



Who is an Applicant?

Understanding the OFCCP's "Internet Applicant" Rule

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The question "Who is an applicant?" has been among the most contentious questions raised during affirmative action reviews and discrimination investigations. Employers have typically wanted to limit the number of persons considered to be applicants in order to reduce record-keeping burdens and limit potential liability. Federal agencies have typically wanted to expand the number of persons considered to be applicants in order to prevent discrimination and insure that every minority, female, and other protected class applicant is afforded equal access to jobs.

After many years of relying on an out-dated definition, the federal government has finally provided some guidance to employers on the question "Who is an applicant?" Federal contractors and subcontractors received particularly important guidance when the U.S. Department of Labor's Office of Federal Contract Compliance Programs published a rule on "Internet Applicants" in October of 2005. This white paper will discuss features in the "Internet Applicant" rule and will provide employers with some suggestions on how to implement the rule.

The Human Resource Professional's Role in Finding Applicants

One of the most important responsibilities of the HR professional is to find well-qualified candidates for open positions. When an opening occurs, HR professionals may be involved in determining qualifications for the opening, finding recruitment sources to attract candidates, evaluating resumes, application forms, and other materials provided by candidates, conducting interviews for the best candidates, and deciding which candidates should be hired. Other managers may play an important role in some or all of these duties, but the HR professional plays a critical role in ensuring that the process is an effective evaluation of the

persons who may best meet the needs of the employer.

In order to find well-qualified candidates, HR professionals must develop applicant pools. HR professionals may use traditional sources such as newspapers, search firms, and employee referral as ways to find applicants. HR professionals may also use the Internet as a referral source by posting openings on Internet sites, by accepting resumes through e-mail or through other sources from the Internet, or by reviewing resumes posted on Internet job banks.

What are Employers Required to Do?

The federal government has a variety of requirements in regard to the development of applicant pools.¹ Laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 prohibit the discriminatory treatment of applicants on the basis of race, sex, religion, color, national origin, age, or disability. These laws are enforced by the Equal Employment Opportunity Commission (EEOC). Executive Order 11246 and other laws require that government contractors and subcontractors take affirmative action in the employment of minorities, females, and certain other classes of applicants. These laws are enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Additional laws and regulations may apply to various employers.

The laws and regulations that prohibit discrimination and require affirmative action have certain requirements concerning the retention and

¹ State and local governments may have similar or additional requirements. This white paper will focus on the federal requirements. Employers should be aware, however, that there may be additional or different requirements in regard to applicants in their particular geographic areas.

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analysis of applicant information. Employers are generally required to retain applicant materials for one year, although many federal contractors and subcontractors are required to retain applicant materials for two years.² "Applicant materials" include application forms, resumes, cover letters, interview notes, advertisements, position descriptions, and anything else submitted for or pertinent to the selection process. All employers are required to analyze their applicant pools to insure that there is no discrimination in regard to the consideration of applicants.

Federal contractors and subcontractors have additional requirements in regard to applicants. These companies must make efforts to collect information on the race, ethnicity, and gender of all applicants. (The difference between race and ethnicity is discussed later in this paper in footnote 6.) While the federal affirmative action regulations use a "where possible" standard in this regard, the OFCCP clearly wants contractors and subcontractors to collect race and gender data on as many applicants as possible.³

The Uniform Guidelines' Definition of "Applicant"

In 1978, several federal agencies jointly released the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines or UGESP). The Uniform Guidelines are found at Chapter 41, section 60-3 of the Code of Federal Regulations. The Uniform Guidelines were jointly adopted by the EEOC, the OFCCP, the Office of Personnel Management, and the Justice Department. The

Uniform Guidelines were meant to provide a single set of principles that companies could use to evaluate their various selection practices and procedures and to determine whether these selection practices and procedures were having a discriminatory effect on applicants or employees on the basis of race, sex, and other protected classifications. While the UGESP have undergone some minor revisions since 1978, they have essentially remained intact since that time.

The Uniform Guidelines provided a foundation for many common human resource practices.

- The Uniform Guidelines provided instruction on the manner in which tests and other selection devices are to be evaluated.
- The Uniform Guidelines required that documentation must be kept in regard to selection decisions.
- The Uniform Guidelines strongly encouraged the development of job descriptions.
- The Uniform Guidelines presented the 80% test that has been widely used in evaluating selection procedures.

Immediately after the publication of the Uniform Guidelines, employers began to have questions about how the Uniform Guidelines should be interpreted. In 1979, the federal agencies involved in the development of the Uniform Guidelines issued a series of questions and answers that were meant to provide guidance to employers. Among the questions and answers was question 15:

Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?

