

Final Rule from the OFCCP

Late to the Internet game, the Office of Federal Contract Compliance Programs has issued its final rule for employers struggling to define who is an “applicant” among the thousands of resumes received by e-mail and the Internet. The definition is important to federal contractors who are obligated to solicit and track the race and gender of its applicants. Recognizing in a recent interview that “[n]obody believes that the thousands of applications a company gets from Monster.com are the same as individual applications for a position,” the OFCCP Director issued what his agency considers a clear standard for Internet applicants that employers can implement and the OFCCP can enforce in audits.

The final rule is little changed from the proposed rule release back in March, 2004 – an “Internet applicant,” must meet each of the following:

1. the individual submits an expression of interest in employment through the Internet or related electronic data technologies;
2. the contractor considers the individual for employment in a particular position;
3. the expression of interest indicates that the individual has an interest in the particular position and possesses the basic qualifications for the position; and
4. at no point in the selection process prior to receiving an offer does the individual remove himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the particular position.

Many commentators argued unsuccessfully for greater uniformity in the “applicant” definition by extending the Internet Applicant standard – including the “expression of interest in the particular position” the contractor is seeking to fill and possession of “basic qualifications” – to the traditional, paper application process. Uniformity would avoid the potential for confusion and unnecessary burdens associated with dual applicant definitions and tracking systems.

The OFCCP refused to go this far. However, its final rule does extend the “Internet applicant” standard to those individuals who express interest by mailing a hard-copy resume where the contractor has invited and considers both the electronic and paper responses it receives. In this scenario, the final rule allows the contractor to apply the four criteria above to all individuals expressing interest – whether by electronic means or otherwise. If, however, the contractor accepts applications only through traditional means, such as mailing resumes or walk-in applications, the Internet criteria above do not apply to define who is an “applicant.”

The final rule also clarifies record keeping requirements for the “expressions of interest” received through the Internet. The proposed rule was to require that contractor retain “all” electronic expressions of interest. Now recognizing the burden this rule would create from the thousands of electronic resumes received, the final rule adds that the electronic expression of interest must also be considered for a particular position by the contractor before the retention requirement applies. The retention requirement is, therefore, still broader than just those who qualify as Internet applicants under the criteria above. However, by establishing protocols that refrain an employer from considering all electronic expressions received, an employer can avoid the significant burdens potentially imposed by the retention requirements.

Should you have any questions concerning the Internet applicant rule, or need assistance with your applicant screening, tracking and record retention protocols, please contact [Ross Hamilton](#), [(336) 574-8083 or [email](#)], in our Greensboro office.

Correction to May 25, 2006 Client Alert: Please note that the Senate vote took place on Wednesday, May 24, 2006.

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