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## Implications of the Internet Applicant Regulation on Adverse Impact Analyses

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Federal contractors and subcontractors that allow expressions of interest for employment through the Internet or other related electronic data technology are required to follow Internet applicant regulations released by the Office of Federal Contract Compliance Programs (OFCCP)<sup>1</sup>. These regulations were published on October 7, 2005 and contractors were required to implement them no later than February 6, 2006. The Internet applicant regulations are now over four years old, so what have been the *real* implications of the Internet applicant regulations on adverse impact analyses? This paper considers that question.

Based upon DCI Consulting Group's experiences with OFCCP compliance evaluations, as well as a review of recent conciliation agreements, we have found very little enforcement strictly on the record keeping requirements under the Internet applicant regulations. That is to say, it appears that OFCCP is certainly enforcing record keeping violations on contractors that do not keep accurate applicant flow data, but we have found little enforcement on the "new" requirements for records for both internal and external database searches. However, we have seen a significant amount of enforcement based upon applicant flow data that shows an adverse impact against a protected class. In fact, in recent years nearly 95% of settlements ending in a financial remedy were failure to hire cases alleging systemic discrimination<sup>2</sup>. This enforcement

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<sup>1</sup> "41 CFR part 60-1 Obligation to solicit race and gender data for agency enforcement purposes", released by the Department of Labor, Office of Federal Contract Compliance Programs, October 7, 2005.

<sup>2</sup> "A review of OFCCP enforcement statistics: A call for transparency in OFCCP reporting" released by the Center for Corporate Equality, March 2009.

is the real purpose for the development of the Internet applicant rule, as well as the requirement to solicit race/ethnicity and gender from all Internet applicants for the sole purpose of conducting accurate adverse impact analyses. Before going over how adverse impact analyses have been impacted by the Internet applicant regulations, it would be helpful to understand what data OFCCP will use in an adverse impact analysis during a compliance evaluation.

### ***Data Required During OFCCP Compliance Evaluations***

One of the main focuses of the OFCCP during a compliance evaluation is the applicant adverse impact analysis. When a Federal contractor is selected for a compliance evaluation, the contractor is sent (via certified letter) a scheduling letter indicating the establishment being reviewed by OFCCP. The scheduling letter has 11 items that must be submitted upon the initial audit submission. Item 10 requires the contractor to provide the OFCCP with personnel activity (applicants/hires, promotions and terminations) so that OFCCP can conduct adverse impact analyses.

When a contractor receives this scheduling letter, the first thing contractors must determine is whether to submit the personnel activity at the job group or job title level. Submitting the data at the job group level combines the data for all of the job titles within that job group. Submitting at the job title level mirrors actual decisions made by job, not rolled up into a larger group. Next, summary information would be sent by the Federal contractor allowing OFCCP to conduct adverse impact analyses.

Please find below a snapshot of an Item 10 submission by job title.

<b>Job Title</b>	<b>Group</b>	<b>Selected</b>	<b>Applied</b>
<b>HR Generalist</b>	<i>Male</i>	1	20
	<i>Female</i>	20	75
	<i>Non-Minority</i>	15	65
	<i>Minority</i>	5	30

As you can see from the example, contractors are required to identify the number of individuals that applied for the position. For purposes of conducting an adverse impact analysis, the most controversial issue is on the definition of “applied”? Many contractors used to take the position that it was anyone they interviewed for the job, whereas OFCCP took the position that it was any job seeker that expressed an interest in the job. There was a large disconnect between

the contractor community and OFCCP on the definition of who actually applied. This disconnect caused a lot of friction during compliance evaluations. What was the basis for OFCCP using this general definition of an applicant? The definition of an applicant that OFCCP referenced dates back to 1978 with the issuance of the Uniform Guidelines on Employee Selection Procedures (UGESP)<sup>3</sup>. Let's review the history of the applicant definition and how it evolved over time.

### ***The History of the Applicant Definition***

Prior to 2006, Federal contractors referenced the UGESP as the only source for defining an applicant. The following definition was pulled from the question and answer section of the UGESP website.

*“15. Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?”*

*A. The precise definition of the term "applicant" depends upon 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 term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines.”*

The UGESP applicant definition was deemed to be too broad by most in the contractor community. So when the Internet became part of the applicant process, the UGESP applicant definition became even more cumbersome for contractors to comply with because there was an increase in the number of job seekers applying to be considered for a position(s). Due to this, OFCCP decided to further define what an applicant is for Federal contractors and subcontractors.

Ultimately, the OFCCP released regulations that defined an Internet applicant. OFCCP defined an Internet applicant as those job seekers that meet the following four criteria<sup>4</sup>.

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<sup>3</sup> “Uniform employee selection guidelines interpretation and clarification (Questions and answers)”, found at <http://www.uniformguidelines.com/questionandanswers.html>.

<sup>4</sup> Department of Labor, Office of Federal Contract Compliance Programs, 41 CFR Part 60-1, Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes; Final Rule.

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

By applying the Internet applicant definition, contractors may greatly decrease the amount of Internet applicants to include in the applicant adverse impact analysis. That is to say, the individuals that did not meet the basic qualifications, withdrew their interest prior to an offer or weren't considered for the position would be removed from the analysis (not included in the "applied" column). Every job seeker that meets the four prongs of the Internet applicant definition should be included in the applicant adverse impact analysis.