A. The precise definition of the term "applicant" depends on the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being

² Contractors and subcontractors with 150 or more employees and a contract or subcontract of \$150,000 must retain applicant materials and other personnel records for two years.

³ The requirement to collect race and gender data on applicants is found in 41 CFR 60-1.12(c). The explanatory materials associated with November 2000 revisions to 41 CFR 60-1.12 use much stronger language than the "where possible" language found in the regulation itself to describe the employer's obligation to collect this information.

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considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice . . . A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process.

Problems Associated with the Uniform Guidelines' Definition of "Applicant"

The very broad definition of the term "applicant" found in the answer to question 15 caused a number of problems for employers. Some of these problems related to the way in which applicant data is analyzed for possible discriminatory effect on applicants. Other problems related to the burden of keeping and recording information on large applicant pools. These problems were more or less profound depending on the size of the employer, the number of applications submitted for any particular opening, and the resources available to track and record applicant information.

1. Analyzing Applicant Data

One of the key problems associated with the traditional Uniform Guidelines definition of applicant involved the data to be analyzed by employers. The Uniform Guidelines made it clear that employers were to analyze their selection processes to determine whether these processes had an adverse effect on the consideration of

minorities, females, and members of various other protected classes. The ability to correctly analyze data on any particular applicant pool was affected by the determination of who was an applicant.

Under the traditional Uniform Guidelines definition of applicant, many persons who expressed interest in a position would be classified as applicants even though there was no chance they would be hired. For example, persons who expressed interest and who were not even minimally qualified for a position were to be included in analyses of applicants. Similarly, persons who expressed interest and who failed to meet a company's formal protocols for expressing interest were to be considered applicants. Analyses of applicants were often skewed because of this over-inclusion of applicants.

2. Record Keeping

Many companies also found that the traditional Uniform Guidelines definition of applicant imposed a significant paperwork burden. In order to analyze applicants, a company must develop a tracking system that catalogs important information associated with each applicant. Most companies have electronic systems that are used to record information on applicants, although smaller employers may keep this information on paper logs. Regardless of how this information is kept, a company must devote the time and resources needed to enter and organize this applicant data and to review the data in order to insure its accuracy. The broader the definition of "applicant," the greater the time and resources that must be expended on recording this information.

For federal contractors and subcontractors, the burden is increased by the requirement to collect race and gender information on applicants. Regardless of the technique used to collect this data, there is time and effort that must be devoted to accurately recording race and gender information for applicants so that proper analyses

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can be done. With a very broad definition of "applicant," there can be significant time and expense associated with this collection of race and gender data.

3. Use of the Internet

The use of the Internet as a recruitment tool has presented special challenges for employers seeking to properly record and analyze applicant data. When a company posts a position on an Internet site, the opening can be seen by individuals throughout the United States and across the world. Employers will generally receive more applications for openings posted on the Internet because the Internet reaches a broader audience than traditional recruitment resources such as newspaper advertisements. This results in more applicants, more of a recording burden, and more questions about what to analyze.

Some companies use job banks on the Internet to find candidates for openings. HR professionals may search job banks for particular skills and then review the resumes of individuals produced by such a search. Prior to the release of the "Internet Applicant" rule, the OFCCP had at times suggested that any person found through such a search should be considered an applicant and that any resume viewed in such a search should be included on applicant logs, regardless of the qualifications or interest of the individual. Thus, an HR professional's attempt to effectively use technology to find qualified applicants may have resulted in significant paperwork burdens and problematic data for analysis.

Joint Taskforce Proposal

The increased use of the Internet and other sophisticated technological tools presented a major challenge both for employers and for federal agencies. It became increasingly obvious that the traditional definition of applicant found in question and answer 15 was no longer viable because of the problems noted above. Thus, the

federal Office of Management and Budget (OMB) instructed representatives from the OFCCP, the EEOC, and the other federal agencies that had drafted the Uniform Guidelines to produce a definition of applicant that took into account the issues associated with the use of the Internet.

A joint taskforce of agency representatives began meeting in 2000 and had an original deadline of December 21, 2001 to publish a new applicant definition for Internet applicants. After a number of extensions, the joint taskforce finally released a proposal regarding Internet applicants on March 4, 2004. This proposal took the form of additional questions and answers associated with the Uniform Guidelines. It should be noted that this proposal was NOT a change to the Uniform Guidelines themselves.

Under the joint taskforce proposal, for an individual to be considered an Internet applicant the following must have occurred:

- The employer must have acted to fill a particular position;
- The individual must have followed the employer's standard procedures for submitting applications; and
- The individual must have indicated an interest in the particular position.

