



## **OFCCP “Internet Applicants” Final Rule for Federal Contractors Becomes Effective February 6, 2006**

**By R. Scott Hetrick**

### **Overview**

On February 6, 2006, the Department of Labor’s Office of Federal Contract Compliance Programs’ “Internet applicants” final rule becomes effective. The final rule informs federal contractors and subcontractors regarding how those employers must handle record-keeping responsibilities when the contractor uses the Internet and related technologies to seek or recruit new employees. *Fed. Register* Vol.70, No.194, pp.58945-58963. The new regulations apply to those companies who have at least a \$10,000 contract with a federal agency or those companies who have at least a \$10,000 subcontract with such a federal contractor and the subcontract is necessary for the performance of the primary contract. OFCCP regulations require contractors to obtain, where possible, information on applicants’ gender, race, and ethnicity. The new final rule defines “Internet applicants,” requires contractors to collect and retain such data from such individuals, and provides guidance on how the contractor can accomplish these obligations without undue burden.

## Who is an “Internet Applicant”?

The final rule establishes four criteria in order for an individual to be considered an “Internet applicant”:

- the individual submits an *expression of interest* in employment through the Internet or related technologies;
- the contractor *considers* the individual for a *particular position*;
- the individual's expression of interest indicates that he or she possesses the *basic qualifications* for the position; and
- the individual at no point in the selection process prior to receiving an offer of employment from the contractor, *removes himself or herself from further consideration* or otherwise indicates that he or she is *no longer interested* in employment in the position.

## What Records Must Be Kept?

The new rule requires the contractor to maintain, for two years from the date of the employment decision to which they relate, the following records:

- job advertisements and postings (both external and internal);
- applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position (*e.g.*, on-line resumes or internal resume databases);
- records identifying job seekers contacted regarding their interest in a particular position;
- for purposes of recordkeeping with respect to internal resume databases, the contractor must maintain a record 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 purposes of recordkeeping with respect to *external* resume databases, the contractor must maintain 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 the particular position who are *considered* by the contractor;
- tests and test results; and
- interview notes.

### **How Should Contractors Obtain Race, Ethnicity and Gender Data?**

Even though the contractor's collection of gender, race, and ethnicity information is mandatory, the new "Internet applicant" regulation retains the long-standing OFCCP rule that a contractor must only obtain such demographic data "where possible." The contractor should attempt to obtain the data through voluntary disclosure. The OFCCP generally encourages contractors to use tear off sheets, post cards, or short forms to request such demographic information from applicants. Contractors may readily adapt these methods to electronic formats. Regardless of the means used, the contractor's invitation to an applicant to self-identify his or her race, ethnicity or gender must always to state that the submission of the information is voluntary.

If the applicant declines to self-identify, and visual observation is not feasible, there is nothing more for the contractor to do, according to the OFCCP.

## Conclusion

Federal contractors and subcontractors now have clear standards for dealing with recruitment in “cyberspace.” The OFCCP has outlined a four-part test for “Internet applicants” and provided guidance to contractors as to what records must be kept concerning these applicants. After February 6, 2006, contractors must comply with the new rule or face adverse consequences during OFCCP audits. This notice provides an overview of a new OFCCP regulation. Because the law regarding the obligations of federal contractors is comprehensive and detailed, employers should seek legal counsel with any specific questions.

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