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When Applicants Apply Through the Internet

Ely A. Leichtling and Pamela M. Floor

In this article, the authors explore what government contractors need to know about proposals issued on the definition of "applicant" in the context of the Internet and related technologies and on recordkeeping and tracking of race, gender, and ethnicity of "Internet Applicants."

On March 4, 2004, the Office of Federal Contract Compliance Programs (OFCCP) and other federal agencies issued long overdue proposed guidance on the definition of who is an applicant, including when a person applies for a job via the Internet. The proposed guidance is significant because it outlines a test for determining who is an applicant that is broader than the interim definition that was recently suggested by OFCCP personnel. The definition of applicant is particularly important to federal government contractors because they must track the race, ethnicity and sex of applicants, retain resumes, applications and the like, and analyze whether hiring practices, policies or procedures have a "disparate impact" on minority and women applicants. On March 29, 2004, the OFCCP followed-up on the March 4, 2004 proposed guidance by issuing proposed regulations concerning these recordkeeping and tracking issues.

BACKGROUND

The March 4, 2004 Proposed Guidance on the Definition of "Applicant" in the Context of the Internet and Related Technologies

Government contractors have to track persons who qualify as applicants for open positions so they can later compare the hiring rates of women to men and of minorities to whites. The OFCCP never clearly defined the term "applicant," however. The OFCCP stated that it relied on the definition of applicant contained in Question and Answer 15 from the "Adoption of Questions and Answers to Clarify and Provide A Common Interpretation of the Uniform Guidelines on Employee

Ely Leichtling and Pamela Floor are partners of Quarles & Brady LLP. Among other things, their practices concentrate in the preparation, review, and audit of affirmative action programs. They may be reached at eal@quarles.com and pploor@quarles.com.

Selection Procedures” (Uniform Guidelines) that was published on March 2, 1979, to clarify the Uniform Guidelines, which had been issued on August 25, 1978 by the Equal Employment Opportunity Commission (EEOC), the OFCCP, the Office of Personnel Management, and the Department of Justice. According to these Uniform Guidelines, an “applicant” is any person who has indicated an interest in being considered for hiring, promotion or other employment opportunities. The Uniform Guidelines direct employers to keep records regarding all applicants.

Employers that are federal government contractors struggled with how to reconcile their practical recruiting needs with the OFCCP’s guidelines. Contractors often resisted such a broad definition because of the burdensome recordkeeping obligations and the negative effect that including large numbers of unqualified persons had on their disparate impact analyses. Many contractors defined an applicant as anyone who expressed an interest and met the minimum qualifications required for the position. Such a definition enabled contractors to limit the pool of applicants for whom they kept records only to qualified candidates. Some contractors went further, and limited their definition of applicant to those who filled out an employment application, which was in turn made available only to candidates at the time of on-site job interviews. In addition, employers have been increasingly concerned about the definition of “applicant” because the Internet has become an increasingly important tool for recruiting and greatly increased the potential pool of applicants.

In late 2001, the Office of Management and Budget (OMB) instructed the agencies that issued the Uniform Guidelines to update the Uniform Guidelines to address the definition of applicant and the impact of the Internet and related technologies on the question of who is an applicant for purposes of the Uniform Guidelines. The March 4, 2004, proposed guidance also informs employers when they should identify the race, gender and ethnicity of their applicant pool when they use the Internet and related technologies. The proposed guidance can be found at <http://a257.g.akamaitech.net/7/257/242214mar20010800/edocket.access.gpo.gov/2004/pdf/04-4090.pdf>.

Commentary by the EEOC on the March 4, 2004, proposed guidance states that Question and Answer 15 continue to apply to an employer’s use of paper resumes and applications to fill vacancies. The fact that the proposed guidance limits the context of the new definition to the Internet and related electronic data processing technologies is unfortunate because of the difficulties many contractors had in applying that definition even to the traditional “paper” process. The issuing agencies may have felt constrained to limit the proposed guidance in this way because of how the OMB framed the assignment, but many of the principles in the proposed guidance arguably should translate into the more traditional paper-based employment processes, as well.

THE NEW MARCH 4, 2004, PROPOSED GUIDANCE

The proposed guidance adds five questions and answers. The EEOC will eventually publish an announcement in the Federal Register of the effective date of the proposed guidance once it is finalized. This article focuses on one of the new questions and answers. Question and Answer 96 is the “biggie” and addresses what is meant by the term “applicant” in the context of the Internet and related electronic data processing technologies. The Answer to Question 96 states:

In order for an individual to be an applicant in the context of the Internet and related electronic data processing technologies, the following must have occurred:

- (1) the employer acted to fill a particular position;
- (2) the individual followed the employer’s standard procedures for submitting applications; and
- (3) the individual indicated an interest in the particular position.

