



JONES DAY COMMENTARY

WHO IS AN INTERNET APPLICANT? FINAL RULE ON RECORDKEEPING FOR GOVERNMENT CONTRACTORS PROVIDES SOME GUIDANCE

On February 6, 2006, the final rule of the Office of Federal Contract Compliance Programs ("OFCCP") defining "Internet applicant" took effect. For the first time, the OFCCP is requiring covered federal contractors to obtain, when possible, the gender, race, and ethnicity of "Internet applicants." The final rule also adds "Internet applicants" to those covered by the OFCCP's recordkeeping requirements. This final rule applies to applicants who apply for positions where contractors consider traditional expressions of interest as well as Internet or electronic-based applications. Existing recordkeeping standards remain in effect for the positions in which contractors accept and consider only candidates who have displayed interest through traditional means. Like many laws that govern businesses, the previous regulations and interpretations have been an area of controversy for a

number of reasons, including the fact that the law has not evolved as fast as the technology.

OVERVIEW OF THE FINAL RULE

The final rule:

- Defines "Internet applicants" as job seekers applying for work through the Internet or related electronic data technologies from whom contractors must solicit demographic information.
- Outlines contractors' recordkeeping and data collection requirements related to hiring resulting from the Internet or related electronic data technologies.
- Identifies the records the OFCCP will require contractors to produce when it evaluates whether the contractors have maintained information on impact and conducted an adverse-impact analysis pursuant to the regulations.¹

1. Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes, 70 Fed. Reg. 58,946 (Oct. 7, 2005) (effective Feb. 6, 2006, 41 CFR 60-1).

WHO IS AN “INTERNET APPLICANT?”

Identifying “applicants” who are subject to the OFCCP’s data collection and recordkeeping requirements is important for two reasons: (1) Covered federal contractors are required to identify “applicants” to determine whether their hiring practices have a disparate impact on minorities and women; and (2) only “applicants” are entitled to sue for unlawful discrimination for failure to hire under federal and state laws. Thus, it is essential that federal contractors understand the definition of “Internet applicant” and the corresponding expanded scope of these regulations.

An individual must satisfy *all* of the following four criteria to be considered an “Internet applicant”:

- The individual must submit an *expression of interest* in employment through the *Internet or related electronic data technologies*, such as e-mail, commercial and internal resume databases, and employer web sites.
- The contractor must *consider* the individual for a particular position.
- The individual’s expression of interest must show that he or she has the *basic qualifications* for the position.
- The individual *does not remove* himself or herself from the selection process at any time prior to receiving an offer or otherwise indicate that he or she is *no longer interested* in the position.

THE FOUR “INTERNET APPLICANT” CRITERIA

Notwithstanding the new regulations, practitioners and employers have questions regarding certain terms. This discussion outlines those questions and the status of the debate.

Expression of Interest in Employment Through the Internet or Related Electronic Data Technologies. There are at least two ambiguities related to this first criterion that arose during the rule comment period. First, commentators asked the OFCCP to explain the term “Internet or related electronic data technologies.” While the OFCCP refused to elaborate because technology is constantly evolving, it did offer some guidance. The OFCCP explained that e-mail, internal and third-party resume databases, job banks, electronic scanning technology, applicant-tracking systems, applicant service providers, and applicant screeners are included within the term. Thus,

job seekers utilizing any of these methods may satisfy this first criterion. The OFCCP’s explanation also suggests the potentially broad reach of the new final rule.

The second issue that arose during the comment period related to the uncertain applicability of the short definition of “Internet applicant.” It was unclear whether the rule would apply to contractors’ traditional application acceptance processes, such as paper resumes, in addition to their Internet and related-technologies application processes. Consequently, the final rule now states that the Internet applicant rule applies to expressions through traditional means if the contractor considers *both* electronic and traditional expressions of interest for that position. On the other hand, the existing traditional applicant rules apply where the contractor uses only traditional means of accepting applications, such as paper resumes, for hiring.

Whether the Contractor Considered the Individual for a Particular Position. The final rule states that a contractor “considers [an] individual for employment” within the meaning of the second criterion when the “contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.” A contractor’s practice will dictate which individuals it “considers” to determine if this criterion is satisfied.

For example, if a contractor’s policy (and practice) is to consider only electronic resumes, only those individuals who utilized the electronic procedure will be “considered” within the meaning of this term. Similarly, a contractor may implement a practice that prohibits consideration of unsolicited resumes that are not submitted for a particular position.

