

TOPIC:

OFCCP “INTERNET APPLICANT” DATA COLLECTION AND RECORDKEEPING RULE

INTRODUCTION:

The Office of Federal Contract Compliance Programs (“OFCCP”) has issued a final rule [\[1\]](#) modifying data collection and recordkeeping requirements for federal government contractors and subcontractors subject to Executive Order 11246 (“EO 11246”). This new rule establishes when such contractors and subcontractors must solicit race, ethnicity, and gender data, and under what circumstances they must maintain records and other information for individuals who express interest in positions via the Internet and other electronic means. The final rule became effective February 6, 2006 and is now being enforced by OFCCP. Accordingly, colleges and universities subject to EO 11246 need to review their job applicant and employment selection procedures.

This Note discusses the final rule, its applicability, and the requirements for demographic information collection and recordkeeping concerning Internet job applicants. It also offers suggestions to institutions for refining their hiring processes to ensure they are complying with the final rule.

DISCUSSION:

EO 11246, as amended, “requires covered contractors and subcontractors to refrain from discrimination and to engage in affirmative steps to ensure that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, and/or national origin.” [\[2\]](#) OFCCP, the federal agency that enforces EO 11246, mandates that covered federal government contractors and subcontractors (collectively, “contractors”) compile certain demographic information concerning applicants and retain certain records related to job seekers. OFCCP’s final rule modifies these data collection and recordkeeping requirements for individuals who express interest in positions via the Internet and other electronic means.

I. To Whom Does the Rule Apply?

The final rule applies to contractors subject to EO 11246. The rule’s data collection and record retention requirements apply to contractors holding a federal government contract or subcontract [\[3\]](#) in excess of \$10,000. [\[4\]](#) The demographic information, which the final rule requires contractors to collect, is of particular import to those contractors or subcontractors who are obligated to prepare written affirmative action programs (“AAPs”), which includes an annual evaluation of the impact of their selection process on minority and female applicants. [\[5\]](#) Such AAPs are required for contractors that have 50 or more employees and a contract or subcontract in excess of \$50,000.

EO 11246 does not cover grants, although the actual terms and purposes of the arrangement, rather than its

label, ultimately control whether an arrangement is a contract or a grant. Generally speaking, government contracts are distinguishable from grants in that the principal purpose of a contract is to provide a direct benefit to the federal government, while the principal purpose of a grant is to further a public purpose. [6] In the college and university context, federal contracts frequently take the form of research contracts on behalf of a particular government agency, for example, contracts to run a government laboratory, or contracts to provide on-line or other educational support to the military. Institutional examples of federal grants include support for curriculum development in the humanities or another academic field, or the preservation of scholarly materials.

Contractors who fail to comply with EO 11246, including the data collection and record retention requirements, may be cited by OFCCP during a compliance evaluation. Such evaluations may take place on a routine or pre-award basis. If determined not to be in compliance, the contractor normally will be required to enter into a compliance agreement that permits regular monitoring of its employment practices by OFCCP for a period of time. In certain unusual situations, such as where a contractor refuses to come into compliance or violates a compliance agreement, the contractor may be subject to an OFCCP enforcement proceeding, which can lead to debarment from federal contracts.

II. How Does the Rule Modify the Requirements to Collect Demographic Information on Applicants?

The final rule gives contractors the opportunity to limit the pool of applicants for which demographic data needs to be collected. [7]

Who Is an Applicant?

In the past, OFCCP followed the Question and Answers to the Uniform Guidelines on Employee Selection Procedures (“UGESP”), which defined an “applicant” as “a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice.” [8]

This ambiguous definition proved unworkable, especially as the use of the Internet and related electronic data technologies for job application purposes became widespread, making “mass mailing” of resumes and the use of Internet job boards (such as Monster.com) possible. Under the traditional definition, every job seeker who expressed interest in employment, irrespective of whether a position was open or the job seeker even met the basic qualifications for the position, could be deemed an “applicant.”