The proposed guidance elaborates on each of the three parts of the test, with examples, as follows.

The Employer Has Acted to Fill a Particular Position

The proposed guidance offers an example of an employer seeking to fill two positions in one of its facilities. The employer identifies 200 recruits from the database it maintains of job seekers who register and complete on-line personal profiles for the employer’s resume database for the *type* of positions at issue. The employer contacts the 200 job seekers and 100 respond affirmatively and timely to the employer’s inquiry about their current interest in the particular vacancies at the particular location. The proposed guidance states that even if the employer chooses to interview only 25 of the 100 affirmative responders for the positions, all 100 are “applicants” within the meaning of the Uniform Guidelines. But job seekers who submit unsolicited resumes (whether electronic or otherwise) for positions of a type that the employer is not currently seeking to fill would not be “applicants,” although they might later become applicants if and when the employer decided to fill the position and contacted them to see if they were interested.

To limit the number of job seekers who must be considered “applicants,” employers should consider setting up their recruitment and selection procedures so that those job seekers who send resumes to the employer or fill out electronic profiles are not applying for specific vacancies at specific locations, and thus only the smaller group of job seekers who are subsequently contacted by the employer and who indicate an interest in the particular vacancy at the particular location will be deemed “applicants” under the Uniform Guidelines.

The proposed guidance does not state that the employer in its example may exclude from the definition of “applicant” those of the 100 who failed to meet the employer’s minimum qualifications for the position. The absence of language allowing an employer to consider qualifications in defining who is an applicant almost certainly will be the subject of comments that will be submitted objecting to the proposed guidance.

The Individual Has Followed the Employer’s Standard Procedures for Submitting Applications

The proposed guidance acknowledges the employer’s power to define how a job seeker must apply, and only those who follow the employer’s procedures become “applicants” under the Uniform Guidelines. For example, if job seekers must use an electronic kiosk or contact the store manager to apply for a sales position, only those who do so are “applicants” under the Uniform Guidelines. Similarly, if an employer e-mails on-line job seekers to ask if they are currently interested in a particular vacancy, only those who meet the employer’s deadline qualify as “applicants.” The proposed guidance reminds employers that the employer’s procedures and directions must be non-discriminatory because recruitment and the application processes are subject to Title VII and Executive Order 11246.

The Individual Has Indicated an Interest in the Particular Position

The proposed guidance explains that a person who post resumes in third-party resume banks or on personal Web sites are not “applicant” within the meaning of the Uniform Guidelines for employers who search those sites because the individual is not indicating an interest in a particular position with a specific employer. Such a person becomes an “applicant” only if the employer contacted the individual about a particular position and the individual indicated an interest in that position and followed the employer’s standard procedures for submitting applications. The same would be true if the employer contacted an individual about a particular position in response to an unsolicited resume submitted on-line. The individual would need to indicate an interest in

that position and follow the employer's standard procedures for submitting applications before becoming an "applicant." A job seeker who expressed interest in a whole category of positions, such as marketing opportunities, rather than a particular vacant position with a specific employer is not an applicant. The proposed guidance also explains that if an individual repeatedly submitted a resume or profile to the same employer (for example, by adding numerous on-line job listings to his or her "shopping cart") or simply sent resumes (for example, by using automated on-line tools) over and over again, that individual was merely identifying the types of positions in which he or she was interested and was not automatically an applicant. But under the proposed guidance, the situation would change if the job seeker completed and submitted an electronic application form that was unique for a particular position because then the job seeker would have indicated a specific interest in that particular position.

WHAT THE MARCH 4, 2004, PROPOSED GUIDANCE DOES NOT DO

It is important for employers to note that the proposed guidance will not alter in any way the legal rights and responsibilities of employers, applicants and employees under Title VII or Executive Order 11246 (applicable to federal government contractors) under any legal theory of discrimination, including disparate impact. The right of an applicant or employee to file a charge or complaint of discrimination or to file a lawsuit is unchanged by the Uniform Guidelines and the proposed regulations on the term "applicant." Thus, even if a job seeker is deemed not to be an "applicant" under the Uniform Guidelines, employers may not discriminate against that job seeker on the basis of race, gender or ethnicity and that job seeker remains free to pursue claims of discrimination against an employer.