This proposal from the taskforce has two major flaws. First, this proposal only applies to persons applying through the Internet. Persons who apply through traditional means such as the mail would be treated differently than persons applying through the Internet. Second, the proposal leaves open a number of important questions regarding applicants, including the question "Are persons who do not have the minimal qualifications for a position 'applicants'?" As of the date of this version of this white paper, the joint taskforce has not released a final version of its applicant proposal.

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OFCCP Final Rule on "Internet Applicants"

Shortly after the taskforce released its guidance, the OFCCP released a proposed rule regarding applicants. A final version of the OFCCP's rule on Internet applicants was released on October 7, 2005. The final rule had an effective date of February 6, 2006.⁴

The OFCCP's final rule on Internet applicants defined the term "Internet Applicants" and gave federal contractors and subcontractors some instruction on what was required when an individual was considered to be an "Internet Applicant." Under the OFCCP's final rule, an individual must meet a four-part test in order to be considered an "Internet Applicant." The four parts of this test are as follows:

- (I) The individual must submit an expression of interest in employment through the Internet or related electronic data technologies;
- (ii) The contractor must consider the individual for employment in a particular position;
- (iii) The individual's expression of interest must indicate the individual possesses the basic qualifications for the position; and,
- (iv) The individual must at no point in the contractor's selection process remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in the position.

Part I - Applicants' Use of "The Internet or Related Electronic Data Technologies"

There are several important ideas associated with

⁴ We are using the technical term "rule" in this paper when we talk about the OFCCP's definition of "Internet Applicant" in place of the more commonly used term "regulation" because this is the way in which the OFCCP describes the action it has taken. The "Internet Applicant" rule is now part of the Code of Federal Regulations, and can be found at 41 CFR 60-1.3 and 41 CFR 60-1.12.

the first part of the OFCCP's "Internet Applicant" definition. First, the OFCCP has stated in the final rule that the term "Internet Applicants" can encompass any individual who becomes an applicant through the use of any technological tool. The following individuals are all "Internet Applicants" under the OFCCP's rule:

- Persons who apply for a position via e-mail
- Persons who apply for a position through a company's website
- Persons who are found by a company on a posting board like Monster.com
- Persons who send in a resume and who are added to a company's internal applicant database system
- Persons who apply for a position at a company site using an electronic kiosk or other electronic data-collection device

The OFCCP has gone so far as to suggest that individuals who submit a resume or application form via fax are Internet applicants because a fax machine is a piece of "electronic data technology." Thus, there are individuals who may fall under the definition of "Internet Applicant" who do not directly use the Internet as the means to express interest in a position.

Second, the OFCCP has indicated in its final rule that if any one applicant expresses interest in a particular position through the Internet or some other technological tool, then the "Internet Applicant" rule applies to every applicant for that position. For example, if a company has an opening for a welder, and only one of 3,000 persons who expresses interest in the welder position uses e-mail or another technological tool to express interest, the "Internet Applicant" rule is used for ALL applicants. This is an important difference from the current proposal by the joint taskforce and an important change from the OFCCP's proposed version of the "Internet Applicant" rule. Rather than having two standards to follow for a particular position, the "Internet Applicant" rule will apply to all applicants unless

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every single applicant for the position applies through some traditional means such as the mail or in-person completion of an application form.

Part II - Consideration for Employment in a Particular Position

The OFCCP's final rule on "Internet Applicants" makes it clear that in order to be an "Internet Applicant," an applicant must have received some kind of substantive consideration. This means that in order to become an "Internet Applicant," it is not sufficient for an individual to simply use the Internet to express interest in positions at a company. The company must have given some kind of active consideration to the individual's credentials in order for the individual to potentially become an "Internet Applicant."

Under part II of the OFCCP's definition of an "Internet Applicant," companies are allowed to establish protocols that potential applicants are required to follow. Individuals who fail to follow these protocols are not considered to be "Internet Applicants." For example, a company may say that it will not consider individuals who do not apply through the company's web site. As another example, a company may define a time frame in which individuals must apply in order to receive consideration. Individuals who fail to follow protocols like these cannot be "Internet Applicants."

Part II of the "Internet Applicant" definition also says that individuals must apply for a "particular position." It is not unusual for applicants to express interest in "any" or "all" positions a company has open, or to express interest in "shop" or "office" positions. Under the "Internet Applicant" rule, individuals who fail to express interest in particular positions are not "Internet Applicants" unless the company considers individuals for multiple, undefined openings. It is also not unusual for individuals to apply for positions when there are no openings. These individuals are also not "Internet Applicants," as

there was no particular opening for which they could have been considered.

