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New Federal Regulation on Data Collection and Recordkeeping for Internet Job Applicants

By John F. Goemaat

“Internet Applicant” defined for employers

On October 7, 2005, the US Department of Labor, Office of Federal Contract Compliance (OFCCP), issued the final version of its long-awaited regulation on required employer recordkeeping for job applicants who inquire about employment opportunities electronically. The OFCCP oversees the anti-discrimination and affirmative-action obligations of employers who are federal contractors and sub-contractors. The new rule is intended to apply to all OFCCP required employer recordkeeping and data collection on the gender, race and ethnicity of each job applicant.

In the age of electronic job searches and applicant inquiries, employers receive expressions of interest from applicants for positions, both advertised and unadvertised, in high numbers. The OFCCP has required employers who are federal contractors and sub-contractors to collect and keep data on job applicants' gender, race and ethnic identity to determine whether employers are complying with affirmative action commitments. Faced with the requirement to identify the gender and racial background of every person submitting a resume electronically, employers found the burden to be overwhelming. On the other hand, the OFCCP was unwilling to give up its identification requirement.

The new regulation is intended to strike a balance between the burden of data collection and recordkeeping to employers and the benefits to their government regulators. *(cont'd →)*



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The new regulation requires gender, race and ethnic identity information of “Internet Applicants” to be collected and recorded. However, it defines an “Internet Applicant” as an individual

1. Who submits an expression of interest in employment through the Internet or related electronic data technologies;
2. Whom the employer considers for a particular position;
3. Whose expression of interest indicates he/she has the basic job qualifications; and
4. Who at no time in the application process indicates he/she does not wish to be considered for the position.

The regulation provides explanations and examples regarding each of these four “Internet Applicant” criteria to assist employers in compliance. For example, the regulation explains how employers may use data management techniques to sort through electronically submitted inquiries. Some of these techniques will eliminate the requirement to collect gender, race and ethnicity information, and some will not. In addition, the basic qualifications that an employer uses to exclude an individual from consideration for employment, and therefore from the data collection requirement, must be objective. These qualifications may not be dependent on the employer’s judgment.

Once an individual meets the criteria of an Internet Applicant, the employer should ask for the applicant’s voluntary self-identification by gender, race and ethnicity. This sensitive inquiry may be conducted electronically, but it should be made with a

clear indication that the information is solely for purposes of fulfilling government-imposed recordkeeping obligations. Without such clear indication, the solicitation of this information might well be perceived to be for discriminatory purposes. In fact, private employers who are not required to comply with OFCCP regulations, or comparable obligations, should not solicit this information from job applicants.

Effective February 6, 2006

Prior to finalizing the regulation, the OFCCP received comments from employer groups that the regulation would require extensive changes in personnel practices, employment process implementation and technology system modifications and testing. In response to these employer comments, the OFCCP stated that it would give employers what it considered sufficient time to implement the new data collection requirement for Internet Applicants. The OFCCP, therefore, made the new regulation effective February 6, 2006. Affected employers should commence their analysis of the regulation and their own required compliance activity as soon as possible.



The material in this Employment Alert is for information purposes only and is not intended as legal advice. If you have any questions concerning this Alert, please contact John F. Goemaat (jgoemaat@lindabury.com) or John H. Schmidt, Jr. (jschmidt@lindabury.com). For biographical information on our attorneys, visit our web site at www.lindabury.com.

