



# Labor and Employment Law Information Memo

October 2005

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## OFCCP ISSUES FINAL RULES ON FEDERAL CONTRACTORS' RECORDKEEPING REQUIREMENTS WITH REGARD TO INTERNET APPLICANTS

The Office of Federal Contract Compliance Programs ("OFCCP") requires that federal contractors maintain certain types of employment and applicant records, including, where possible, information regarding the gender, race, and ethnicity of each "applicant" for employment. On October 7, 2005, the OFCCP published final rules that are intended to clarify and explain how these current recordkeeping requirements apply to "internet applicants." The new rules go into effect February 6, 2006.

### Definition of "Internet Applicant"

Under the OFCCP's new rules, an "internet applicant" is an individual who meets all of the following criteria: (1) the individual submits an expression of interest in employment through the internet or related electronic data technologies; (2) the individual is considered by the federal contractor for employment in a particular position; (3) the individual's expression of interest indicates that the individual possesses the basic qualifications for the position; and (4) the individual does not, at any point in the federal contractor's selection process prior to receiving an offer of employment from the contractor, remove himself or herself from further consideration or otherwise indicate that he or she is no longer interested in the position.

Under the rules, submission of "an expression of interest in employment through the internet or related electronic data technologies" includes all expressions of interest in a particular position, regardless of the means or manner in which the expression is made, if the federal contractor considers any expressions of interest made through the internet or related electronic data technologies for that position. For example, if a federal contractor posts on its web site an opening for a particular position, and solicits either an on-line profile or a paper résumé from individuals who wish to apply for the position, all individuals who respond (including those who respond by sending a paper résumé) are considered to have expressed an interest in the position through the internet or related electronic data technologies. Similarly, if a federal contractor considers individuals who send unsolicited résumés for a particular position that individuals may also apply for through the contractor's web site, the individuals who sent the unsolicited résumés are also considered to have expressed an interest in the position through the internet or related electronic data technologies.

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A federal contractor “considers the individual for employment in a particular position” only when the contractor assesses the substantive information set forth in the expression of interest with respect to any qualifications applicable to a particular position. For example, a federal contractor may establish a protocol under which it refrains from considering any expressions of interest that are not submitted in accordance with the contractor’s application procedures. Under these circumstances, individuals who do not comply with the contractor’s application procedures are not “considered” for employment by the contractor, and do not meet the definition of “internet applicant.”

An individual meets the “basic qualifications” for a position if the individual meets the minimum qualifications either advertised to potential applicants or established in advance by a federal contractor for the position, as long as those minimum qualifications are non-comparative, objective, and relevant to the performance of the position. A qualification is non-comparative if it does not depend on the qualifications of the other applicants. For example, requiring three years of experience in a particular position is a non-comparative qualification; requiring that an individual be among the top five in years of experience among the applicants for the position is a comparative qualification. An objective qualification is one that does not depend on the federal contractor’s subjective judgment. For example, requiring a Bachelor’s degree in Accounting is an objective qualification; requiring a Bachelor’s degree in Accounting from a university with a good Accounting program is a subjective qualification.

An individual will be considered to have removed himself or herself from consideration for a position not only if the individual makes an express statement to the federal contractor withdrawing from consideration, but also if the individual is repeatedly non-responsive to inquiries from the contractor about his or her interest in the position.

### **Record Retention Requirements**

Under the new rules, federal contractors are required to preserve, for at least two years, records regarding any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered individuals for a particular position, and records identifying job seekers who were contacted regarding their interest in a particular position, regardless of whether the individuals meet the definition of “internet applicant.”

If a federal contractor maintains an internal résumé database, the contractor must maintain a record of each résumé added to the database, a record of the date each résumé was added to the database, the position for which each search of the database was made, the substantive search criteria used for each search, and the date of each search. If a federal contractor uses an external résumé database, the contractor must maintain a record of the position for which each search of the database was made, the substantive search criteria used for each search, the date of each search, and the résumés of job seekers who met the basic qualifications and were considered for the particular position.

For any record maintained by a federal contractor with respect to individuals who meet the definition of “internet applicant,” the contractor must be able to identify (where possible) the gender, race, and ethnicity of each internet applicant.

If you need any advice regarding whether you are a federal contractor who is subject to these recordkeeping requirements, or if you need assistance in complying with the new recordkeeping requirements with regard to internet applicants, please contact:

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