

May 27, 2004

Joseph DuBray Jr., Director
Division of Policy, Planning and Program Development
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C-3325
Washington, D.C. 20210

Mr. DuBray:

Attached to this letter are comments on the proposed regulations found in the Federal Register dated March 29, 2004. The proposed regulations are found at Federal Register vol. 69, no. 60, p. 16446 and following. These proposed regulations would modify 41 CFR sec. 60-1.

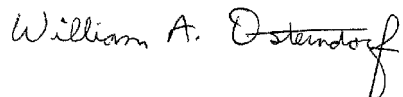
I am submitting the attached comments in response to your agency's request for input on the matters discussed in the proposed regulations. I have worked as a consultant assisting public and private sector employers in the preparation of affirmative action plans for the last 18 years. My firm, HR Analytical Services, assists companies in the preparation of AAPs that are meant to respond to all federal affirmative action requirements. We serve companies with as few as 60 and as many as 12,000 employees. Among the companies using our services are some of the largest federal contractors in the State of Wisconsin. We have prepared thousands of affirmative action plans for companies throughout the nation, and our AAPs have been reviewed on numerous occasions by representatives of the OFCCP.

The applicant issues addressed in your agency's proposed regulations have been among the most difficult issues that employers face during reviews by your agency. Your agency's proposal is an important and constructive move towards addressing these issues.

There are some items that your agency should consider before releasing final regulations in regard to applicants. The most critical action your agency can take is to apply the standards proposed for Internet applicants to all applicants.

Should you or your staff have questions about the attached comments, I can be contacted at the telephone number noted below. Thank you for your interest.

Sincerely,



William A. Osterndorf
President

attachment

COMMENTARY ON PROPOSED REVISIONS TO 41 CFR SEC. 60-1 REGARDING "INTERNET APPLICANTS"

On March 29, 2004, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register proposed revisions to 41 CFR section 60-1. This proposal was entitled "Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes." The proposed revisions to 41 CFR section 60-1 would add new language in regard to "Internet applicants."

The commentary below responds to the request for comments issued with the publication of these proposed regulatory changes. The commentary below is submitted by William Osterndorf of HR Analytical Services. HR Analytical Services is a Milwaukee, Wisconsin based management consulting firm that specializes in assisting federal contractors and subcontracts who need to prepare affirmative action plans for the federal government. Our clients range in size from 60 employees to more than 12,000 employees. HR Analytical Services has developed thousands of affirmative action plans for companies throughout the nation, and our clients have been through affirmative action reviews by the OFCCP on a regular basis.

General Comments

Many affirmative action reviews, including some of the affirmative action reviews involving our clients, have revolved around the question "Who is an applicant?" This question frequently arises when regulatory agencies are reviewing whether there has been any discrimination associated with applicant pools that have been developed in response to an employer's open positions. When the question "Who is an applicant?" has arisen, the OFCCP and other federal agencies have regularly pointed to answer 15 in the Questions and Answers associated with the Uniform Guidelines on Employee Selection Procedure. These questions and answers were first published in 1979, in an era long before the Internet and other modern media dramatically transformed the way in which applicant materials were collected by employers.

Answer 15 responds to the question "Who is an applicant?" as follows:

The precise definition of the term "applicant" depends on the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice....

The OFCCP and other regulatory agencies have frequently interpreted answer 15 in the broadest possible manner, suggesting that any person who even remotely expresses interest in a position, no matter how qualified or unqualified, is an applicant. The OFCCP has generally then gone on to suggest that information on all applicants must be recorded on an applicant log, that employers must attempt to gather race and sex information on all applicants, and that employers must then analyze the effects that selection procedures have on all applicants.

The OFCCP's proposed regulations on "Internet applicants" are an important and valuable start in resolving many long-standing applicant issues that have troubled federal contractors and subcontractors. These regulations provide explicit guidance on the nature of the applicants where race and sex data needs to be collected, and by extension, the nature of the applicants who must appear on applicant logs and who must be part of impact ratio analyses. The new regulations appear to limit the definition of applicants to a pool

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of persons who have actually expressed interest in an open position and who have the minimum qualifications for the open position. This will be of great value to employers, as employers will no longer need to record and analyze information on unqualified applicants or on individuals who have not made a direct showing of interest in an open position. Instead, employers can properly concentrate their time and efforts on determining whether qualified and interested persons from protected classes are receiving appropriate consideration for open positions.

