



# The Complete AAP News

## New OFCCP Rules for Applicants Published



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• The Internet Applicant Rules become effective February 6, 2006.

On Friday, October 7, 2005, new rules for the collection of race and gender data for Internet and related electronic data technologies was published in the Federal Register 41 CFR Part 60-1.

In 2000, the Office of Management and Budget (OMB) instructed agencies that were utilizing the Uniform Guidelines on Employee Selection Procedures (UGESP) to address the “issue of how use of the Internet by employers to fill jobs affects employer record-keeping obligations” under UGESP. These agencies included the Equal Employment Opportunity Commission, The Department of Labor, The Department of Justice and the Office of Personnel Management.

In March of 2004, the

Office of Federal Contract Compliance Programs (OFCCP) proposed to amend their regulations governing applicant recordkeeping requirements. After an obligatory period for comments from interested parties, the final proposal was submitted to OMB for approval.

The new rules, effective February 6, 2006, attempt to clarify how employers with Affirmative Action obligations must track applicants obtained through the Internet or related electronic data technologies.

Four criteria must be met to be considered an “Internet Applicant:”

1. The individual submits an expression of interest through the Internet or related electronic

data technologies;

2. The contractor considers the individual for employment in a particular position;
3. The individual’s expression of interest indicates the individual possesses the basic qualifications for the position; and
4. The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates the he or she is no longer interested in the position.

If an individual meets the criteria, the contrac-

## New OFCCP Rules continued

tor must track the race and gender of the applicant.

What does criteria #1 mean by “an expression of interest through the Internet or related electronic data technologies?” This term was intentionally defined broadly because technology is constantly changing. Currently it would include e-mail, resume databases, job banks, electronic scanning technology, applicant tracking system/applicant service providers, and applicant screeners.

Criteria #2, “considers the individual for employment in a particular position,” means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.” Contractors may establish standard procedures that applicant must follow to be considered.

Criteria #3 allows contractors to screen out as applicants those indi-

viduals who do not possess the “basic qualifications” for the position.

The qualifications must be advertised or established by making and maintaining a record of such qualifications prior to considering any applicants for the position. A “basic qualification” is “any qualification that is noncomparative, objective, and relevant to the performance of the particular position and enabling the contractor to accomplish business related goals.” Note that employment tests are not considered basic qualifications. All applicants who take an employment test must be tracked and recorded.

Finally, criteria #4 lets the contractor remove an individual from consideration as an applicant if the individual “removes himself or herself from further consideration.” This could include failing to answer repeated

e-mails, failing to follow established procedures, or rejecting an inadequate salary or location of the work requirements.

One concern expressed by contractors was how to handle situations where applicants are considered through electronic data technology and others are considered through traditional means. The regulations make it clear where applicants for a particular position are considered from both electronic and traditional sources, the contractor need only consider as applicants those that meet the new Internet applicant criteria. Determining whether to use the new Internet applicant criteria depends on the means by

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## New OFCCP Rules continued

which an expression of interest is made for a particular job. What happens if you normally receive applicants for engineering positions through your web site and also accept paper resumes, but for this particular opening, you receive only paper resumes? The regulations appear to say you cannot apply the Internet applicant criteria for this job because you received only paper resumes. This results despite the fact that every other time you have openings for this job you used the new Internet applicant criteria because you receive online and paper applicants.

The OFCCP recognized the possibility that applying different data collection of traditional applicants vs Internet applicants might lead to a “dual standard” but failed to fully address the problem through the regulations. Contractors who have Internet applicants for some jobs and traditional applicants for

others are left applying two different standards.

Our experience with OFCCP audits over the past few years has revealed that Compliance Officers frequently accept plans where contractors defined applicants as those having “minimum qualifications.” So perhaps the Internet applicant definition will by practice be applied to all applicants regardless of the means by which they apply.

Another section of the Preamble stresses that the OFCCP may choose not to “rely on record-keeping definitions to frame the appropriate analysis for liability or remedy purposes when alleging a violation...” They go to say the “OFCCP will rely on Census and other labor market data to assess contractors’ hiring practices for potential discrimination.” In light of these insights into OFCCP audit strategy, contractors would be well advised to compare the percent of women

and minority applicants and hires to their respective job group availability before submitting data for an audit. Particular attention should be given to applicants and hires compared to the local availability listed as factor #1 on the Availability Analysis. Where the percentage of women or minority applicants and hires are significantly less than availability, expect the OFCCP to closely scrutinize your recruitment and hiring practices for those jobs.

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## OFCCP Collects \$34.5 Million in 2004

In Fiscal year 2004, the Office of Federal Contract Compliance Programs collected financial remedies of \$34.5 million for victims of employment discrimination. This figure represents a 31% increase over 2003.

Included in the \$34.5 million figure was over \$10 million for back pay and interest to over 10,000 workers, and close to \$18 million to women.

The largest single amount involved a consent decree with Wachovia Corporation that provided \$5.5 million to approximately 2,000 current and former employees.



## New On-line Assistance

The Office of Federal Contract Compliance Programs now has a special web site with resources for Federal Contractors.

Included are links to census data, best practices, posters and reports. The site can be accessed at <http://www.dol.gov/esa/regs/compliance/ofccp/ofcpcmp.htm>

A link to this page is also available via the "External Links" page of our web site at [www.yocom-mckee.com](http://www.yocom-mckee.com)

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1176 for more information

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## Employment Resource Referral Directory

The Office of Federal Contract Compliance Programs has created a directory of governmental and non-governmental nonprofit organizations that assist contractors with job referral services to women, minorities, veterans and individuals with disabilities.

The directory is available at <http://www.dol.gov/esa/ofccp/ERRD/>

[errsrvs.htm](#)

The OFCCP also invites organizations that would like to be included in the directory to submit information to [OFCCP-Public@dol.gov](mailto:OFCCP-Public@dol.gov)

A link to this page is also available via the "External Links" page of our web site at [www.yocom-mckee.com](http://www.yocom-mckee.com)