The rule also permits a contractor to decrease the size of the applicant pool if it is too large. If this occurs, the contractor may limit the number of applicants it considers by using data management techniques that do not depend on candidates’ qualifications. Using random sampling, for example, will allow the contractor to limit the applicant pool to a small subset of resumes for review. In such a case, the contractor may randomly select for review 100 of 1,000 resumes submitted. The contractor can also use absolute numerical limits to reduce the number of applicants to the first of a given number of submitted applications, *e.g.*, consider the first 50 applications submitted. Likewise, the contractor could decide to consider

applications only for a certain time period, e.g., any applications not acted upon within 90 days of receipt.

In these examples, some individuals will not satisfy the second criterion because the contractor's policies or data management techniques precluded their consideration, and thus they will not be "Internet applicants."

Basic Qualifications. An individual must also meet *all* of the basic qualifications in order to satisfy the third prong of the "Internet applicant" definition. "Basic qualifications" are the qualifications the contractor advertises as the requirements an individual must have in order to be considered for the position. Alternatively, if the contractor does not advertise the position, then "basic qualifications" are those requirements that the contractor establishes and records before considering anyone.

Additionally, all basic qualifications must:

- Include *noncomparative features* (e.g., requiring five years' experience instead of seeking the candidate who has the most experience, which is a comparative requisite).
- Be *objective* (e.g., requiring a law degree instead of requiring any degree from a good school, which is a subjective determination).
- Be *relevant* to the particular position and *enable* the contractor to *meet business-related goals*.

Removing Oneself From Further Consideration or Indicating Lack of Interest. A potential job candidate who disqualifies himself or herself from the application process will not be considered an "Internet applicant." Removal can occur with a candidate's express statement of lack of interest or passive unresponsiveness to the contractor's repeated inquiries to determine interest. Answers to questions that show a mismatch, such as salary requirements far exceeding the position's salary, or work location limitations, can also constitute indicating lack of interest, provided that the contractor has a uniform practice of not considering such candidates. Finally, data management techniques, as described above, can be used to limit the number of individuals the contractor must contact to determine interest, as long as the sample of the pool is appropriate in terms of those meeting the basic qualifications.

FINAL RULE RECORD RETENTION REQUIREMENTS

In addition to defining "Internet applicant" and requiring that contractors collect gender, race, and ethnicity data for "Internet applicants," the final rule requires contractors to maintain records pertaining to all Internet- or related electronic-data-technologies-based "expressions of interest" in which the contractors "considered the individual for a particular position." Contractors must retain these records even if the individual does not ultimately satisfy the definition of "Internet applicant." On the other hand, contractors are not required to retain records of individuals who were never considered for the position but must retain records that identify individuals the contractors contacted concerning their interest in a particular job.

Certain internal and external resume database records must be maintained even if the applicant is not an "Internet applicant." Contractors using internal resume databases must maintain records for each resume that was added to the database, including the date it was added, the position for which each search was made, the substantive criteria for the search, and the date of the search. The recordkeeping requirements associated with internal resume databases are triggered when the first two criteria are satisfied (*i.e.*, a job seeker submits an expression of interest through the Internet and the contractor considers that individual for a particular position).

Contractors using external resume databases must maintain records for the position for which each search was made, the date of the search, the substantive criteria for each search, and the resumes of any individuals who met the basic qualifications for the position who were considered by the contractor. The recordkeeping requirements associated with external resume databases attach after the first three prongs of the "Internet applicant" definition are satisfied; that is, the considered individual must also meet the basic qualifications for the position.

Thus, despite contractors' flexibility in defining "basic qualifications" and the corresponding control over how many candidates are ultimately "Internet applicants," a contractor may still be obligated to retain records for some individuals even though they may not ultimately be included in the applicant flow report and adverse-impact analysis.

FINAL RULE REQUIREMENT TO SOLICIT RACE, GENDER, AND ETHNICITY DATA

The final rule also requires a contractor to solicit race, gender, and ethnicity information from all individuals who are “Internet applicants” by definition. Unlike the recordkeeping requirements, which may be imposed even though the job seeker is not an “Internet applicant,” the solicitation rule applies only to candidates who satisfy all four of the defining criteria. While the rules do not specify when the race, gender, and ethnicity information must be solicited during the hiring process, since the requirement is triggered only after the four criteria are met, it follows that solicitation is not required until after the hiring process is complete. Indeed, because a candidate can remove himself or herself at any time prior to receiving an offer, including by not responding to an offer, the solicitation is probably not required until after the position is filled. Only then is the group of “Internet applicants” known, and only then will the contractor know from whom it must solicit information.