The concept of substantive consideration is especially important for companies that regularly search internal or external databases for candidates. Under the traditional applicant definition in the Uniform Guidelines, federal agencies had suggested that any person whose resume is associated with a database search should be included as an applicant. However, only those applicants whose qualifications are given a substantive review are considered to be "Internet Applicants" under the OFCCP's final rule. The OFCCP's final rule acknowledges that a keyword search of an external database such as Monster.com may yield thousands of responses. Employers are allowed to use data management techniques to limit the number of resumes that receive substantive review and thus limit the number of persons counted as "Internet Applicants." For example, if a keyword search of a database returns 1,000 resumes, a company could decide to review only the first 100 of these resumes, or could decide to review every 15th resume. Individuals whose resumes are not given substantive consideration in such a scenario would not be "Internet Applicants."

Part III - The Applicant Possesses the Basic Qualifications

One of the most critical elements of the OFCCP's "Internet Applicant" definition is part III, which states that an individual must possess the basic qualifications for a position in order to be considered an "Internet Applicant." Unlike the joint taskforce proposal or the Uniform Guidelines definition, the OFCCP's "Internet Applicant" rule explicitly recognizes the fact that individuals should not be considered to be applicants until they can demonstrate that they can actually perform the required elements of the job.

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In order to be used as a basic qualification⁵, the qualification must have three characteristics: it must be objective, non-comparative, and related to the job.

- Any qualification where the contractor or an outsider would be required to measure an attribute the applicant possesses against the attributes other applicants possess could not be a basic qualification because it requires a comparison of candidates or credentials. For example, a requirement to have a bachelor's degree could be a basic qualification, while a requirement to have a degree from "one of the top business schools" could not.
- Any qualification where the contractor or an outsider would be required to evaluate whether an applicant's background was "good" could not be a basic qualification because it would require a subjective assessment. For example, a requirement to have three years of experience could be a basic qualification, while a requirement to have "as much experience as possible" could not.
- Any qualification that is not clearly related to the performance of the particular position at issue could not be a basic qualification. A requirement for a welding position to have previous welding experience could be a basic qualification, while a requirement to have a bachelor's degree could not. Note that the requirement to have a bachelor's degree is objective and non-comparative, but that it is not job-related for a welding position.

Basic qualifications must be defined by a company before the start of the recruitment process. OFCCP's "Internet Applicant" rule states that basic qualifications must either be contained within advertisements or web site postings or that they must be written down prior to the start of the recruitment process and retained by the company. Companies are not allowed to modify basic qualifications during the course of the recruitment for a particular position. The OFCCP has suggested that when advertisements and/or web postings (or other publicly available announcements of a position) are used, all basic qualifications must be listed, and that any qualification that are not listed cannot be considered a basic qualification.

Companies that search internal or external databases for candidates may initially search for a subset of the basic qualifications attached to a position. Once results are returned from the database search, the company may add one or more of its remaining basic qualifications to further narrow the pool of candidates to be considered. However, all basic qualifications must be written down prior to the start of the initial search, and the company may not create additional basic qualifications during a search.

While companies have relatively wide discretion to determine what constitutes a basic qualification, the OFCCP has suggested that gaining a passing score on a pre-employment test may NOT be a basic qualification. The "Internet Applicant" rule itself does not speak directly to this issue, but the commentary provided with the regulations does address this issue. OFCCP officials have gone so far as to suggest that companies need to solicit race and gender information from all individuals who take a pre-employment test, regardless of whether these individuals are "Internet Applicants."

Part IV - The Applicant Does Not Withdraw

The idea that candidates who withdraw are not

⁵ It should be noted that the OFCCP uses the term "basic qualification" in its final rule rather than the more commonly used term "minimum qualification." While OFCCP officials have at times indicated that the terms "basic qualification" and "minimum qualification" are synonymous, there have also been suggestions by OFCCP officials that a "basic qualification" may be a higher standard than a "minimum qualification."



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applicants has been present since the publication in 1979 of the questions and answers attached to the Uniform Guidelines. However, the OFCCP's "Internet Applicant" rule has a much wider definition of withdrawal than that traditionally used by federal agencies. Under part IV of the "Internet Applicant" rule, there are a variety of ways in which applicants can withdraw.