In light of the incongruity between the traditional definition of “applicant” and the realities of today’s technologically driven job search market, OFCCP has narrowed the category of individuals who must be considered applicants by adopting an “Internet Applicant” definition in the final rule. Notably, OFCCP’s “Internet Applicant” definition does not include all people who express interest in employment, as it excludes individuals who are not considered for a particular position, who do not meet basic objective qualifications or who take themselves out of consideration for the position. [9]

Specifically, the new “Internet Applicant” rule applies when:

- An individual submits an expression of interest through the Internet or related electronic data technologies;
- The contractor considers the individual for employment in a particular position;
- An individual’s expression of interest indicates that he or she possesses the basic qualifications for the position; and
- Prior to receiving an offer of employment from the contractor, an individual at no point in the selection process removes him or herself from further consideration or otherwise indicates that he or she is no longer interested in the position. [10]

Each of these requirements is discussed in greater detail below.

Submission of expression of interest via the Internet or related electronic data technologies.

Although the OFCCP declined to provide a precise definition of the term “Internet and related electronic data technologies,” in recognition of rapid technology changes, it has indicated that the term includes, but is not limited to, e-mail, resume databases, job banks, and employer websites. [11] When a job seeker submits an expression of interest via any of these methods, an employer must solicit demographic data if the remaining three requirements of the Internet Applicant definition are met. Note, however, that contractors may subject expressions of interest submitted through non-electronic means to the “Internet Applicant” criteria if a contractor considers both traditional and electronic expressions of interest for the particular position. Only in situations where a contractor considers expressions of interest submitted exclusively through traditional means (e.g., by mail or hand delivery) will the broader traditional definition of “applicant” apply. [12]

Contractor considers job seeker for employment in a particular position.

Under this requirement, the contractor “considers” a job seeker when it assesses “the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.” [13]

A contractor may establish a protocol whereby it refuses to “consider” expressions of interest that are not submitted with respect to a particular position (e.g., unsolicited resumes), or in accordance with designated procedures (such as requiring job seekers applying electronically to apply through its Internet website, rather than by e-mail). Further, where there are a large number of expressions of interest, a contractor may use certain data management techniques that do not depend on the assessment of qualifications to reduce the number of expressions of interest it will consider. For example, the contractor may consider a subset of resumes selected at random, or it may elect to consider only the first 100 resumes received. [14] If the contractor has not “considered” a given candidate as a result of such protocols or techniques, it need not solicit demographic data.

Possession of basic qualifications for the position.

“Basic qualifications” include advertised qualifications that job seekers must possess to be considered for the position, or, if a position is not advertised (e.g., where the contractor searches for applicants through an external resume database such as Monster.com), qualifications that are established by the contractor and the creation and maintenance of a record of such qualifications in advance of consideration of any expressions of interest. These qualifications must be noncomparative, objective, and relevant to the performance of the particular position, and enable the contractor to meet its business-related goals. [15] Individuals who do not meet such predetermined “basic qualifications” can be removed from the category of individuals from whom demographic data must be requested. [16]

No removal from consideration.

A job seeker removes him or herself from further consideration or otherwise indicates he or she is no longer interested in the position if the individual makes an express statement to that effect, or passively demonstrates disinterest due to repeated non-responsiveness to contractor inquiries about interest in the position. In addition, a contractor may infer disinterest based on information provided in the expression of interest (such as salary requirements or preferences regarding type or location of work), as long as the contractor uniformly and consistently does not consider similarly situated job seekers. [17] A contractor need not solicit demographic data on candidates who remove themselves from consideration.

III. What Records and Information on Job Seekers Must be Kept?

While covered contractors may limit their solicitation of race, ethnicity, and gender data to persons who apply electronically and are within the “Internet Applicant” definition of the final rule, contractors must retain records relating to expressions of interest submitted via the Internet or related electronic data technologies for any job

seekers “considered” for a particular position, regardless of whether such individuals meet the other criteria in the “Internet Applicant” definition. [18] In other words, if the contractor considers the substantive information provided by the applicant with respect to qualifications, it must keep the records even if the candidate is determined not to meet the basic qualifications of the job. Such records include, but are not limited to, applications, on-line resumes, internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, job advertisements, and job postings. [19]

Resume databases

The final rule contains special recordkeeping requirements related to a contractor’s use of internal and external resume databases.

Internal. Contractors are required to retain records of the following: (1) each resume added to the database, (2) the date each resume was added, (3) the position for which each search of the database was made, and (4) the date and search criteria used for each search.