Self-reporting or self-identification remains the preferred method for soliciting race, gender, and ethnicity data; however, visual observation is permissible if a candidate refuses to self-identify.

INFORMATION CONTRACTORS SHOULD MAINTAIN TO ENABLE THE OFCCP TO EVALUATE ADVERSE IMPACT

As explained above, a contractor has latitude, to a degree, to determine the basic qualifications for positions it seeks to fill. Nevertheless, the OFCCP intends to scrutinize whether the basic qualifications established by the contractor actually have an adverse impact on minorities or women. In essence, the OFCCP is concerned that certain individuals, otherwise qualified, may be discouraged from applying for a position because of the contractor’s potentially discriminatory standards.

The OFCCP will consider:

- Records that show expressions of interest considered by the contractor—even for individuals who are not “Internet applicants.”
- Basic qualifications used to develop a pool of “Internet applicants.” The OFCCP, however, does not consider employment tests to be basic qualifications. Nevertheless, the contractor must maintain records related to the impact of employment tests.
- Census and “other labor market data” in order to determine whether the contractor’s basic qualifications have an adverse impact on race, ethnicity, or gender. The OFCCP will consider comparisons statistically significant if there are two standard deviations or more.
- All aspects of the contractor’s compliance, including those outside the scope of the records produced by the contractor, such as screens for basic qualifications and other recruiting, hiring, and employment practices.

PRACTICE TIPS FOR COMPLIANCE WITH THE FINAL RULE

The OFCCP stated that it will not extend the February 6, 2006, effective date. Despite this, the OFCCP also stated that it will use its enforcement discretion and not cite federal contractors for technical recordkeeping violations for 90 days following the effective date. In order to take advantage of this grace period, a contractor must (1) demonstrate that it is making progress to update its systems to comply with the final rule; and (2) comply with the preexisting requirements.

Accordingly, contractors should not delay in adopting procedures to comply with this new law. Contractors should consider the following recommendations for ensuring compliance:

- Determine whether the company is subject to the OFCCP’s final rule. The OFCCP has jurisdiction over employers that are covered federal contractors. Medicare and Medicaid are financial assistance; they are not contracts.
- Analyze and revise the company’s current applicant definition so that record retention and applicant data are not too cumbersome.
- Determine whether the company’s current policy will require traditional and “Internet” recordkeeping, and consider implementing a hiring practice with an ongoing technology-based component so that recordkeeping and OFCCP compliance fall under one “Internet applicant” rule.
- Assess whether the company’s technology can support the new recordkeeping requirements.

- Establish clear and administrative-friendly guidelines for an application procedure.
- To reduce the number of “expressions of interest,” consider a policy that excludes applicants who do *not* follow the company’s application procedures, and then follow that policy uniformly and consistently.
- To reduce the number of “expressions of interest,” consider a policy that rejects applicants who send unsolicited resumes for no particular position, and then follow that policy uniformly and consistently.
- For voluminous applicant pools, consider implementing data management techniques that will reduce the number of applicants considered.
- Develop a procedure for capturing the necessary information required for any resume database searches.
- Develop a procedure for soliciting demographic information for Internet applicants.
- Clearly identify, in writing, a job’s basic qualifications *before* advertising the position or considering individuals and ensure that the basic qualifications satisfy each of the criteria outlined in the final rule.
- Make it standard practice to refuse to consider candidates who remove themselves from consideration. For each of these candidates, document: (a) the reason for removal, (b) the number of attempts to contact the individual, (c) the means of communication, and (d) the dates of each contact or attempted contact.
- Train recruiters and appropriate human resources personnel on the new requirements and changes in the company’s policies and procedures to ensure compliance.

LAWYER CONTACTS

For further information, please consult with one of the Jones Day attorneys listed below, who regularly counsel clients on matters relating to the Office of Federal Contract Compliance Programs. General e-mail messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Amy E. Dias

1.412.394.7915

aedias@jonesday.com

Willis J. Goldsmith

1.212.326.3649

wgoldsmith@jonesday.com

Michael J. Gray

1.312.269.4096

mjgray@jonesday.com

G. Roger King

1.614.281.3874

1.858.314.1134

gking@jonesday.com

Barbara J. Leukart

1.216.586.7190

bjleukart@jonesday.com

Alison B. Marshall

1.202.879.7611

abmarshall@jonesday.com

Deborah Saxe

1.213.243.2622

dsaxe@jonesday.com

Douglas M. Towns

1.404.581.8632

dtowns@jonesday.com

Jones Day Commentaries are a publication of Jones Day and should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at its discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.