- Active withdrawal - As in the past, an individual who has expressed interest in a position can specifically indicate that he or she is no longer interested in the position. Any individual who actively withdraws from consideration prior to the time a job is offered is not an "Internet Applicant." This would include individuals who accept another job before a recruitment is complete.
- Passive withdrawal through lack of response - An individual who fails to respond to a company's inquiries is also considered to have withdrawn from consideration. Thus, an individual who does not return phone calls has withdrawn, and a candidate who fails to appear for an interview has withdrawn. This kind of passive withdrawal does not require that a candidate formally contact the company and indicate lack of interest in the relevant position.
- Passive withdrawal through candidate requirements inconsistent with position - One of the unusual elements of the OFCCP's "Internet Applicant" rule is that individuals may "withdraw" from consideration by indicating they have requirements that are inconsistent with the characteristics of the position. For example, if a candidate indicates that he or she has a salary requirement of \$70,000 and the position pays a maximum of \$50,000, the candidate would have withdrawn under the "Internet Applicant" rule. As another example, if a position is located in Alabama, and a candidate has

indicated that he or she would not move to the southern part of the country, the candidate has withdrawn from consideration. If companies are to use part IV of the "Internet Applicant" rule to show that candidates have withdrawn in this manner, they must demonstrate that they have consistently and uniformly applied the criteria that is used as the basis for the passive withdrawal. In the first example above, if OFCCP were to show that the company at times was willing to pay more than its stated maximum, the candidate who requested \$70,000 could not be considered to have withdrawn.

Situations Where the "Internet Applicant" Rule Does Not Apply

OFCCP wrote its "Internet Applicant" rule in such a way that the rule would apply to a large number of recruitment efforts. With the extensive use of the Internet as a recruitment source, the wide use of e-mail as a way to express interest in positions, and the growing use of internal and external database searches to find candidates, the OFCCP expected that its "Internet Applicant" rule would clarify the question "Who is an applicant?" for most recruitment efforts. OFCCP purposely devised a rule regarding applicants that would include as many situations as possible without explicitly indicating that the rule applies uniformly to all situations.

However, there will continue to be situations where the "Internet Applicant" rule does not apply. In any situation where no individual becomes an applicant through the Internet or some other technological tool, the traditional definition of applicant is used. The most common situation where the "Internet Applicant" rule would not apply would be the situation in which a company takes paper application forms from walk-in applicants for an entry-level position. Even in such a scenario, the "Internet Applicant" rule would be in effect if even one applicant

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expressed interest through e-mail or some technological tool.

Since the traditional definition of applicant is generally considered to be more expansive than the "Internet Applicant" definition, companies are well-served by finding ways to insure that every recruitment effort contains at least one "Internet Applicant." Companies could require that all expressions of interest, even for entry-level positions, go through the company web site, or that walk-in applicants use a kiosk of some kind to complete an electronic application form. Companies that fail to find ways to require entry-level applicants to use some type of technological tool may not be able to use minimum qualifications or failure to follow company protocols as ways to remove individuals from being defined as applicants.

Gathering Race and Gender Data on Applicants

While OFCCP has asked companies to gather race and gender information on applicants for many years, there was no formal regulatory requirement to do so until November of 2000. In November of 2000, the agency finalized rules that made it clear that federal contractors and subcontractors have an obligation to gather information on the race, ethnicity, and gender of applicants.⁶ The regulations in this regard use a "where possible" standard, but OFCCP unquestionably wants

companies to collect this information on as many applicants as possible.

Before the "Internet Applicant" rule was finalized, OFCCP required that contractors and subcontractors make efforts to solicit race and gender information from all persons who expressed interest in a position. While some efforts to limit the number of individuals subject to this solicitation were successful, it was not unusual for OFCCP to require that companies solicit race and gender information from persons expressing interest who were not minimally qualified, not following the company's recruitment protocols, and otherwise not likely to receive any substantive consideration.

With the advent of the "Internet Applicant" rule, there are now a smaller number of individuals who must be contacted about providing race and gender information. Companies are not required to solicit this information from individuals expressing interest who do not meet all four parts of the "Internet Applicant" definition in those situations where the "Internet Applicant" rule is in effect. If an individual expressing interest in a position fails to meet any one part of the applicant definition, there is no requirement to solicit race and gender data from that individual. Conversely, companies MUST solicit race and gender information from those individuals who are considered to be "Internet Applicants."

Another way to look at the requirement to solicit race and gender information is to look at the requirement to record and analyze data on applicants. OFCCP is interested in determining whether there has been any discrimination against minority or female applicants. In order to monitor their own selection processes, companies must find a way to record and analyze applicant data. Companies have traditionally used an applicant log to record information. While there are now a wide variety of ways to record applicant data, every company must answer the question "Who is an applicant?" before tracking begins. Persons

⁶ The difference between "race" and "ethnicity" relates to the on-going discussion of whether "Hispanic" should properly be characterized as a race category. New regulations issued by the EEOC indicate that Hispanic is an ethnicity, not a race. In the 2007 EEO-1 form, employers will be asked to provide the race of their employees and will separately be asked to provide information on whether employees are Hispanic or not. As of the latest version of this white paper, the OFCCP's regulations continue to characterize Hispanic as a race category. However, OFCCP appears to be moving in the same direction as EEOC in redefining Hispanic as an ethnicity and not a race. This distinction between race and ethnicity is important to the issue of "Who is an applicant?" only in the sense that the questions asked on a survey form would differ slightly if Hispanic is redefined as an ethnicity. Thus, we will use the term "race" to refer to both race and ethnicity in the remainder of this paper.



