



## **APPLYING THE NEW “INTERNET APPLICANT” DEFINITION**

On February 6, 2006 the OFFCP’s “Internet Applicant” definition, rule 41 CFR 60-1, goes into effect for all employers who are required to maintain an Affirmative Action Plan (AAP). This new rule provides criteria for differentiating between traditional applicants and those applicants received from electronic methods, such as the Internet. If individuals meet the criteria, they are considered an “Internet Applicant” and must be tracked according to the criteria outlined in the new rule.

Traditionally the OFCCP requires employers to identify all individuals that expressed interest in a particular job position as applicants, even if they did not meet the specific requirements of the job position. With electronic methods of receiving resumes and searching online job resume banks; this creates extensive applicant pools for employers. The new “Internet Applicant” rule allows all employers to set specific practices in place to clearly define how the applicants are determined for an open job, based upon the specific criteria outlined in the “Internet Applicant” rule. By defining practices that meet the criteria of the new rule, employers can reduce the number of individuals that are considered applicants.

Although the “Internet Applicant” rule reduces the number of individuals an employer must consider applicants, it also imposes additional responsibilities on each employer to track hiring practices. With this new rule, employers must properly document all criteria used to create the applicant pool employers and request self-identification of race and gender from each applicant.

In order to meet the requirements, each employer must clearly define their application/hiring practices. The new criteria for Internet Applicants allow employers to discount candidates who do not meet the criteria. But with these new criteria, employers are required to maintain detailed documentation about how the applicant pool was created for each job.

## **UNDERSTANDING THE NEW INTERNET APPLICANT CRITERIA**

The new “Internet Applicant” definition requires all employers to identify job candidates as “Internet Applicants” if they meet the following requirements:

- The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- The contractor considers the individual for employment in a particular position;
- The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and
- 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 that he or she is no longer interested in the position.

*It is important to note that if the employer does not employ electronic methods of obtaining applicants the traditional applicant rule still applies and all individuals who express interest in the position must be considered applicants.*

### **The Expression of Interest in Employment**

The new definition clearly states that all applicants received through electronic means are considered "Internet Applicants" and therefore all individuals who apply through a web site, email a resume, or are located in an Internet Resume Job Bank are "Internet Applicants".

It is important to note that if the employer considers expressions of interest made electronically as part of the recruiting or selection process, all applicants for a particular position are considered Internet Applicants. For example, if the employer's policy is to accept applications both electronically and as a hard copy, paper applications received through the mail for a position will also be considered "Internet Applicants".

If the employer only accepts a specific form of resumes/applications, such as electronically, that requirement should be indicated in the listing for the job opening.

### **Employer Considers the Individual for Employment**

Under the new "Internet Applicant" definition, an employer is not required to consider all expressions of interest as applicants. Based upon an employer's policies, they can omit expressions of interest which:

- Are not submitted according to the employer's procedure for receiving applicants, or
- Are not submitted for a specific job position.

Employers can establish policies that dictate how individuals can apply for open positions, and only those individuals that follow the established policies to apply need to be considered as applicants. For example, if the corporate policy is to only accept applications through the corporate Web site, applications received through the mail can be rejected, as long as that policy is applied consistently. Employers can also set policies that indicate whether or not unsolicited resumes will be accepted. With this corporate policy, resumes submitted for unspecified job titles can be rejected.

With the new rule, employers can now apply data management techniques to reduce the size of the applicant pool, as long as techniques used do not produce adverse impact in the applicant pool based upon race, or gender. Acceptable data management techniques include random sampling or absolute numerical limits. Employers must determine the data management technique that will be applied before reviewing the applicant pool. For example, an employer can indicate that they will only consider the first 50 qualified individuals for the position as applicants. If this statement is made by the employer, any candidates after the initial 50 are NOT considered applicants, even if they meet the specified job criteria. All data management techniques used to create an applicant pool must be clearly documented.

### **The Individual Possesses the Basic Qualifications for the Position**

Under the new definition, an employer only needs to consider applicants who meet all of the position's "basic qualifications". This eliminates the need for employers to track all individuals who apply for an open position as applicants. The basic qualifications of the position are the qualifications that the employer advertises in the job listing. If the resumes were gathered from a search of an external resume database, "basic qualifications" also refers to the search criteria or query used to produce the applicant resumes.

