

OFCCP Definition of an Applicant: Frequently Asked Questions

After receiving comments from over 50 major companies and employer groups, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) released the final "Internet Applicants" regulation on October 7, 2005.

These new regulations provide critical requirements for all federal government contractors regarding how applicant records need to be captured, stored, and reported when using both "internal" and "external" applicant tracking systems. The following FAQs provide a general overview of these new regulations, but should not be substituted for sound legal advice from corporate attorney.

What is the OFCCP?

The Office of Federal Contract Compliance Programs ("OFCCP") is part of the U.S. Department of Labor's Employment Standards Administration. It has a national network of six Regional Offices, each with District and Area Offices in Major Metropolitan Centers.

OFCCP is responsible for ensuring that employers doing business with the Federal government (hereafter "Contractors") comply with the laws and regulations requiring nondiscrimination. This mission is based on the underlying principle that employment opportunities generated by Federal dollars should be available to all Americans on an equitable and fair basis.

Generally, all U.S. employers who have 50 employees and maintain contracts with the Federal Government exceeding \$50,000 per year are Contractors and are subject to the OFCCP's monitoring

efforts. This includes both Contractors and sub-contractors.

Why Did the OFCCP Publish These New Regulations?

Prior to the publication of the updated regulations on October 7, 2005, the most recent set of guidelines that addressed the "who is an applicant for my government reporting requirements" question was in 1978 when the Uniform Guidelines on Employee Selection Procedures (uniformguidelines.com) were published. This document provided only very generic answers to this question that applied mostly to only paper resumes.

The advent of the Internet brought confusion to the HR community surrounding this issue and government compliance, because almost any job seeker who sent an employer a resume, for almost any job, would sometimes be counted as an applicant when running adverse impact reports that compare the hiring rate of various groups. In fact, in 1995 Society for Human Resource Management (SHRM) addressed a letter to the OFCCP Director stating that ". . . essentially everyone on Monster.com may be an applicant." The new regulations specifically define who is an applicant, and who isn't, for government reporting and HR/EEO functions.

When Did the New Regulations Go Into Effect?

On February 6, 2006. Although there is currently a 90-day grace period for employers if they can show the OFCCP that they are making progress (see below).

Why Does OFCCP Need This Data And What Is Done With This Data?

The new regulations address recordkeeping by Federal contractors and subcontractors about the Internet hiring process and the solicitation of race, gender, and ethnicity of "Internet Applicants." The recordkeeping requirements of the rule provide data that the OFCCP will use in the enforcement of the nondiscrimination laws.

To this extent, it will primarily be used for conducting "adverse impact" analyses on the Contractor's recruiting and hiring practices to insure that they are not discriminatory by disproportionately screening out women and/or minorities using criteria that are not supportable or defensible.

What If A Contractor Is Having Difficulty Updating Its Systems To Comply With The Requirements Of The Internet Applicant Rule? Will The Effective Date Of The Rule Be Extended?

Yes and no. The OFCCP has kindly extended a limited "90-day no-cite grace

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period” as defined below:

No, the effective date of the Internet Applicant Rule will not be extended. The Rule is effective on February 6, 2006. However, under OFCCP’s enforcement discretion, for a period of 90 days following February 6, 2006, OFCCP **will not cite a contractor for a purely technical record-keeping violation** 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 recordkeeping requirements that preexisted the Internet Applicant final rule, i.e., 41 CFR 60-1.12 (emphasis added).

Who is an “Applicant” Under the New Regulations?

The new regulations provide a four-prong test for sorting applicants from non-applicants for HRIS and EEO tracking/reporting purposes. The “nutshell” version of these four prongs involves the following: The “job seeker”:

- 1) submits electronic expression of interest

- 2) is considered by the employer for a particular position
- 3) possesses the basic qualifications
- 4) does not remove himself/herself from consideration

What is Meant by the First Prong Requirement: “The Applicant Submits an Expression of Interest?”

Any time an applicant submits an “expression of interest,” regardless of the means or manner in which the expression of interest is made, the person should be considered as an applicant if the contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection processes for that particular position.

If the Contractor accepts applicants from the Internet as well as walk-ins, the new regulation Internet applicant definition applies. However, if the Contractor only accepts applications from walk-ins, only the previous Uniform Guidelines definition applies.

What is Meant by the Second Prong Requirement: “The Applicant is Considered by the Employer for a Particular Position?”

The OFCCP defines “considers” as “. . . assessing the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.”

What is Meant by the Third Prong Requirement: “The Applicant Possesses the Basic Qualifications?”

Contractors must advertise to potential applicants the basic qualifications they must possess to be considered for the position (e.g., via a web site), or the contractor may establish criteria in advance by making and maintaining a record of such qualifications for the

position prior to considering any expression of interest for that particular position.

