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Internet Applicants

The Internet Applicant final rule, issued by the Office of Federal Contract Compliance Programs (OFCCP), becomes effective February 6, 2006. However, the OFCCP has announced that for a period of 90 days following February 6, 2006, they will not cite a contractor for failure to comply with the Internet Applicant final rule, provided that the contractor (1) demonstrates that it is taking reasonable steps to update its systems to comply with the rule, including a projected date of compliance, and (2) collects and maintains records according to the established procedures consistent with OFCCP's record keeping requirements that preexisted the Internet Applicant final rule.

Contractors are free to establish a protocol un-

der which they refrain from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, contractors need not consider as applicants everyone included in a search using data management techniques that do not depend on assessment of qualifications. Techniques such as random sampling or absolute numerical limits may be used to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

OFCCP clarified



that, when a contractor uses a third-party resume database, the contractor must retain the electronic resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor, not all the resumes contained in the third-party resume database, along with records identifying job seekers contacted regarding their interest in a particular position, a record of the position for which each search of the database was made, the substantive search criteria used, and the date of

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Special points of interest:

- *Enforcement of the Internet Applicant rule by the OFCCP will not be taken until May 6 2006.*
- *When searching internet job sites, only those candidates meeting OFCCP's 4 criteria need be tracked as applicants, but a record of the position for which the search was made, the search criteria used and date must be kept by the contractor.*



Employee Rights Concerning Payment of Union Dues or Fees

Beginning June 20 of 2005, OFCCP began including a check of compliance with Executive Order 13201 during compliance evaluations. This Order requires contractors to conspicuously post notice and include the “EO 13201 employee notice clause” or a reference to “29 CFR Part 470” in all their subcontracts and/or purchase orders that exceed \$100,000 and were entered into after April 28, 2004.



Employee rights concerning payment of dues or fees must be posted and included in subcontracts and/or purchase orders

The EO 13201 notice states that under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, an employer and union may enter into an agreement that all employees must pay periodic dues and initiation fees, but employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs related to collective bargaining, contract administration, and grievance adjustment. One

aim of this Executive Order was to give employees the ability to opt out of paying union dues that were used for political purposes which the employee did not support.

Non-exempt contractors in the following states are required to post the EO 13201 notice:

Non-Right-to-Work States:

Alaska, California, Colorado, Connecticut, Delaware District of Columbia, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Washington, West Virginia, Wisconsin.

The following contracts, subcontracts and purchase orders are exempt from the EO 13201 clause requirement:

Contracts equal to or less than \$100,000;

Contracts resulting from solicitations before April 18, 2001;

Contracts entered into before April 28, 2004; and

Specific contracts exempted by the Office of Labor-Management Standards in the national interest pursuant to a written request.

For a printable copy of the notice to be posted, visit <http://www.dol.gov/esa/regs/compliance/olms/EO13201posterpg.htm>



EO Survey to be eliminated?

Here is the official language of the proposal:

41 CFR Part 60-2

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey; Proposed Rule

E. Proposal To Eliminate the EO Survey Requirement

OFCCP has concluded that the EO Survey has failed to provide the utility anticipated when the regulation was promulgated in 2000, and consequently does not provide sufficient programmatic value to be maintained as a requirement. In light of the failure of the EO Survey as an enforcement tool, OFCCP concludes that it is no longer of value to accomplish the objectives it was designed to address. OFCCP has developed, and will continue to develop, other more useful and cost effective methods to accomplish these objectives. Therefore, OFCCP has determined that continued use of the EO Survey cannot be justified and proposes to eliminate this

regulatory requirement as no longer of value to OFCCP. Elimination of this requirement allows OFCCP to focus more effectively its enforcement resources to further the overall goal of the OFCCP program to promote and ensure equal opportunity for those employed or seeking employment with Government contractors. 41 CFR 60-1.1.

The rationale for the survey was that it would "enable OFCCP to more effectively and efficiently select contractor establishments that may have possible problems for compliance evaluations, thus enhancing the agency's ability to focus its enforcement resources on those establishments most likely to be out of compliance." (65 FR 26100, 5/4/2000)

OFCCP contracted with two different consulting firms over 5 years to study the effectiveness of the EO Survey.

The consultants found that of the 125 potential predictor values in the data from the EO Survey, only 4 had any

predictive power. Two of those values were already asked on the EEO-1 form and the two others were non-sensical. For example, establishments with findings of systemic discrimination tended to have a smaller difference in the proportion of women and men technicians. "Most predictors showed little relation to systemic discrimination." "None ... came close to the type of pattern that would characterize a perfect predictor..." The best predictor was that the establishment had more than 200 full-time employees, and that is already available on the EEO-1.

In response to these findings, the OFCCP has filed the above cited Proposal to Eliminate the EO Survey Requirement.