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who fall within the definition of applicant are included in the company's applicant tracking system, and the company must solicit race and gender information from these individuals. For positions where the "Internet Applicant" rule applies, only "Internet Applicants" must be included in the applicant tracking system. Companies are allowed to include more than "Internet Applicants" in the applicant tracking system in such a situation, but the applicant tracking system should include at a minimum all "Internet Applicants."

Applicants to Include for Adverse Impact Analyses

Under the Uniform Guidelines, companies are required to analyze applicant and hire data to determine whether selection decisions are having any discriminatory impact on minorities, females, or some other protected class of applicants. The Uniform Guidelines suggest that companies should use an 80% test to determine whether interview, hire, or other selection decisions are having an adverse impact on applicants in a protected class.

Companies should compare persons hired against the particular applicant pools for those openings. There are various ways to aggregate and segregate this applicant and hire data. Federal contractors and subcontractors typically prepare adverse impact analyses by comparing applicants in a job group against the persons hired into that job group. (A job group is a collection of jobs that have similar duties, similar pay, and similar opportunities for advancement.) While the typical analysis of applicants for positions in a job group v. hires into that job group may be sufficient, it may need to be supplemented by other comparisons. OFCCP may ask companies to compare applicant and hire data on individual positions, on particular job titles with multiple hires, on groups of similar positions, on job groups, or on some other basis.

Regardless of the way in which applicants and hires are analyzed, the definition of applicant has a significant effect on the data to be analyzed. The more comprehensive the definition of applicant, the larger the number of applicants to be analyzed. With a larger number of applicants, the possibility of a statistically significant showing of adverse impact increases. One of the important attributes of the OFCCP's "Internet Applicant" rule is that it limits the applicants to be analyzed.

Timing for the Collection of Race and Gender Information

While the OFCCP's "Internet Applicant" rule makes it clear that employers must solicit race and gender information from "Internet Applicants," the rule does not tell employers when to solicit this information. Employers may choose to collect this information at various stages of the hiring process depending on various strategic and practical considerations. While applicants cannot be required to return race and gender surveys, employers are required to provide applicants with an opportunity to complete these surveys.

The strategic issues associated with the timing of the collection of applicant data revolve around the possibility of limiting the number of persons included in impact ratio analyses. As a general rule, the smaller the number of applicants included in an impact ratio analysis, the less likely that there will be a finding of adverse impact. When race and gender data on applicants is collected later in the hiring process, the number of applicants who feel they are no longer under consideration is likely to increase, and thus the number of applicants likely to submit race and gender information will generally decrease. Some in the federal contractor community have suggested that race and gender information should be solicited after a position has been closed and filled, in part because this is the point at which the smaller number of responses to race and gender surveys will be collected.



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The practical issues associated with the timing of the collection of applicant data may cause companies to solicit race and gender at a very different point than the strategic considerations suggest. For many employers, it will be easiest to solicit race and gender information the first time an applicant expresses interest in a position. This will especially be the case for employers who require individuals to apply via their web sites and for employers who use internal databases to store applicant data. It may also be easiest to collect race and gender information from applicants who are found on job posting sites at the initial phase of the hiring process. However, when companies collect race and gender information at an early stage in the hiring process, they are likely to collect data on both Internet applicants and individuals who ultimately do not meet the four parts of the "Internet Applicant" definition. This may result in a waste of time and effort on the part of the company and may suggest to applicants that they are under consideration when they are not.

Regardless of the strategic or practical implications of the timing for the collection of race and gender information, OFCCP's "Internet Applicant" rule makes it clear that companies must solicit information on some group larger than interviewees. Under the traditional Uniform Guidelines definition, some companies had taken the position that the only group of applicants who needed to be surveyed was the group that was interviewed in-person by the company. Under the "Internet Applicant" rule, companies must solicit race and gender information from every person expressing interest who meets the four-part test, regardless of whether they were interviewed. Only in those rare situations where every "Internet Applicant" is interviewed will the two groups be the same, and companies are not allowed to modify their selection protocols or establish basic qualifications that limit "Internet Applicants" to those persons who are interviewed.

In summary:

- Companies MUST attempt to collect race and gender information on all persons who are "Internet Applicants."
- Companies MUST attempt to gather information on some group other than interviewees.
- Companies MUST demonstrate that they have a methodology in place for the collection of race and gender information and MUST be able to demonstrate to OFCCP that there is a rationale in place in regard to the timing for the collection of this data.