The qualifications must meet the following three conditions:

- 1) Non-comparative. For example, Contractors can use a “5 years of minimum relevant experience” rather than ranking applicants in order of years experience.
- 2) Objective. For example, Contractors can require a Bachelor’s degree in accounting, but not a technical degree from a “good school.”
- 3) “Relevant to performance of the particular position” and enable the contractor to accomplish business-related goals.

Multiple “basic qualification” screens are allowed but all qualifications should be identified prior to use in a screening process.

How Can I Develop Basic Qualifications that will Survive an OFCCP Review?

The first two requirements are very straightforward—just be sure that the qualification requirements are “set in stone” (i.e., non-comparative) and are so objective that a third-party (with the contractor’s technical knowledge) would be able to evaluate whether the job seeker possesses the qualification. Also be sure that the standards are applied consistently by hiring screeners and recruiters.

The third requirement, however, is more complicated: “Relevant to performance of the particular position and enable the contractor to accomplish business-related goals.” Just what exactly does “relevant to the performance of the position” mean? What is a basic qualification that enables

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2005 Events Calendar

Conferences

Biddle Consulting Group, Inc. will be a corporate sponsor at the following conferences and will have a vendor booth at each show listed below.

: April 20 :

*APCO Project
RETAINS Symposium
Baltimore, MD*

: April 25-27 :

*Navigator Conference
Exhibit Booth & User's Group
Orlando, FL*

: May 1-3 :

*Association of Legal
Administrators (ALA)
National Conference
Montreal, QC, Canada*

: June 12-13 :

*National Emergency Numbers
(NENA) Conference
Exhibit Booth & User's Group
Pittsburgh, PA*

: August 5-9 :

*NILG Conference
Exhibit Booth & Workshops
Phoenix, AZ*

: August 7-9 :

*APCO International Conference
Exhibit Booth & User's Group
Orlando, FL*

: April 25-27 :

*International Public
Management Association
(IPMA-HR) Conference
Las Vegas, NV*

Seminars & Training

: June 6-7 :

*AAP Methodology
& Software Training
Folsom, CA
Cost: \$990*

see our website for a complete schedule of upcoming seminars and webinars in AAP and Compensation Analysis

www.biddle.com/training

For more information on any of the conferences or other events listed, or to have BCG speak at your event, please call Biddle Consulting Group, Inc. toll-free at (800) 999-0438 or e-mail us at staff@biddle.com

Greetings:

The Arizona ILG/Quad A & Pacific Region ILG Groups are privileged to host the **24th Annual Industry Liaison Group National Conference, August 5-9, 2006 at the JW Marriott Desert Ridge Resort & Spa, Phoenix, AZ**, located 20 minutes from Sky Harbor Airport. The theme for the 2006 NILG Conference is *"Today's Paradox: Equality & The American Dream."*

Since 1982, ILG Groups have worked to strengthen relationships between federal contractors and the OFCCP. The ILG Conference provides a forum that encourages productive dialog between industry and federal agencies. Through outstanding speakers, workshops, and discussion of current issues, the annual conference will be an opportunity to advance the mutual goals of your organization in a cooperative and beneficial atmosphere.

On behalf of the Arizona ILG/Quad A & Pacific Region Industry Liaison Groups, I invite you to join me in making the 24th Annual ILG National conference a great success. www.ailg.org

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the contractor to accomplish a business-related goal? Clearly reviewers will come up with differing opinions on this matter when basic qualifications are evaluated for these criteria.

The good news is that OFCCP used language when developing these criteria that is different than the “job relatedness” requirement of the Federal Civil Rights Act for defending against “adverse impact” claims (instances where a Contractor’s screening practice has substantially different passing rates for different ethnic/gender groups). In other words, they used a reasonable standard. When employers use a screening practice that has adverse impact against a certain group and they are challenged for using such practice, they are required to prove that the practice is “job related and consistent with business necessity.” Although similar to the “relevant to performance” criteria used for defining qualified applicants, this is a much higher standard.

A good rule of thumb to use when evaluating whether a basic qualification meets this standard is this: **Would a clear majority (e.g., 70% +) of competent incumbents in the target position agree that the basic qualification is necessary for performing their jobs on a regular basis?** For example, take a basic qualification in the form of a “35-pound

lifting requirement” that shows up as a “knock-out” prescreen question in an on-line application process as: “Are you able to lift 35 pounds from the floor to your waist several times during an 8-10 hour shift?” Would a clear majority (70% +) of the current incumbents in this position agree with that statement? Because back-peddling after an audit or lawsuit can have such negative effects on a Contractor, it is highly recommended that reasonable and defensible basic qualifications are established using this rule before they are used in the screening process.

Reviewing your company’s job analysis or job description information may also serve useful for evaluating the job relatedness of your basic qualifications, provided that they have been developed in such a way to provide this level of detail.

