

OFCCP's Final Rule on Internet Applicants Now in Effect

Last November, the Office of Federal Contract Compliance Programs (OFCCP) issued its final rule on Internet Applicants. The new rule became effective on February 6, 2006. However, the agency has announced that for a period of 90 days following February 6, 2006, it will not cite contractors for failure to comply with the rule, if the contractor is taking reasonable steps to put a system in place to comply and maintain records consistent with OFCCP's recordkeeping regulations.

The final rule contains a four-part definition of Internet Applicants as follows:

Definition of Internet Applicant

- A. The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- B. The contractor considers the individual for employment in a particular position;
- C. The individual's expression of interest indicates they possess the basic qualifications for the position; and,
- D. The individual at no point in the contractor's selection process prior to receiving an offer of employment, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

The definition is further explained as follows:

What is an "Expression of Interest"?

The expression of interest component could be satisfied if the candidate submitted a resume or application for a particular position. It could also be satisfied if the employer considers an individual from an external database such as a job board or other indirect source. This emphasizes that employers should establish protocols for searches so that their recruiters can maintain the recordkeeping process during a search.

What is the meaning of "Considers the Individual"?

The contractor has considered the individual when they assess the substantive information provided in the expression of interest for basic qualifications for a particular position such as reviewing a resume or application. Contractors might want to consider establishing a uniform process whereby the individual's expression of interest may not be considered if the individual does not follow the established guidelines for submission of their resume. For example, if the uniform process is for all candidates to apply via the company website, applicants that apply by fax or mail may not be considered. It is also important to note that employers may limit the number of individuals considered using data management techniques such as

(continued on page 2, column 1)

EEOC Finalizes EEO-1 Reporting Requirements for 2007

On November 28, 2005, the Equal Employment Opportunity Commission (EEOC) finalized a rule on EEO-1 reporting for 2007 and beyond, reaffirming employee self identification, establishing seven (7) independent race codes, and revising the Officials & Managers job category, as follows:

- **Asians** – report separately from 'Pacific Islanders';
- **Two or More Races** – added as a new racial category;
- **Hispanic or Latino employees** – report separately;
- **Officials & Managers Category** – replaced by two sub-categories, 1.1, and 1.2 of the O&M Category.

Revised Race/Ethnic Definitions

Hispanic or Latino:

A person of Cuban, Mexican, Puerto Rican, South or Central America, or other Spanish culture or origin regardless of race.

Two or more Races (not Hispanic or Latino):

All persons who identify with more than one of the five races below.

Asian (not Hispanic or Latino):

A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent including for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

American Indian or Alaska Native (not Hispanic or Latino):

A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.

Black or African American (not Hispanic or Latino):

A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander

(not Hispanic or Latino):

A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

White (not Hispanic or Latino):

A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Revised Job Categories for Officials & Managers

The current, broad Officials and Managers category will be broken into two subcategories for 2007 reporting. Definitions for the new management categories are:

1.1 Executive/Senior Level Officials & Managers

These are individuals who plan, direct and formulate policies, set strategy and provide the overall direction of enterprises/organizations for the development and delivery of products and services, within the parameters approved by boards of director or other governing bodies. They include, in larger organizations, those individuals within two reporting levels of the CEO, whose responsibilities require frequent interaction with

(continued on page 4, column 1)

(Continued from page 1, Column 1)

random sampling or numerical limits or even no review of qualifications when there is a large number of expressions of interests.

What are "Basic Qualifications"?

The basic qualifications are the advertised qualifications and may also include non-advertised criteria established in advance. Basic qualifications should be non-comparative, objective and relevant to performance of the position.

How do applicants remove themselves from further consideration?

If the applicant informs the contractor they are no longer interested in the position during the selection process prior to receiving an offer, the contractor may remove the person from the applicant pool. The lack of interest may be shown by declining a job interview, or failure to respond to the contractor's contacts about interest in the job.

Applicant Tracking

Consistent with the existing requirement to solicit demographic information from job applicants, the Internet Applicant rule requires contractors to solicit race/ethnicity and gender information from those individuals who meet the definition of Internet Applicant. The rule does not specify when in the selection process this must be done, but the expectation is that contractors would in some way invite those who meet the definition of Internet Applicant to self-report or self-identify for race/ethnicity and gender.

