



OFCCP's Internet Applicant Rule Three Years Later: Challenges and Best Practices

**SMILG First Quarter 2009 Coffee & Compliance
Detroit, MI
February 6, 2009**

**Equal Employment Advisory Council
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Principal Objective

- **Provide practical guidance on assessing and improving “state of compliance” with OFCCP’s internet applicant (IA) rule**
 - **IU rule has been in effect for nearly three years (“full” effective date of May 8, 2006)**
 - **Recent events suggest OFCCP will increase its scrutiny of contractor compliance**
 - **(Even) greater emphasis on hiring discrimination**
 - **OFCCP Directive on Active Case Management (ACM)**
 - **OFCCP Directive on accessibility of online application systems**



Principal Challenges

- **Most principal challenges surface during audit preparation and management**
 - Too few “applicants” for number of hires
 - Too many “applicants” for number of hires
 - Troubling disparities in selection rates, with little (or no, or inadequate) data to explain
- **But some come from other sources**
 - For example, complaints from recruiters



Principal Best Practices

- **Most principal best practices involve some refinement of process and/or technology**
 - **Recognize real-world limitations**
 - **But many IA challenges can be met through reengineering the processes and mechanisms:**
 - **Through which job seekers express their interest**
 - **By which decision makers access, analyze, and disposition job seeker data and records**
 - **No “silver bullet” or “one-size-fits-all” solutions**
 - **Specific recruitment and selection practices will both pose the challenges and drive the solutions to them**



Self-Audit Approach

- **Identify challenges and best practices from perspective of self-critical analysis**
 - **Examine compliance from audit perspective**
 - Extract data and gather records likely to be requested
 - Compare what's maintained to what's required
 - Apply various analyses to assess discrimination risks
 - Suggest ways to close identified gaps
 - **Approach is practical and useful**
 - Audits are a reality (FY 09 audits now underway)
 - Facilitates not only assessment of recordkeeping compliance, but also of applicant and hire *data* to identify and mitigate systemic discrimination risks



Rationale

- **Why do applicant data and records matter?**
 - **Employers hire millions of people each year**
 - And recruit (and screen out) many millions more
 - **Federal laws and regulations affect this process**
 - Require affirmative action in recruitment
 - Prohibit discrimination in recruitment and selection
 - Compel employers to keep certain records
 - Mandate periodic, proactive monitoring of selection (hiring) decisions to ensure nondiscrimination
 - **Understanding the fundamental rationale for the IA rule is helpful to understanding its challenges and how to meet them**



Perspective

- **OFCCP's own view of its IA regulation**

“OFCCP is well aware that contractors utilize a variety of recruitment and selection practices. Nothing in the final rule alters contractors’ discretion to determine their own recruitment and selection practices and procedures. Rather, the final rule simply requires contractors to maintain sufficient records to allow both the employer and OFCCP to monitor the contractor’s selection practices for potential discrimination.”

– Preamble to Internet Applicant Regulation, 70 Fed. Reg. 58946, 58948 (October 7, 2005).



Self-Audit Process

- **Five stages to self-critical analysis**
 - **Select sample(s)**
 - **Extract and tabulate applicant and hire data**
 - **Request and assemble all required records**
 - **Apply OFCCP-oriented desk audit “screens”**
 - **Perform more rigorous compliance examination and close identified gaps**
 - **“Technical” compliance (element-by-element review)**
 - **“Risk management” compliance (ability to explain any problematic selection rate disparities)**



Sample Selection

- **Ensure sample is representative**
 - Location-based and/or functional AAPs
 - All applicant tracking systems included
 - Paper and electronic processes
 - White collar and blue collar positions
 - Regular reqs., rolling reqs., no reqs. at all
 - Entry-level, mid-level, and high-level positions
 - Different sources (*e.g.*, campus versus experienced)
 - Few (many) basic qualifications
 - High (low) applicant-to-hire (A:H) ratios



Data Extraction

- **Extract data from ATS and HRIS**
 - **Select an appropriate “covered period”**
 - *e.g.*, prior AAP cycle, six months of current AAP cycle
 - **Capture data on all job seekers, applicants, offerees, and hires relevant to covered period**
 - Date-based adjustments might be necessary for early selections and late applicants
 - Important to frame the data request more broadly than what ordinarily is provided at desk audit stage
 - Job seeker data are necessary to evaluate compliance with record retention requirements
 - Should have more job seekers than applicants, more applicants than offerees, and more offerees than hires



Request Records

- **Gather all records generated during the recruitment and selection process**
 - Requisitions (qualifications, requirements)
 - Job advertisements, solicitations, postings
 - Resumes and applications (database searches)
 - Locally prepared applicant flow logs (AFL)
 - Pre-screening and screening questions/results
 - Interview notes and guides
 - Tests and test results
 - Offer-related documentation