"Internet Applicants" vs. Other Applicants

The most serious issue associated with the proposed regulations is that these regulations only cover one class of applicants. If published in final form, these regulations will create a fundamental new problem where no problem currently exists. Today, there may be no clear and firm definition of applicant, but at least whatever definition is used by an employer and/or the OFCCP is applied consistently to all classes of applicants. The proposed regulations would create an untenable situation where one set of rules applies to "Internet applicants" and an entirely different set would apply to all other applicants.

It is unarguably the case that the Internet has dramatically changed the way in which many people look for open positions. The research done by the federal interagency taskforce looking into applicant issues clearly demonstrates this to be true. However, what has been lost in this extensive discussion of Internet applicants is the fact that not all positions are filled through recruitment associated with the use of the Internet. HR Analytical Services has clients who recruit hundreds of new employees through traditional means such as newspaper advertisements, schools, employment agencies, and the state employment services. We also continue to have clients who allow individuals to walk into their facilities and fill out the traditional paper application form at their company sites. We know that our experience in this regard is not unique. Employers throughout the nation continue to recruit production employees, clerical employees, and various other types of employees through traditional means that do not involve the use of the Internet. Even when the Internet is an important source of candidates, it is not unusual for employers to also use traditional recruitment devices to find additional candidates.

The use of two different standards for applicants will yield certain unacceptable results. While persons applying through traditional recruitment mechanisms such as the mail will be considered applicants regardless of their skills and qualifications, persons applying through the Internet will only be considered applicants when they meet the four-part test outlined in the proposed regulations. Thus, different standards would be applied to the consideration of applicants based only on the mechanism used to express interest.

Another result of the proposed regulations would be that employers would need to create two parallel systems to record information on applicants. New and complex processes and procedures would need to be instituted to insure that applicant information is routed to one of these two systems. If applicant materials were submitted and it was unclear whether the original submission came through the Internet or related electronic data technologies, individuals involved in selection and record-keeping would have no clear guidance on which standards apply or which system to use. The proposed regulations could potentially create greater burdens on employers, and yet fail to eliminate the confusion and problems inherent in the current regulatory environment.

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This situation is further complicated by the OFCCP's requirement to list all open positions at "an appropriate local employment service office of the state employment security agency." (Citation from 41 CFR sec. 60-250.5(a).) The state employment services now generally post all positions on their web sites and/or other web sites. However, there are a certain number of applicants who will respond to these postings because they have personally seen these postings at a state employment service office. These applicants can and do respond to such postings by completing an application form at the company site or by sending a resume through the mail. The requirement to post with the state employment service thus guarantees that there will be situations where applicants will come in both through the Internet and through traditional means.

Recommendation

It is our strong recommendation that the OFCCP change its four-part test so that the test can be used to determine which individuals qualify as applicants for surveying and other purposes regardless of how applicants were referred. The first part of this test could be changed by simply removing the phrase "through the Internet or related electronic data technologies" from the proposed revisions to 41 CFR 60-1.3. (The word "Internet" would also be removed from the remaining parts of 60-1.3.) The use of the four-part test for all applicants would then provide both employers and OFCCP Compliance Officers with a consistent and appropriate standard for determining whether employers' selection practices have any adverse impact on minorities and females.

"Advertised, Basic Qualifications" vs. "Minimum Qualifications"

It is common for our clients and employers to refer to the "minimum qualifications" for an opening. All applicants are required to meet these minimum qualifications in order to receive any kind of additional consideration. The establishment of minimum qualifications allows an employer to set a baseline for the type of skills and experience that an individual must possess in order to be able to do the essential functions of a position.

Under the definition of applicant used since the inception of the Uniform Guidelines, OFCCP Compliance Officers have regularly suggested that individuals who expressed interest in a position were to be considered applicants even if they did not meet the minimum qualifications for a position. This has left employers in a difficult situation in two ways. First, employers have been required to solicit race, gender, and ethnicity data on a much broader range of individuals than those who will actually receive any kind of substantive consideration. Second, statistics have at times suggested that adverse impact exists when unqualified minorities and females were a part of the relevant applicant data.