THE MARCH 29, 2004, PROPOSED REGULATIONS ON RECORDKEEPING AND TRACKING OF RACE, GENDER, AND ETHNICITY OF "INTERNET APPLICANTS"

The OFCCP's record retention regulations require covered contractors to retain paper applications and resumes for two years if the contractor has 150 or more employees and a government contract of at least \$150,000 and, for other covered contractors, for only one year. The OFCCP's current regulations also require covered contractors to, where possible, identify the gender, race and ethnicity of each applicant. However, the OFCCP's applicant tracking and recordkeeping regulations do not define "applicant."

The March 29, 2004, proposed revisions to the OFCCP's record-keeping regulations add a definition of "Internet Applicant," require contractors to retain Internet submissions of interest and require contractors to collect gender, race and ethnicity information concerning Internet Applicants. The proposed regulations can be found at <http://www.dol.gov/esa/regs/fedreg/proposed/2004006972.pdf>.

DEFINITION OF "INTERNET APPLICANT"

The March 29, 2004, proposed regulations would add a definition of "Internet Applicant," which would consist of four criteria, but would not define other types of applicants. Under the proposed definition, an Internet Applicant means any individual who:

- Submits an expression of interest in employment through the Internet or related electronic data technologies;
- Is considered for employment in a particular open position;
- Based on the expression of interest, possesses the "advertised, basic qualifications" for the position; and
- Does not indicate lack of continued interest in the position.

THE MEANING OF "ADVERTISED, BASIC QUALIFICATIONS"

The proposed regulations further define the concept of "advertised, basic qualifications" to mean those qualifications that the employer advertises (for example, by posting a description of those qualifications on its website) to potential applicants, stating that they must possess those qualifications in order to be considered for the position. Therefore, if a college degree is merely preferred, but not required for the position, a job seeker without a college degree cannot be excluded from the definition of Internet Applicant merely because he or she does not have a college degree. In addition, the qualifications must meet the following three conditions:

- *The qualifications must be non-comparative.* For example, three years' experience is a non-comparative qualification. Being among the top five candidates in terms of the amount of experience possessed is a comparative qualification and would not meet the OFCCP's definition.
- *The qualifications must be objective.* For example, "a

Bachelor's degree in accounting" is objective, while a "technical degree from a good school" is not. The proposed regulations state that one way to tell whether a proposed qualification is objective is whether a third-party unfamiliar with the employer's operation would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment. Presumably, this means that typical language used by many employers in job advertisements, such as "a college degree or equivalent experience" may not meet the definition because the concept of "equivalent experience" is subjective.

- *The qualifications must be job-related.* In other words, they must be relevant to performance of the job and enable the employer to accomplish its business-related goals.

RECORD RETENTION

The March 29, 2004 proposed regulations clarify that covered contractors must retain not only paper applications and resumes, but "any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant . . .)."

Reliance by the OFCCP on Labor Force Statistics to Monitor an Employer's Use of "Advertised, Basic Qualifications"

Because the March 29, 2004 proposed regulations require employers to retain submissions from job seekers through the Internet or related electronic technologies, even if those job seekers are not Internet Applicants, the OFCCP will be able to determine whether an employer has applied its "advertised, basic qualifications" in a non-discriminatory fashion to determine who is or is not an Internet Applicant. Further, in the introduction to the March 29, 2004, proposed regulations, the OFCCP states that it will rely on labor force statistics or other relevant data to examine an employer's recruitment processes that occur prior to the collection of gender, race, and ethnicity data on Internet Applicants. Thus, the OFCCP will compare (a) the proportion of women and minorities in the contractor's relevant applicant pool with (b) labor force statistics or other data on the percentage of women and minorities in the relevant labor force and, if there is a significant difference between the applicant pool and labor force figures, the OFCCP will investigate further as to whether the contractor's recruitment and hiring practices conform with Executive Order 11246 standards. This presumably will serve as a check to ensure that the employer's advertised, basic qualifications do not have a disparate impact on women or minorities and as a way to determine

whether the employer is taking appropriate good faith efforts to increase the flow of qualified female and minority applicants.

Tracking of Gender, Race, and Ethnicity

The March 29, 2004 proposed regulations continue to require covered contractors to, where possible, identify the gender, race and ethnicity of each applicant who submits his or her information to the employer through traditional paper channels (that is, not through the Internet and related electronic technologies), but also require contractors, where possible, to identify that information with reference to Internet Applicants. Thus, while an employer must retain copies of electronic submissions from all potential job seekers, under the March 29, 2004, proposed regulations, it needs to try to identify the gender, race and ethnicity only of that smaller group of electronic job seekers who fall within the definition of Internet Applicant.