What is Meant by the Fourth Prong Requirement: “The Applicant Does Not Remove Himself/Herself From Consideration?”

The individual is considered as an “applicant” only if at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, he/she removed themselves from further consideration or otherwise indicates that he or she was

no longer interested in the position. The Contractor may conclude that an individual has removed himself or herself from further consideration (or is no longer interested in the position) if:

- 1) The individual **expressly states** that he or she is no longer interested in the position;
- 2) The individual’s **passive demonstration of disinterest** shown through **repeated** non-responsiveness to inquiries from the contractor about the position; or
- 3) The individual provided information pertaining to (1) the individual’s interest in the specific position or type of position at issue, (2) the location of work, or (3) his or her salary requirements that **provide the basis for determining the individual is no longer interested in the position** (provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers).

What if My “Basic Qualifications” Skill Search Returns Too Many

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California AB 1825 State Mandated Sexual Harassment Training Now Available

Biddle Consulting Group, Inc. is now offering sexual harassment training to organizations, as a result of the new California State Assembly Bill 1825 (new government code 12950.1), which states, “California employers are mandated to provide initial and routine sexual harassment training for supervisors if the company regularly employs 50 or more employees or regularly receives the services of 50 or more persons pursuant to a contract.”

For more information, please contact BCG at (800) 999-0438

Applicants? Are all automatically Classified as Applicants Under the New Regulation?

No. The new regulations allow the Contractor to use either “absolute numeric limits” (e.g., the first 100 of the 2,500 applicants returned from the search) or “random sampling” of research results (e.g., every 9th record).

What About Applicants Who Submit Resumes Electronically Without Following the Rules? Do I Need to Keep their Information Also?

No. OFCCP does not require contractors to consider any and all expressions of interest they receive, regardless of the manner or nature of the expression of interest. The contractor is entitled to establish and abide by standard procedures that job seekers must follow to express an interest in employment. Contractors are also not required to consider for employment individuals who do not name a particular position they are applying for. However, keep in mind that any company-wide protocol must be followed at all times or else the entire screening process will be subject to increased exposure.

We Administer On-line Tests to Applicants? Do I need to Request and Keep Race/Gender Information for All Applicants Who Take our On-line tests?

Yes. Tests are treated separately under the new regulations and race/gender information needs to be solicited and kept for all applicants who take them (and kept for at least two years).

Can I Ask Questions About “Relative Experience” During the On-line Screening Process—Such as “How Many Years Forklift Driving Experience Do you Have”?

Yes, provided that the information is only used in a **non-comparative** way (and is of course related to the job) when addressing basic qualifications. Be careful here because consistency is very important. You don’t want to have one hiring manager requiring 5 years experience and the other requiring 10. With that said, it is allowable to compare experience and qualifications in the **selection process**, just not in an assessment of basic qualifications which are typically seen as “hurdles” (either you have it or you don’t) in the initial on boarding process.

Can I Ask Applicants to Provide Self-Ratings on their Skill Levels in Different Areas—Such as “Please Rate Your Skill Using Microsoft PowerPoint: Beginner / Intermediate / Advanced”?

Yes, provided that the information is only used in a **non-comparative** way (and is of course related to the job). If the Contractor had a question like this and used it in a way to only accept applicants who provided self-ratings of “Intermediate” or higher, this would be supportable (provided it was used consistently and applicants were not ranked by the level they listed).

At What Point In The Recruiting Process Should Applicants Be Asked Their Race And Gender?

Under the new regulations, contractors are required to solicit race, ethnicity, and gender data from all individuals who meet the definition of “Internet Applicant” or the traditional definition of “applicant” depending upon which standard is applicable to the particular position. OFCCP does not mandate a specific time or point in the selection process that contractors must solicit this information, so long as the information is solicited from all Internet Applicants or traditional applicants, as appropriate.

What if applicants don’t offer race and gender information?

The obligation to solicit demographic information from job applicants is not new. The Internet Applicant rule adds that a contractor is required to solicit and collect such data from each applicant or Internet Applicant, whichever is applicable to the particular position. Voluntary self-reporting or self-identification is still generally the preferred method for collecting data on race, ethnicity, and gender, but in situations where self-reporting is not practicable or feasible, observer information may be used to identify race, ethnicity, and gender.

Where Can I Find Additional Information About These New Regulations?

The OFCCP has provided several resources for obtaining additional information. See below. ❄

MORE INFORMATION ONLINE:

OFCCP’s Website:

<http://www.dol.gov/esa/regs/compliance/ofccp/faqs/emprfaqs.htm>

Actual Regulations:

<http://www.dol.gov/esa/regs/fedreg/final/2005020176.htm>

OFCCP FAQs Regarding New Regulations:

<http://www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm>

OFCCP’s PowerPoint Presentation on the New Regulations:

<http://www.dol.gov/esa/ofccp/iardwnld.htm>



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