The OFCCP has taken a much needed step forward by proposing that individuals applying for a position via the Internet must meet the "advertised, basic qualifications" for the position in order to be considered applicants. By suggesting that employers must gather and analyze race, gender, and ethnicity data only on those individuals who meet these advertised, basic qualifications, the OFCCP and employers can properly focus their reviews of applicant data on the individuals who would, in fact, have an opportunity for employment. Persons who could not be considered viable candidates for a position because they are lacking

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some critical skill would properly be left out of adverse impact and other analyses.

Our concern here is that the OFCCP has used nomenclature that is unfamiliar to human resource professionals and others who may be involved in selection and record-keeping. As noted above, employers tend to talk about "minimum qualifications" for a position. While the phrase "advertised, basic qualifications" appears to be the same as "minimum qualifications," the phrase used in the proposed regulations may be misinterpreted by various parties.

The word "advertised" that is used in the proposed regulations is problematic. Employers frequently establish minimum qualifications in position descriptions and other internal documents. These minimum qualifications may be shared widely with potential applicants through advertisements or web postings. However, employers may at times truncate the minimum qualifications in an advertisement or web posting in order to save cost or space. There are also times when employers use recruiters and other sources to find candidates where the minimum qualifications for the position are shared with the recruiter or other source but the minimum qualifications are never formally advertised.

The word "basic" is also problematic. It is not clear what a "basic" qualification is, either from the context of the regulatory materials or from natural usage by human resource professionals. In my discussions with our clients, there was uncertainty as to whether "basic" meant "minimum" or "typical" or "important" or something else.

Recommendation

It is our recommendation that the OFCCP substitute the words "defined, minimum qualifications" for the words "advertised, basic qualifications" in the proposed regulation. The phrase "minimum qualifications" is, as noted earlier, a term in common usage for a type of qualification that is the primary, foundation (or "basic") type of qualification required for a position. Human resource professionals, OFCCP Compliance Officers, and others who are involved in selection and record-keeping are familiar with the phrase "minimum qualifications" and understand the phrase's plain meaning.

We suggest the use of the word "defined" rather than "advertised" for several reasons. It appears to be the OFCCP's desire that employers should have pre-defined qualifications for positions that do not change during the course of a recruitment. By using the word "defined" rather than "advertised," the OFCCP achieves this objective without creating a conflict over whether a position has been formally advertised or not. The word "defined" would also be helpful to human resource professionals and others involved in the initial stages of recruitment efforts, as it would provide incentive to clearly spell out the qualifications for a position before recruitment begins rather than at the point where formal advertising occurs.

It may be that the OFCCP has used the word "advertised" in order to insure that there are written qualifications for a position. If that is the case, then the agency should include the word "written" in its proposal, rather than the word "advertised." The OFCCP could state that an individual must possess the "written, defined, minimum qualifications for the position" rather than the "advertised, basic qualifications."

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Changes to Regulatory Language

In order to accommodate the suggestions above, we suggest the language in 60-1.3 should read as follows:

Applicant

(1) "Applicant" means any individual:

- (I) who submits an expression of interest in employment;
- (ii) whom the employer considers for employment in a particular position;
- (iii) whose expression of interest indicates the individual possesses the defined, minimum qualifications for the position; and,
- (iv) who does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

(2) For purposes of this definition, "defined, minimum qualifications" means qualifications that the employer makes before the selection process begins that potential applicants must possess in order to be considered for the position and that meet all of the following three conditions:....

Please note that the suggested language above eliminates the awkward grammatical structure that is currently a part of the definition of Internet applicant.

The language in 60-1.12 would read as follows:

(c)1(ii) Where possible, the gender, race, and ethnicity of each applicant as defined in 41 CFR 60-1.3

In other sections of 60-1.3 and 60-1.12, the word "applicant" would be substituted for the word "Internet applicant."

Summary

In closing, it is worth noting again that this proposal by the OFCCP is an important and valuable step in dealing with a problem that has plagued both the agency and employers since the inception of the Uniform Guidelines. We commend the agency on developing a proposal that both defines applicant and that incorporates the idea that all parties should be focused on those applicants who meet the minimum qualifications for positions. The concerns we have raised above are offered as a means of providing insight that will allow for the development of effective final regulations. We hope to prevent the creation of a new problem that would surely absorb the time and energy of both the OFCCP and employers.

On behalf of HR Analytical Services,

William A. Osterndorf
President