What to Keep vs. What to Record

In addition to the definition of "Internet Applicant," the OFCCP's "Internet Applicant" rule has instructions on the materials that employers are required to retain. These retention requirements are very different than the other provisions found in the rule. As a general rule, federal contractors and subcontractors must retain information from any individual who expresses interest in an open position, even though federal contractors and subcontractors are required to solicit race and gender information only from "Internet Applicants."

As noted earlier, there are a significant number of federal contractors and subcontractors that are required to keep all applicant materials for two years from the date of submission. For the remaining contractors and subcontractors, there is a one-year retention requirement. This one- or two-year retention requirement includes not just application forms and resumes but cover letters, notes taken by managers during interviews, advertisements, initial determinations about basic qualifications, and anything else related to the selection process.

The record retention issue becomes complicated when employers take in large numbers of

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applicants through the Internet. An employer that posts a job on its web site may take in thousands of resumes. A large number of these applicants may not be considered "Internet Applicants." However, the resumes of unqualified persons, persons who don't apply through the proper procedures, and so on would need to be retained, even though there may be no race and gender solicitation from these individuals (and thus no adverse impact analysis on these individuals).

When the "Internet Applicant" rule applies, OFCCP will generally not request access to information on persons who are not considered to be "Internet Applicants." However, OFCCP must be given access to ALL applicant materials (including resumes and applications for persons who don't meet the four-part "Internet Applicant" test) if the agency has questions about the process actually used to determine which applicants qualify as "Internet Applicants" or if the agency believes that the company changed its criteria in the middle of a search.

Retention Requirements for Internal and External Databases

OFCCP has provided guidance on the materials to be retained when companies search internal and external databases. If a company has an internal database of potential candidates and searches are conducted against that database, there are certain rules that apply regarding what information must be kept. Companies must keep:

- a copy of each resume added to the database;
- a record of the date each resume was added to the database;
- the position for which each search of the database was made; and
- corresponding to each search, the substantive search criteria used and the date of the search.

For most employers using an internal database, this information would need to be kept for two years. Since a resume in such a database may be viewed multiple times, the resume should be kept for two years from the last time it was viewed as part of a search.

There are also companies that will search external job banks or other resume databases such as Monster.com. There are record retention requirements that also apply to these databases. Companies must keep a record of the position for which each search of the database was made, and corresponding to each search:

- the substantive search criteria used;
- the date of the search; and
- the resumes of job seekers who met the basic qualifications for a particular position and who were considered by the contractor.

There are a few important limitations on the retention requirements for an external database.

- First, contractors only need to retain information from external databases for individuals who met a position's basic qualifications.
- Second, contractors only need to retain information from external databases for individuals who were "considered" by the contractor. Thus, if a company does an initial search of an external database, and comes up with 1,000 individuals who supposedly met the basic qualifications, but the company only looks at the first 100 resumes that were part of this search, ONLY the 100 resumes must be kept (assuming that the 100 actually met the company's basic qualifications).

Our Suggestions Regarding the OFCCP's "Internet Applicant" Rule

With the release of the "Internet Applicant" rule, the OFCCP has provided federal contractors and



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subcontractors with formal guidance on who should be considered an applicant. There are a number of actions that companies should consider taking in light of the "Internet Applicant" rule.

Making Sure the "Internet Applicant" Rule Applies

The "Internet Applicant" rule can be valuable to companies because companies can use the "Internet Applicant" rule to limit the number of applicants that need to be recorded and analyzed. However, in order to gain the benefits of the "Internet Applicant" rule, companies need to make sure that the rule applies to each opening. Companies can do this by taking the following actions:

- Require all applicants to apply via the company web site, via e-mail, or via some other means where an electronic data technology is used. For entry-level positions where a company has traditionally taken application forms from walk-in applicants, the company may want to use electronic kiosks in its lobby. Alternately, the company may require applicants to go through a third-party source such as the local state employment service that can fax or e-mail application forms.
- Establish a procedure for applying prior to accepting any applications or resumes. The procedure should specify the manner in which applications or resumes will be taken and the particular electronic data technologies that will be involved.
- Annotate applicant records to show how applicants expressed interest. For any given position, the use of an electronic data technology by one applicant causes the "Internet Applicant" rule to apply to that position. An applicant tracking system that expressly shows that at least one applicant used an electronic data technology will support the company's use of the "Internet Applicant" rule.