Apply OFCCP Screens

- **First analytical step of self-audit should simulate OFCCP's ACM screens**
 - **What would be submitted to the agency in response to a scheduling letter?**
 - Applicant data (not data on all job seekers)
 - Hire data (or possibly offer data)
 - Tabulated by job group (or possibly job title)
 - For minorities and non-minorities, women and men



Apply OFCCP Screens

- **Simulation of OFCCP ACM screens**
 - **How might OFCCP analyze those data?**
 - **Applicant-to-hire (A:H) ratio analysis**: no bright-line thresholds, but low A:H ratios where unexpected might result in questions about IA tracking
 - **“Known” applicants analysis**: low rates of “known” race/ethnicity and gender might result in questions about self-id process
 - **Standard impact ratio analysis (IRA)**: statistically significant disparities in selection rates likely will result in requests for detailed information
 - **Applicant-to-availability analysis**: rare, but possible (demographics of applicants compared to availability data)



Examine Compliance

- **Even if ACM simulation results are positive, examine compliance from technical and risk management perspectives**
 - **Technical compliance**
 - **Identify each specific IA requirement and determine whether it is being satisfied**
 - Recordkeeping, adherence to rules for data management techniques, use of basic qualifications, etc.
 - **Risk management compliance**
 - **How well do your data and records position you to quickly and convincingly explain any disparities?**
 - Screening procedures, tests, disposition codes, interview notes, etc.



Examine Compliance

- **Technical compliance assessment**
 - **EEAC's three-part analytical framework helpful to self-critical evaluation**
 - **Data collection** – is the job seeker someone from whom race/ethnicity/gender must be solicited?
 - **Record maintenance** – is the record a “personnel or employment record” which must be retained?
 - **Legal/statistical analysis** – is the job seeker an internet applicant for purposes of analyzing the impact of the company's recruitment and selection practices?



Examine Compliance

- **Technical compliance assessment**
 - **Self-critical evaluation should track OFCCP's internet applicant definition**
 - Expression of interest in employment submitted or analyzed through the Internet or related technologies;
 - That is considered by the contractor for a particular position;
 - Which indicates that the individual possesses the advertised or established basic qualifications for the position; and
 - Where the individual does not remove him or herself from further consideration for – or otherwise indicate disinterest in – the position



Examine Compliance

- **Technical compliance assessment**
 - **Identify all expressions of interest (EOI)**
 - Online profiles, resumes, applications
 - **Ensure that required EOI records are kept**
 - EOI of all internet applicants
 - EOI considered for a particular position
 - **Database searches**
 - All EOI within internal resume databases (2 years from last date on which EOI was returned through search)
 - All EOI within (or from) external resume databases where basically qualified and considered



Examine Compliance

- **Technical compliance assessment**
 - **Additional database search requirements**
 - For searches of internal databases, must keep
 - The date on which each resume was added;
 - The position for which each search was conducted;
 - The date each internal search was conducted; and
 - The substantive search criteria used*
 - For searches of external databases, must keep
 - The position for which each search was conducted;
 - The date each external search was conducted; and
 - The substantive search criteria used*

* ensure consistency with basic qualifications



Examine Compliance

- **Technical compliance assessment**
 - **Consideration**
 - **Ensure “consideration” is defined and communicated**
 - Manual assessment of qualifications, opening a resume, using technology to assess qualifications (*e.g.*, ranking)
 - **Ensure consideration is properly documented**
 - Confirm that opened resumes cannot be dispositioned as “not considered”
 - **If data management techniques used to limit those considered, ensure they were proper and documented**
 - Cannot be based on qualifications
 - Ensure that techniques are uniformly and consistently applied position-by-position



Examine Compliance

- **Technical compliance assessment**
 - **Basically qualified**
 - **If basic qualifications used to define internet applicant pool, ensure compliance with OFCCP's limitations**
 - Objective, noncomparative, relevant to the position
 - Advertised or established in advance
 - **Individual must possess all advertised/established basic qualifications to qualify as an internet applicant**
 - Ensure uniform and consistent application
 - Review all screening mechanisms to ensure that screens are consistent with basic qualifications
 - If job seeker deemed not basically qualified by recruiters, ensure proper documentation



Examine Compliance

- **Technical compliance assessment**
 - **Job seeker interest**
 - **Ensure that exclusions from applicant pool because of “disinterest” were proper and documented**
 - If presumed disinterest, validate basis for presumption
 - » *e.g.*, salary, location, type of work, schedule, etc.
 - » **Ensure uniform and consistent application**
 - » **If based on non-responsiveness, ensure that at least two attempts to contact were made**
 - If expressed disinterest, ensure properly documented



