A job seeker is considered by the contractor if the contractor reviews the application for any substantive information, even if the job seeker does not indicate for which job he or she is applying or if the job sought is not open. Basically, if a contractor looks at a resume, it has been considered and must be retained by the contractor. There is no other requirement for the contractor at this point other than retaining the resume.

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The third prong of the definition of internet applicant deals with the contractor's review of the resume for the basic qualifications of a job. The basic qualifications of a job must be established in advance, be objective and "noncomparative" (does not compare one job seeker against another). Basic qualifications do not include paper tests. If contractors require applicants to take a paper and pencil test, race, ethnic and gender information must be solicited regardless of whether the applicant meets the test of an internet applicant. Basic qualifications must also be relevant to the performance of the job and must be advertised or established in advance. To establish a basic qualification in advance, the qualification must be written down and retained by the contractor.

Job seekers may remove themselves from consideration and not be an internet applicant a number of ways, such as:

- The job applicant's expression of interest indicates a salary or location requirement that is incompatible with the position.
- The job seeker fails to respond to repeated inquiries from the contractor.
- The job seeker does not show up for an interview.
- The job seeker expressly indicates to the contractor that he or she is no longer interested.

If the job seeker has not removed himself or herself from consideration and the other three prongs are met, an internet applicant is born. At this point, the contractor is required to solicit the applicant's race, ethnic and gender information.

Federal contractors should also be aware that compliance with the new regulations also applies to searches done by the federal contractor over the internet through resume databases, such as Monster.com. In this case, the job applicant has done nothing more than posted his or her electronic expression of interest on the internet but has not expressed an interest in a particular position for a particular contractor. For each search of the electronic database, the contractor must retain information about the search conducted, including the:

- job for which the database was searched
- date of the search
- basic qualifications searched

If a contractor utilizes an internal database of internet applicants, the contractor must also record the date the resume was added to the database, job searched and date and search criteria for each search.

Contractors who receive numerous responses to a single search may wish to randomly select candidates for consideration using "data management techniques, such as random sampling or absolute numerical limits." Again, only resumes that are actually considered must be retained.

Contractors that either do not accept electronic expressions of interest or do not commingle traditional applicants and internet applicants are governed by the "traditional standards." Currently, there are no regulations establishing the traditional standards. This provides contractors with discretion in determining at what point they will solicit race, ethnic and gender information when filling positions with only traditional methods. The OFCCP only requires the solicitation of race, ethnic and gender information from individuals who are internet applicants or who are considered a traditional applicant by the contractor. Contractors should carefully consider the timing of soliciting this information to make sure that it is not solicited too early. Contractors choosing to accept electronic expressions of interest must act now to make sure their affirmative action compliance programs are in place to track the required applicant data.

Employers who wish to discuss these new regulations may contact either Mr. Yates or Ms. Pawlicki by calling 419-241-6000. Mr. Yates, who is a member of the Firm, has been named to the 2006 Ohio Super Lawyers. Ms. Pawlicki is an associate of the Firm. Both practice in the Employment Section.