Substantive Consideration for a Particular Position

Under part 2 of the "Internet Applicant" rule's definition of applicant, an individual is an "Internet Applicant" only if he or she received substantive consideration for a particular position. Companies can limit the number of applicants counted as "Internet Applicants" under this part of the definition by taking the following steps:

- Set limits on how and when resumes and application forms are accepted. Consider using a cut-off date for accepting expressions of interest.
- Define the specific procedure that applicants must follow in order to receive additional consideration and make applicants aware of the specific procedure to follow.
- Have applicants apply for specific positions. Rather than allowing applicants to suggest they are interested in "any" or "professional" positions, applicants should be required to apply for specific openings. At the very least, applicants should be required to apply for categories of jobs rather than "any opening." (For example, it would be best to make production applicants apply for "assembler" or "welder" rather than "shop.")
- For multi-site employers, make applicants express interest in openings at a particular location.
- Determine whether the company will use any kind of data management techniques to limit consideration of applicants. If possible, the particular data management techniques to be used should be determined prior to the time the company starts accepting expressions of interest.

Using Basic Qualifications

Under part 3 of the "Internet Applicant" rule's definition of an applicant, an individual is an

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"Internet Applicant" only if he or she meets the company's basic qualifications for a position. Companies can limit the number of applicants counted as "Internet Applicants" under this part of the definition by taking the following steps:

- Have predefined criteria that are used to evaluate who is qualified for a position.
- Write down the basic qualifications prior to the start of a recruitment effort. Employers are well-served by writing down preferred qualifications as well as basic qualifications.
- Make sure basic qualifications are objective, non-comparative, and job-related.
- Avoid establishing basic qualifications such as "good communication skills" that by their nature are subjective and that require comparisons between candidates.
- Publish **all** basic qualifications in advertisements, web postings, and other sources where positions are announced to the public.
- Take care when using basic qualifications sequentially during a search of an internal or external database. While a search of a database can initially involve a subset of the company's basic qualifications, companies are NOT allowed to develop new basic qualifications while in the midst of search of database. Only the predefined written basic qualifications should be used to eliminate persons from the group of applicants defined as "Internet Applicants."
- Make sure that there are no changes to basic qualifications at any point during the course of a recruitment effort. If a change needs to be made to the basic qualifications for a position, the current recruitment effort should be closed and recruitment should start again using the new basic qualifications.

Recording Information on Persons Who Withdraw from Consideration

Under part 4 of the "Internet Applicant" rule's definition of an applicant, an individual is an "Internet Applicant" only if he or she does not withdraw from consideration. Companies can limit the number of applicants counted as "Internet Applicants" under this part of the definition by taking the following steps:

- Keep careful track of the point at which applicants withdraw. The company should have some type of formal entry (either in an applicant tracking system or elsewhere) to indicate when and how the withdrawal occurred.
- Annotate records to indicate the reason that an applicant withdrew when the withdrawal was a passive withdrawal.
- Use only objective, job-related criteria to demonstrate that applicants passively withdrew because they had requirements inconsistent with a position.

Collecting Race and Gender Data on "Internet Applicants"

Companies are obligated to make an effort to collect race and gender data on ALL "Internet Applicants." There are certain actions that the company should take in this regard:

- Determine the manner in which race and gender data will be solicited from applicants before recruitment begins.
- Determine the point in the recruitment effort at which the solicitation for race and gender will occur.
- Avoid race and gender solicitations that appear to be mandatory requests for this information. It should be made clear to applicants that the race and gender solicitation is a voluntary request and that applicants are not required to provide this data.



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- Record and analyze race and gender information on all "Internet Applicants" who submit this data.
- Record the race and gender of "Internet Applicants" as unknown for applicants who fail to voluntarily provide this data. These applicants should remain in the company's applicant tracking system, as they are still "Internet Applicants," but their race and gender should show as unknown.
- Avoid making assumptions about the race and gender of applicants who do not submit survey forms and who have not been physically seen by a company representative. Applicant tracking systems should NOT default to white and male for persons of unknown race and gender.
- Solicit race and gender information from some group of applicants beyond those who are interviewed.
- Record race and gender information on all persons who are interviewed, even where they do not fill out a race and gender survey form. In this type of situation, OFCCP will expect that companies visually identify the race and gender of an applicant.

More information on the OFCCP's "Internet Applicant" rule can be found at the OFCCP's web site at www.dol.gov/esa/ofccp. Companies are well served by occasionally reviewing the frequently asked questions that OFCCP is posting and responding to on their website. Companies should also watch for additional guidance that OFCCP may make available concerning the race and ethnicity categories that should be included in applicant surveys.

Companies can find additional information concerning applicants at our web site at www.hranalytical.com. Revised versions of this paper will be made available as major revisions are released.

Prepared by Bill Osterndorf, HR Analytical Services. All materials © HR Analytical Services 2008. Most recent revision: February 15, 2008. Please note that the information in this paper does not constitute legal advice and that certain portions of this paper may not apply to your company.