Applicability to Paper Resumes and Applications

The OFCCP, in its March 29, 2004 notice concerning the proposed regulations specifically asked for comments about the fact that the proposed rule creates differing standards for data collection for traditional applicants versus Internet Applicants for the same job. Given that currently there is no OFCCP regulation permitting employers to apply a minimum objective qualification standard to limit the definition of "traditional" applicant and thus reduce the number of "traditional" job seekers for whom the employer must attempt to obtain gender, race and ethnicity data, employers have an interest in having similar standards apply to both "traditional" applicants and Internet Applicants. Employers should take advantage of the opportunity to point this out to the OFCCP in any comments they make to the proposed regulations.

COMBINED IMPACT OF THE MARCH 4, 2004 PROPOSED GUIDANCE ON THE UNIFORM GUIDELINES AND THE MARCH 29, 2004, PROPOSED RECORDKEEPING REGULATIONS

When the March 4, 2004, proposed guidance on the Uniform Guidelines and the March 29, 2004, proposed recordkeeping regulations are considered in combination, it appears that three groups of job seekers who use the Internet and related technology are created:

- *Those who meet the definition of Internet Applicant.* For this group, the employer must, where possible, obtain gender, race and ethnicity data, analyze the impact the employer's hiring pro-

cedures have on this group and maintain their expressions of interest in accordance with the OFCCP recordkeeping requirements.

- *Those who, though they do not qualify as Internet Applicants because they fail to meet the employer's advertised, basic qualifications, do fit within the proposed definition of applicant in the context of the Internet contained in Question and Answer 96 to the Uniform Guidelines announced on March 4, 2004, which does not contain an exclusion based on failure to meet advertised, basic qualifications.* At a minimum, an employer must maintain records concerning this group of job seekers' expressions of interest, in accordance with the OFCCP record retention guidelines. It appears from the March 29, 2004 proposed regulations that employers need not attempt to determine the gender, race and ethnicity of this group of persons. However, such a conclusion appears to conflict with the requirement in the Uniform Guidelines that an employer must determine the impact of its employment practices on "applicants." We can only hope that this issue is further addressed in connection with the OFCCP's response to the various comments that will be made to both the March 4, 2004, proposed guidance and the March 29, 2004, proposed regulations.

- *Those job seekers who are neither "applicants" under the proposed guidance on the Uniform Guidelines nor Internet Applicants under the proposed regulations.* For this group, the OFCCP merely requires an employer to maintain their expressions of interest in accordance with the OFCCP's recordkeeping guidelines.

ADVICE FOR GOVERNMENT CONTRACTORS

On an interim basis, the Director of the OFCCP's Division of Program Operations suggested in summer 2003 that until the proposed guidelines were finalized, OFCCP compliance officers would accept as an interim definition of "applicant," if used consistently by an employer, those job seekers who are minimally qualified, have been considered as part of a pool of candidates who have survived some initial screening prior to the formal interview process and who are in the final pool from which the employer performs an impact ratio analysis comparing hires to applicants. In other words, as long as the employer was gathering race, ethnicity and gender information for a group *larger* than the group of people it interviewed, the OFCCP would accept the employer's definition.

The March 4, 2004, proposed guidance and March 29, 2004, proposed regulations are far different and sweep in a much larger group of people. For example, the March 4, 2004, proposed guidance does not explicitly allow employers to exclude those who fail to meet minimum qualifications. The March 29, 2004, proposed regulations, while they permit employers to exclude those who fail to possess the "advertised basis qualifications" for a position, do not allow employers to further exclude those who do not survive a subsequent initial screening process. For now, employers should review the proposed guidance and the proposed regulations, compare them with their current definition of applicant (both with regard to Internet-type and paper resumes, applications, etc.), determine how, as a practical matter, they can best comply with the definitions in the proposed guidance and proposed regulations and begin readying their applicant tracking systems and application procedures to meet the requirements.

In addition, employers should continue to use subjective criteria and "preferred" qualifications, as appropriate. Although subjective hiring criteria (" . . . or equivalent experience") and preferred, but not mandatory, qualifications ("college degree or equivalent experience *preferred*") cannot be used to exclude a job seeker from the definition of Internet Applicant under the March 29, 2004, proposed regulations, that does not mean that an employer should abandon such criteria if the employer believes they are useful and business-related. Nothing in the proposed regulations makes it illegal for an employer to use such criteria. The proposed regulations would, however, require an employer to obtain, where possible, the gender, race and ethnicity of those job seekers whom it chooses not to hire if they otherwise meet the definition of Internet Applicant, even though they lack the subjective or preferred (though not mandatory) qualifications the employer is seeking.