Recordkeeping

Finally, the Internet Applicant rule amends OFCCP's existing recordkeeping regulations to require contractors to maintain for **two years**, electronic records of the recruitment and selection processes for positions filled using the Internet or related electronic data technologies. (Examples of related electronic data technologies include email, electronic scanning technology, resume databases, applicant tracking systems and applicant screeners.) For these positions, the records to be maintained include applications, expressions of interest through the Internet or related electronic data technologies that the contractor may use to consider an individual for a particular position, job advertisements and postings, and any records produced or received during the recruitment and selection process.

Additional Information

The full text of the OFCCP's final rule on Internet Applicants can be found on the agency's website at <http://www.dol.gov/esa/regs/fedreg/final/2005020176.pdf>. The agency also has published Questions & Answers on the website to provide further clarification of the new rule.

Even though OFCCP may not initially cite contractors for noncompliance with this new regulation, it is important that employers immediately begin recording the applicant data required. If your company has questions about developing or changing Internet Applicant recordkeeping processes, please contact Gerstco personnel.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

New USERRA Posting Notice Effective January 18, 2006!

The Veterans Benefits Improvement Act of 2004 (VBIA) requires employers to "provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. Employers may post this notice where other employee notices are customarily placed or by handing it out or mailing a notice, or distributing the notice via electronic mail.

To download a copy of the poster, visit the Department of Labor's website: www.dol.gov/vets.

Background: The USERRA Act provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. It requires employers to allow veterans to return to their employment after military service at the same pay, benefits and status they would have attained had they not been away on military duty. It prohibits discrimination and retaliation based on uniformed service status and is enforced by the U.S. Department of Labor, Veterans' Employment and Training Services (VETS). If a contractor is found to have violated this act, the agency may use any or all of the following remedies: injunctive relief, back pay plus interest, and double back pay for willful violations.

OFCCP Plans to Audit a Record Number of Contractor Establishments in 2006

OFCCP began sending "advance notice" letters in early 2006 to federal contractors with two or more establishments, targeting them for Compliance Evaluations this year. Using the Agency's new Federal Contractor Selection System (FCSS), approximately 9,000 establishments have been identified for review. This is in addition to 1500 other advance notice letters sent in October 2005.

OFCCP's Selection System

The agency's FCSS is designed as a predictor of systemic discrimination and is based primarily on the EEO-1 report. Following are OFCCP enforcement statistics since 2001.

Year	Financial Remedies	Workers Recompensated	Average Benefit Per Victim	Number of Compliance Evaluations
2001	\$28,975,000	9,093	\$3,187	4,716
2002	\$23,975,000	8,969	\$2,673	4,135
2003	\$26,220,356	14,361	\$1,825	4,698
2004	\$34,479,294	9,615	\$3,586	6,529
2005	\$45,156,462	14,761	\$3,059	2,730
Change from 2001	56%	62%	-4%	-42%

What is OFCCP's Desk Audit Process?

1. Audit Notifications: Federal Contractor Selection System (FCSS) and Scheduling Letters

The FCSS letter is an advance notice sent to a Contractors' Headquarters office, listing all locations for possible review. When an audit date has been scheduled, a second letter is sent by certified mail to the specific entity. This letter contains an 'Itemized Listing' of what must be submitted for the Desk Audit. Contractors have 30 days to respond from date of receipt.

2. Documents for Desk Audit Submission

Some of the key elements required for submission are:

- a. AAP Narratives
- b. Statistical Reports
- c. Compensation Information (Paragraph 11)
- d. Personnel Activities

3. Request for Additional Information

After an initial review of the contractor's Desk Audit submission, OFCCP may request other information, focusing on personnel actions and compensation practices.

4. Close Desk Audit or . . . Onsite Review

Many reviews are closed at the end of the Desk Audit; however, if OFCCP believes, because of its analysis, systemic issues may exist, the review will continue and an onsite visit may be scheduled.

Submitting Compensation Data for OFCCP's Desk Audit

OFCCP's scheduling letter includes a request for compensation information at the Desk Audit stage. Paragraph 11, in the Itemized Listing requests that compensation data be submitted in a summary format. Contractors have a choice as to how compensation data is submitted. Paragraph 11 describes the requirements:

Paragraph 11

"Please provide annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level, showing total number of employees by race and gender and total compensation by race and gender. Present these data in the manner most consistent with your current compensation system. If you maintain the information in electronic format, please submit in that format. See 41 CFR 60-1.4(a)(1). You may also include any other information you have already prepared that would assist us in understanding your compensation systems."