### ***Defining the Applicant Pool for an Adverse Impact Analysis***

The first step in defining the applicant pool for an adverse impact analysis is to ensure the applicant flow log is accurate and complete. Additionally, each job seeker should have been assigned an applicant disposition code defining the outcome of that job seeker during the selection process. Why are disposition codes important? The applicant disposition codes drive the entire analysis of who is included or withdrawn from the analysis. A proper analysis cannot be conducted unless all job seekers within a requisition are coded, and we have a clear understanding of the final status of each applicant. Incorrect or missing disposition codes increase liability in an OFCCP audit. Disposition codes can fall into one of five categories: Selected, rejected but meets basic qualifications, doesn't meet basic qualifications, data management technique (DMT), or withdrawn.

<b>Selected</b>	<b>Rejected but Meets BQs</b>	<b>Doesn't Meet BQs</b>	<b>DMT</b>	<b>Withdrawn</b>
Hired external	Not most qualified	Does not meet the basic qualification	Did not consider due to data management technique	Was not interested in job
Hired but did not start work				Unable to contact
Declined offer	Did not pass interview			
Hired internal				

Remember, for an audit submission, OFCCP requires data on the number of selections made and the number of those that applied for each position. How do we define the number of selections made and the number of applicants that applied for a position? Let's start with explaining who contractors should be including in the analysis as a "selection". Any decision that a contractor makes to hire an individual for a position is considered a selection if it falls into one of the three hiring scenarios, as listed below:

Hired	Offered	Internal Successful
Hired and reported to work	Offered job but applicant declined	Internal applicants that applied for a position and were selected
Hired but did not report to work		

Determining who is selected is easier to determine than who is an applicant. Again, the million dollar question that OFCCP and Federal contractors have is “*who is considered an applicant*”. The pool size can vary in size but is driven using the applicant disposition codes applied to each job seeker. Utilizing the Internet applicant definition and removing those job seekers that weren’t considered due to data management techniques, withdrew interest or didn’t meet the basic qualifications could allow for a smaller pool size and may make the difference on whether there’s a disparity (statistical significance flagging adverse impact).

### ***Adverse Impact Analysis***

Federal contractors are required to analyze personnel activity to determine if there is adverse impact in the total selection process and if so, then evaluate each component of the selection process. What is adverse impact? The UGESP defines adverse impact as the following: “Under the Guidelines adverse impact is a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group.”<sup>5</sup> Adverse impact is typically proven through statistical analyses such as the four-fifths (4/5<sup>th</sup>) rule, statistical significance and practical significance. “A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”<sup>6</sup> Statistical significance testing will determine whether the observed differences in selection rates occurred by chance or whether something else may be causing the difference in selection rates, and is used most often in present day OFCCP enforcement. Typically, depending on sample size, Standard Deviation or Fisher’s Exact Test will be used for statistical significance tests. It’s in the best interest of a contractor to run both tests, the four-fifths rule and statistical significance, because it’s possible for one test to trigger adverse impact but not the other test. The question of whether to use the 4/5<sup>th</sup> rule, statistical significance and practical significance is beyond the scope of this white paper and will be left for others to debate the issue.

<sup>5</sup> *Uniform Guidelines on Employee Selection Procedures (1978), 41 CFR 60-3.4(D).*

<sup>6</sup> *Uniform Guidelines on Employee Selection Procedures (1978), 41 CFR 60-3.4(D).*

### *Example of Adverse Impact Analysis Pre-Regulations & Post-Regulations*

Suppose we had a requisition open for Electrical Engineers and 1,000 job seekers applied for the position. Of those job seekers, 600 were never considered, another 150 did not meet the advertised basic qualifications and 50 individuals were not interested in the position (withdrew from process). For purposes of conducting an adverse impact analysis, how many applicants do we have? According to the Internet applicant regulation, we would have 200 Internet applicants; however, according to the UGESP applicant definition we would have 1,000 applicants. That's a difference of 800 applicants being included in the adverse impact analysis. Is there adverse impact using the UGESP or Internet applicant definition?

Applicant Definition	Group	Selected	Applied	Statistical Significance	Adverse Impact
Pre-Internet Applicant	Non-Minority	80	800	2.20	YES
	Minority	10	200		
Internet applicant	Non-Minority	80	180	-0.47	NO
	Minority	10	20		

As noted above, there's adverse impact when using the Pre-Internet definition, but not when using the Internet applicant regulation. One scenario identifies that adverse impact was identified for Electrical Engineer position affecting Minorities which allows OFCCP to investigate further. However, using the Internet applicant definition, the pool size is reduced and no statistical significance is identified in the analysis. Why? The sample size is much smaller when the Internet applicant regulation is applied rather than the UGESP definition, and this mirrors the reality of employer decision making. The Internet applicant rule reduces the applicant pool by removing those individuals that didn't meet basic qualifications, withdrew their interest, or who weren't considered for the position (e.g., due to data management techniques) and thus were never really applicants.

### *Parting Thoughts*

How will the OFCCP be impacted by the new Administration? We can't say for sure what will occur now that Patricia Shiu is heading the office; however, we have heard rumors about changing the 'basic qualifications' prong in the Internet applicant definition. What does this mean? Removing the basic qualification criteria in the Internet applicant definition would increase the amount of job seekers considered an applicant and analyzed in the applicant pool. Statistically, the larger the pool size, the easier it is to find statistical significance which indicates adverse impact. In summary, OFCCP would have an easier time identifying adverse impact in the applicant summary data provided during a compliance evaluation. However, at the end of the day, the goal is to mirror reality of employer decision making and assess adverse impact. Strategic disposition codes increase the likelihood that reality will be mirrored.

## References

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