In order to limit applicants based upon basic qualifications of the position, the basic qualifications for the position must meet the following three conditions:

- **Non-comparative** – The OFCCP states that basic qualifications can not be based on a comparison between the applicants. For example, the OFCCP states as an example that an employer's qualification that an applicant possess "three years of experience in the particular position" is non-comparative. But a qualification which states that "an individual have one of the top five number of years' experience among the pool of job seekers" in a comparative qualification that cannot be used as a basic qualification to limit the applicant pool.

- **Objective** – The OFCCP states that basic qualifications must be “objective and not depend on the employer’s subjective judgment”. This means that any basic qualifications established by the employer cannot be subject to an individual opinion. For example, it is acceptable to require a basic qualification of a degree in Accounting for an Accountant position, but an employer cannot use a qualification of “a degree from good school” because that qualification is based upon a subjective opinion from another individual.

The OFCCP points out in the rule, that one method of determining if the basic qualifications are objective is to ensure that they could be determined by a third-party. “A third-party, unfamiliar with the employer’s operation, would be able to evaluate whether the job seeker possesses the qualifications without more information about the employer’s judgment.”

- **Relevant** – The qualifications specified must be relevant to performing the duties of the specified position. The OFCCP’s states the qualification must be “relevant to the performance of a particular position and enabling the employer to accomplish business related goals”. A degree in Accounting is a relevant qualification for an Accountant position, but is typically not relevant for a Computer Programming position.

It is important to note that the OFCCP does NOT consider employment tests used in the employee selection process, whether administered on-line or written, basic qualifications for a position. Therefore, although employers can use employment tests as part of the interview process, the test cannot be used to reduce the size of the applicant pool.

Another key factor, the OFCCP does not consider factors such as the individual’s willingness to relocate, salary requirements, shift availability as basic qualifications, but they may be identified as criteria that indicate the individual’s lack of interest in the position, as described below.

#### **Individual does not Remove Themselves from Further Consideration**

The individual is considered an applicant as long as they do not remove themselves from consideration for the position or indicate they are no longer interested in the position prior to receiving an employment offer from the employer. An applicant can remove themselves from consideration for the position by either stating they are no longer interested or by demonstrating lack of interest in the position. Lack of interest can be determined by the individual’s failure to respond to correspondence from the employer through telephone calls, letters, email messages, etc.

The employer can also infer a lack of interest by the applicant in the position based upon information provided in the application and resume. For example, information provided about salary requirements, shift availability, and willingness to relocate can be used to infer the applicants continued interest in the position. In order to make these types of inferences, the employer must be consistent in making those inferences for all applicants.

It is important to ensure that all criteria relating to how an applicant removed themselves from consideration for a particular position is fully documented. This information will be required by the OFCCP in the event of a compliance review of the employer.

## **NEW RECORDKEEPING REQUIREMENTS**

With the addition of the "Internet Applicant" rule, employers must ensure that they maintain the proper documentation related their processes for determining the applicant pool of a particular position. It is important that each employer maintain thorough documentation of this process to ensure no Adverse Impact exists in the applicant/hiring process. The contractor must document the following:

- The OFCCP states that contractors must maintain all expressions of interest "which the contractor considered the individuals for a particular position." This includes maintaining all resumes received from individuals or gathered from resume databases.
- Employers must maintain records of all individuals contacted concerning their interest in a specific position.
- When gathering resumes of individuals from both internal and external databases, the employer must record the search criteria used, the position for which the search was made, and the date the search was performed.
- The "basic qualifications" and any other criteria used to reduce the applicant pool.

### **Working with Resume Databases**

Employers can use both internal corporate resume databases and external Internet resume databases to find applicants for a specific position. When gathering applicants from internal or external databases, contractors must ensure that they thoroughly document the "substantive search criteria used" along with recording the other information required by the OFCCP for database searches.

- **Internal Databases** – Employers must maintain a record of all individual resumes found during the search, the date each resume was added to the database, the position for which the database was searched, and all search criteria used.
- **External Databases** – Employers must maintain a record of the position for which the database was search, all individual resumes found during the search that meet the basic qualifications of the particular position, the date of the search, and all search criteria.

## **SOLICITATION OF RACE AND GENDER INFORMATION**

The new rule requires all employers to solicit race and gender information from all applicants. The rule does not indicate when in the application process the race and gender information should be solicited. But employers need to ensure that all Internet Applicants are solicited for self-identification of race and gender.

The new rule allows employers to make a visual inspection for purposes of identifying race and gender, for all applicants who appear and person and decline the request to self-identify.

It is the responsibility of the employer to ensure that the self-identification information of applicants is used for EEO reporting information only, and is not provided to the hiring manager or any other individuals responsible for interviewing/hiring the applicant.