Read more about the proposed elimination of the EO Survey at: <http://www.dol.gov/esa/regs/fedreg/proposed/2006000646.htm>



Abt Associates, Inc. found the EO Survey's predictive power to be only slightly better than chance.



EEOC Implements Final Revisions to EEO-1

January 27, 2006 the Equal Employment Opportunity Commission (EEOC) announced the implementation of final revisions to the Employer Information Report, also known as the EEO-1 Report, as recently voted on and approved by the Commission. The implementation of the final revisions, which will be effective for the 2007 reporting year, marks the first major change to the employer survey in four decades.



The EEOC's new race and ethnic categories need to be addressed by the OFCCP

The new EEO-1 Report's race and ethnic categories include:

- Adding a new category titled "Two or more races, not Hispanic or Latino";
- Deleting the "Asian and Pacific Islanders" category;
- Adding a new category titled "Asians, not Hispanic or Latino";
- Adding a new category titled "Native Hawaiian or Other Pacific Islander, not Hispanic or Latino";
- Extending the EEO-1 data collection by race and ethnicity to the

State of Hawaii; and

- Strongly endorsing employee self-identification of race and ethnicity, as opposed to visual identification by employers.

The new EEO-1 Report's job categories include:

- Dividing "Officials and Managers" into two levels based on responsibility and influence within the organization: "Executive/Senior Level Officials and Managers" and "First/Mid-Level Official and Managers"; and
- Moving non-managerial business and financial occupations from the "Officials and Managers" category to the "Professionals" category.

EEOC is not requiring employers to re-survey their workforce before the 2007 EEO-1 report. However they are encouraging employers to use routine updates of employee personal information to obtain the new EEO data. EEOC is suggesting that Employers also should

seek self-identification of new employees under the new ethnic and racial categories as soon as possible.

How does this affect your affirmative action plan? OFCCP has not yet commented on how the new race and EEO categories will be used for affirmative action planning. Contractors must reconcile the EEOC's suggestion to begin tracking hires and employees in the new race categories as soon as possible with OFCCP's continued use of the old race categories.

It is easy enough to combine the Asians, not Hispanic and Native Hawaiian race categories together into the old Asian category in your AAP, but the Two or more races category will not neatly fit into any of the correct race categories. For analysis of adverse impact in hiring, those applicants choosing Two or more races should probably be placed into a "race unknown" category and not included in the analysis. There is no way to know whether an applicant choosing



two or more races even considers themselves part of a minority group. A voluntary self-id form will not indicate whether the applicant is White/Black, Asian/Black/White or any other possible combination. Nothing will indicate which race/ethnicity is primary, if any.

When collecting a snapshot of your current workforce for use in calculating availability and setting goals, employees who self-identified as two or more races is even more difficult. Do these individuals consider themselves part of a minority group? Will the OFCCP eventually add another category of two or more races for which we will calculate availability and set goals? How does a contractor go about making a good faith effort to recruit two or more race individuals? Will there be agencies, placement services, community groups representing individuals of two or more races?

Until OFCCP announces how they intend to implement the EEOC's new race/

ethnic categories, contractors must make their own reasonable effort to make sense of them on their own! One suggestion would be to visually categorize employees who self-identified as two or more races. Place them into one of the current five categories of White, Black, Hispanic, Asian, American Indian.

You can read the final EEOC notice at <http://edocket.access.gpo.gov/2005/05-23359.htm>



The challenge is how to handle EEOC's new race/ethnic categories until OFCCP announces guidelines

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How are Contractors Selected for Audit?

OFCCP uses the annual EEO-1 report to select a subset of contractors for compliance evaluations. Typically between 2,000 and 4,000 establishments are selected every year. The latest selection system is called the Federal Contractor Selection System (FCSS) that uses data from 10 years of past compliance evaluations to identify and characterize relationships between the EEO-1 and findings of violations during compliance evaluations.

The FCSS model uses seventeen factors comparing the workforce profile of each establishment to those of other establishments in the same industry classification and also to the labor market data from the 2000 Census.

This model attempts to identify those establishments with a higher likelihood of discrimination. OFCCP will not reveal the factors used in their mathematical model and no statistics have been released ad-

ressing whether the model actually identifies those establishments most in need of a compliance evaluation. Anecdotal evidence from various contractors, attorneys and the results from compliance evaluations question the effectiveness of the FCSS system.

Read more about the FCSS system at: <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/fcssfaqs.htm>

Need Help Using The Complete AAP?

Consider attending one of our Training Classes held in the beautiful Rocky Mountains of Colorado! This hands on training uses your data to often complete your plan in the two day training class!

For class schedules and more information visit: http://www.yocom-mckee.com/training_reg.html

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the search.

See our Fall 2005 newsletter for the four tests defining an internet applicant.

See also the OFCCP's web site at <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm#Q5> for more details about the Internet Applicant rule.