How Should Federal Contractors Respond to OFCCP's Paragraph 11 Request?

Prior to submitting compensation data, contractors should determine the type of aggregate data to submit by conducting more than one type of analysis. This could include performing a 'Tipping Point' Analysis, a Means or Median test, a Cohort or other statistical analysis, especially when pay differences for minorities and/or women may need further explanation.

The 'Tipping Point' procedure is a very broad analysis primarily used by OFCCP to determine if more information will be needed in the compensation area.

If the contractor is asked to submit an employee roster as a result of 'failing' OFCCP's Tipping Point analysis, the Agency will use other statistical methods to determine the extent to which it believes pay issues exist for minorities and women.

Even if your organization is not under review, it may be in your company's best interests to perform a compensation analysis, under legal guidance. OFCCP has proposed new compensation guidelines which may be finalized this year. When issued, the guidelines will require contractors to perform some type of self audit of their compensation systems to ensure non-discrimination in pay practices.

(New Officials ... continued from page 1)

the CEO. Examples of these kinds of managers include Chief executive officers, chief operating officers, chief financial officers, line of business heads, presidents or executive vice presidents of function areas or operating groups, chief information officers, chief human resource officers, chief marketing officers, chief legal officers, management directors and managing partners.

1.2 First/Mid Level Officials and Managers

These are individuals who serve as managers, other than those who serve as Executive/Senior Level Officials and Managers, including those who oversee and direct the delivery of products, services or functions at group, regional or divisional levels of organizations. These managers receive directions from Executive/Senior Level management and typically lead major business units. They implement policies, programs and directives of Executive/Senior Level management through subordinate managers and within the parameters set by Executive/Senior Level management. Examples of these kinds of managers are: Vice Presidents and directors; group, regional or divisional controllers; treasurers; and human resources, information systems, marketing and operations managers. It also includes those who report directly to middle managers such as first-line managers, team managers, administrative services managers, etc.

Requirements for 2007 EEO-1 Reporting

While Federal Contractors may want to plan for change, EEO-1 revisions are not effective until after the next reporting cycle ending September 30, 2006.

(Note: there is no requirement in the regulations to resurvey the workforce but contractors may do so for good business reasons.)

These changes should be made for 2007 reporting:

A. All management job titles should be re-categorized into the two new EEO-1 Officials and Managers categories beginning October 1, 2006.

B. A new EEO-1 voluntary self-identification form should be implemented starting October 1, 2006 that captures the revised race and ethnicity for at least all new entrants into the organization (i.e., hires) and could also be used for applicants.

A revised EEO-1 Self-Identification form is available from Gerstco, Inc. Please contact Katie Lockyer at Ext. 210.

VEVRAA Regulations Finalized

Background: Section 4212 of the Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA) applies to Federal government contractors and subcontractors. It prohibits discrimination against veterans in all terms, conditions, or privileges of employment. It requires contractors to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era." This regulation is enforced by the U.S. Department of Labor, Office of Federal Contract Compliance (OFCCP) and the OFCCP regulations implementing VEVRAA can be found in 41 CFR Part 60-250 that require contractors to have a written Affirmative Action Plan (AAP) and to list employment openings with the local state employment service office.

VEVRAA Amendments Effective January 3, 2006

The Veterans Employment Opportunities Act of 1998 (VEOA) has been amended to increase the threshold for federal contractors to establish coverage under VEVRAA from \$10,000 to \$25,000. It also extends VEVRAA coverage to a new group of veterans called **other protected veterans**, defined as "persons who served on active duty during a war or in a campaign for which a campaign badge has been authorized, under laws administered by the Department of Defense."

The Veterans Benefits and Health Care Improvement Act of 2000 (VBHCIA) was also amended to extend VEVRAA coverage to a new group of veterans called **recently separated veterans**, defined as "any veteran during the one-year period beginning on the date of such veteran's discharge or release from active duty."

Pending VEVRAA Amendments

Certain amendments to the Jobs for Veterans Act of 2002 (JVA) are still pending. When effective, the amount of a government contract required to establish coverage under VEVRAA will increase to \$100,000. Requirements for listing jobs with the local state employment service office will also be revised. It is possible that America's Job Bank (AJB) will not be available. If AJB is not available, contractors should list their employment openings with local State Employment Service offices.

A new Veterans Self-Identification form is available from Gerstco, Inc. Please contact Katie Lockyer at Ext. 210.