Examine Compliance

- **Technical compliance assessment**
 - **Employment tests**
 - Ensure that demographic data on all test takers are solicited and maintained, regardless of IA status
 - Ensure that test impact can be analyzed independently of IA data
 - Results apart from pass-fail
 - Score distributions
 - Test elements
 - Ensure all tests are properly validated



Examine Compliance

- **Technical compliance assessment**
 - **Other issues**
 - Ensure every hire has a corresponding applicant record
 - Cross-check hired position with applied-for position
 - Evaluate consistency between each individual's applicant demographics and hire demographics
 - If job seeker is seen but has not self-identified, ensure system for determining race/ethnicity and gender
 - Determine whether company personnel are "applying" job seekers to certain positions
 - Ensure accessibility of application process for individuals with disabilities



Examine Compliance

- **Risk management compliance assessment**
 - **If statistically significant disparities observed, do you have the data and records needed to quickly and convincingly explain them?**
 - Not a technical compliance issue
 - Little guidance from OFCCP's IA rule
 - Key sources of information
 - ATS disposition code data
 - Interview notes
 - Test results (already discussed)



Examine Compliance

- **Risk management compliance assessment**
 - **Disposition codes**
 - Ensure disposition code options reflect your specific recruitment and selection realities
 - Evaluate whether codes are being used properly
 - What happened to each job seeker and when
 - Look for common disposition code pitfalls
 - Inconsistent application, frequent use of “go-to” codes, too few or too many codes to choose from, codes contradict other information
 - No universally applicable list of disposition codes
 - One company’s “menu” of disposition codes next slide

Status	Disposition	Status	Disposition
Pending	Under Consideration	Inactive - Withdrawn	Could Not Contact / Failed To Return Calls
Inactive - Not Considered	Resume Not Reviewed (Data Management Technique/Other)	Inactive - Withdrawn	Misstatement or Omission in Application
Inactive - Not Considered	Improper Submission of Interest / Failure To Complete Application	Inactive - Not Selected	Not Minimally Qualified After Review (Education, Experience, Etc.)
Inactive - Not Considered	Prescreen U.S. Work Authorization/Eligibility	Inactive - Not Selected	Not Minimally Qualified After Screen (Education, Experience, Etc.)
Inactive - Not Considered	Prescreen Not Basically Qualified	Inactive - Not Selected	Not Best Qualified (Education, Experience, Etc.)
Inactive - Not Considered	Prescreen Presumed Disinterest (Salary)	Inactive - Not Selected	Did Not Pass Pre-Employment Test(s)
Inactive - Not Considered	Prescreen Presumed Disinterest (Location)	Selected	External Hire
Inactive - Not Considered	Prescreen Presumed Disinterest (Hours/Days of Availability)	Selected	Internal Promotion/Transfer
Inactive - Not Considered	Prescreen Presumed Disinterest (Type/Field of Work)	Selected	Declined Offer - Compensation/Benefits
Inactive - Considered	U.S. Work Authorization/Eligibility	Selected	Declined Offer - Location/Type of Work
Inactive - Considered	Not Basically Qualified	Selected	Failed Post-Offer Drug Test
Inactive - Withdrawn	Disinterested (Salary)	Selected	Failed Post-Offer Background Check
Inactive - Withdrawn	Disinterested (Location)	Selected	Failed Post-Offer Medical Test
Inactive - Withdrawn	Disinterested (Hours/Days of Availability)	Selected	Failed Post-Offer Reference Check
Inactive - Withdrawn	Disinterested (Type/Field of Work)	Selected	Failed Post-Offer Check of Application Accuracy
Inactive - Withdrawn	Application Withdrawn (Personal Reasons or No Reason Given)	Selected	Failure To Report To Work
Inactive - Withdrawn	Did Not Agree To / Show for Screen or Interview	Cancelled	Requisition Cancelled



Examine Compliance

- **Risk management compliance assessment**
 - **Interview notes**
 - **Ensure that interview notes are consistent with disposition codes and other data maintained in ATS**
 - *e.g.*, cannot have interview notes for those whom the ATS identifies as “not considered”
 - If job seeker expresses disinterest during interview (phone or in-person), notes should clearly reflect this



Going Forward

- **Expect greater scrutiny of compliance with internet applicant requirements**
- **Prepare for possibility of EEOC revisiting IA guidance under UGESP**



Other Compliance Issues

- **EEOC under the new administration**
 - Charges | litigation | race/ethnicity categories
- **OFCCP under the new administration**
 - Selection | scheduling | audit management
- **Implications of *Ledbetter* Fair Pay Act**
- **Other topics of interest**
 - Mandatory job listing requirements
 - Accessibility of online application systems
 - Others?



Wrap-Up and Questions