External. Contractors are required to retain records of the following: (1) the position for which each search of the database was made, (2) the date and search criteria used for each search, and (3) resumes of job seekers identified during the search who meet the basic qualifications for the position and are considered by the contractor. [20]

The final rule does not specify the form in which records related to internal and external resume databases must be maintained. Many contractors store the required information electronically, although retention of this information on paper is also permitted under applicable regulations.

IV. What Rules Apply to Test Takers?

The last major modification resulting from OFCCP’s final rule relates to the use of employment tests. A contractor must solicit race, ethnicity, and gender information for applicants for whom employment tests and test results are used in the screening process, regardless of whether the job seekers who took the test meet the Internet Applicant definition (e.g., even if it is later determined he or she does not meet the basic qualifications for the job). [21] For example, demographic data must be solicited if the test results are considered and used to determine who will be screened further in the process. However, if the test is not used as a selection procedure until after the test taker is determined to meet the basic qualifications for the job, demographic data need not be solicited on those who do not meet the basic qualifications. [22] In all cases, copies of the tests and test results must be retained for the requisite time periods.

V. Recommendations for Colleges and Universities Who Are Federal Contractors Subject to Executive Order 11246

Colleges and universities who are federal contractors subject to EO 11246 should review their application processes for faculty, staff, and other categories of employees to identify when they need to collect demographic information and what employment-related documents they need to retain. In many cases, it may be prudent for educational institutions to revise their job search procedures to narrow the administrative burden associated with the new data collection and/or recordkeeping requirements set forth by the final rule. For instance, colleges and universities may want to establish the following:

- Protocols to exclude consideration of expressions of interest that are not submitted in accordance with standard procedures. For example, an institution may establish a rule whereby persons wishing to apply for a faculty or staff position electronically must apply through the school’s Internet recruitment website, not by e-mail or facsimile.
- Protocols to exclude consideration of expressions of interest that are not submitted with respect to a particular open position. For example, an institution may establish a policy whereby it will not

consider any resumes that are submitted without identifying the specific open position for which the job seeker is applying.

- Data management techniques to limit consideration of individuals for positions that generate a large number of expressions of interest. For example, an institution may elect to consider only a random sample of expressions of interest, or set an absolute ceiling on the total number it will consider.
- Basic qualifications for given positions. For example, an institution may mandate that all applicants for a certain position possess a specialized degree or requisite employment experience (e.g., three years of registered nursing experience in a hospital).

Institutions may also want to review and confirm what tests will be used as a selection procedure, and at what point in the process test results are considered, given that using such tests may impose additional, potentially burdensome data collection and record retention requirements. To the extent tests are used, procedures should be implemented to ensure that proper demographic data is requested from the test takers when circumstances require, and that all relevant records are retained.

Administrators with hiring responsibility are likely to benefit from consulting with counsel before altering or amending their policies.

CONCLUSION:

EO 11246 and its implementing regulations have imposed strict data collection and recordkeeping requirements on colleges and universities that are covered contractors or subcontractors. OFCCP's new Internet Applicant rule offers the opportunity to implement job application and selection procedures that could, if used properly and on a consistent basis, significantly reduce the administrative burdens associated with the required demographic data collection and record retention requirements.

FOOTNOTES

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RESOURCES FOR COUNSEL:

Regulations:

- [70 Fed. Reg. 58,946 \(October 7, 2005\)](#)
- 41 C.F.R. Part 60-1
 - 41 C.F.R. Part 60-1.3
 - 41 C.F.R. Part 60-1.3 (1) (ii)
 - 41 C.F.R. Part 60-1.5
 - 41 C.F.R. Part 60-1.12
 - 41 C.F.R. Part 60-1.12(a)
- 41 C.F.R. Part 60-2.17(b)
- [Executive Order 11246, as amended](#)

Cases:

- [Hammond v. Donovan](#), 538 F. Supp. 1106, 1109-1110 (W.D. Mo. 1982)

Department of Labor Resources:

- [Employment Law Guide](#)
- [Internet Applicant Recordkeeping Rule: Frequently Asked Questions](#)
- [Contractor Data Tracking Responsibilities, OFCCP Directive ADM 04-1](#)
- [OFCCP Internet Applicant Recordkeeping Rule – PowerPoint presentation](#)

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