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## LABOR AND EMPLOYMENT ALERT

### EEOC AND OFCCP ISSUE LONG-AWAITED GUIDANCE ON THE DEFINITION OF “APPLICANT”



All employers who use electronic databases — either their own or commercially available résumé-posting sites — when hiring should be aware that on March 4, 2004, the EEOC and the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) published for public comment guidance concerning the meaning of the term “applicant” under the Uniform Guidelines on Employee Selection Procedures (UGESP). The Department of Justice and Office of Personnel Management, which are also signatories to the UGES, joined in the guidance.

#### BACKGROUND

Title VII prohibits any employer with 25 or more employees from discriminating on the basis of race, gender, ethnicity or religion. Employers are prohibited both from intentional discrimination (disparate treatment) and from adopting practices that, while neutral on their face, disproportionately affect women or minorities (disparate impact). In addition, Executive Order 11246 requires that government contractors and subcontractors with contracts of \$50,000 or more and at least 50 employees engage in affirmative action to ensure that women and minorities are afforded equal opportunity in the workplace.

#### *What is the UGES?*

The case law establishes that an employer who utilizes qualification standards or selection devices that disproportionately screen out women or minorities must demonstrate that those standards or devices are job-related and justified by business necessity, i.e., “valid,” in order to avoid liability for discrimination under a disparate impact theory. It is the view of the EEOC and the OFCCP that the UGES, adopted in 1978, establishes the processes that must be followed to make such a showing.

### ***Why is this guidance being issued?***

The UGESP itself does not contain a section defining its terms. Instead, the EEOC and the OFCCP previously issued two sets of guidance designed to assist employers in understanding the technical terms and methodology it contains (the Qs & As). One of the Qs & As addresses the definition of an “applicant.” The definition is pivotal because it establishes the group that must be studied to determine whether a particular selection requirement has a disparate impact. The UGESP requires employers to maintain records that would disclose the impact that their job requirements have on the employment opportunities of applicants by race, gender and ethnicity. The point at which an individual becomes an “applicant” thus establishes the point at which the employer must seek and record information on the individual’s race/gender/ethnicity.

*Example:* An employer requires that all of its engineers possess master’s degrees. The questions that arise are (1) whether this requirement screens out a disproportionate number of female or minority *applicants* for engineering positions and if so (2) whether the requirement is job-related and justified by business necessity within the meaning of the UGESP. It may be intuitive that fewer women than men are engineers; however, the operative question is whether among the engineers who “apply” to this employer, disproportionately more men than women hold master’s degrees. To analyze this question, the employer must keep records on the race/gender/ethnic identity of all such applicants.

The earlier EEOC/OFCCP guidance defined an applicant as any individual who “expresses an interest in employment.” Thus, application occurred at intake, not after the employer screened for basic qualifications, which, like all others, were subject to disparate impact analysis. As the use of Internet and e-mail applications and electronic résumé distribution has increased, challenges have been raised to the burden and even the feasibility of keeping records on all applicants under the existing standards. In early 2000 the Office of Management and Budget directed the agencies to examine the definition of an applicant and the paperwork burden created by that definition with an eye toward making the UGESP less burdensome in light of developing electronic technology.

### **THE PROPOSED GUIDANCE**

Rather than amend the UGESP itself, the agencies have issued guidance on the applicant issue. The proposal addresses Internet résumé posting, the use of corporate Web pages and the searching of electronic bulletin boards, as well as the treatment of e-mail applications and the use of Internet vendors who perform preliminary online tests or screens of potential employees.

### ***What does the new guidance say?***

The proposed guidance is an addition to, rather than a revision of, the existing Qs & As. It purports to clarify, but not alter substantively, the definition provided more than 20 years ago.

The guidance underscores the agencies’ position that the application of Title VII and Executive Order 11246 does not change when covered employers utilize the Internet and related electronic data-processing technologies for recruitment and selection.

The guidance states that the UGESB applies only to selection devices themselves, not to “business practices.” Thus, the employer’s decision to use, e.g., an electronic bulletin board for posting job openings is not subject to disparate impact scrutiny. Rather, the requirements established for any given opening, or the criteria used in screening résumés responding to a particular posting, must be examined for disproportionate effect and validity. In particular, the proposed guidance states that any search criteria used to elicit names from an electronic database, such as Monster.com, is subject to disparate impact analysis and that in such an analysis the comparison to be drawn is between the gender/race/ethnicity of the individuals in the search result and relevant census or workforce data.

The guidance defines an applicant as one who (1) applies to fill a particular opening defined by the employer, (2) complies with the employer’s standard procedures for submitting applications and (3) indicates an interest in being considered for the opening or other opportunity. In discussing the latter point, the guidance underscores that the UGESB applies not only to hiring, but to promotion, selection for training and other opportunities as well.

*Examples:* (a) An individual e-mails his résumé to all the defense contractors in a particular city or posts the résumé on an electronic database seeking a position as an engineer. This individual is not an applicant to any particular company because he/she did not apply for a particular opening defined by the employer.

(b) The individual e-mails his résumé to all the defense contractors in a particular city, stating an interest in engineering work. Employer A has an ongoing need for engineers, and has a routine practice of responding to such e-mails with a copy of its standard application form to be completed and returned. The individual is not an applicant unless and until he returns the application.

(c) A company is seeking engineering employees and searches a bulletin board maintained by a professional association. Because the résumés are posted on the board over a period of time, the employer contacts the individuals it finds to determine whether they remain available for employment. Only those individuals who express an interest in employment at the time it is available are considered to be applicants. If the employer does not contact all the applicants on the bulletin board who are seeking the type of position it has open, however, then the criteria it uses to screen out those it will contact is subject to adverse impact analysis comparing the results of its screen to census or labor market data.

Finally, the guidance explains that a decision to consider online tests of specific or general skills is selection procedure subject to disparate impact analysis rather than a recruitment practice exempt from the UGESB.

#### ***Does this guidance change the law?***

The agencies state that the proposed guidance does not change existing law developed under Title VII and Executive Order 11246. In fact, the proposal makes it clear that the agencies are not seeking comments on changing or updating the UGESB itself. Many employers will feel, however, that the guidance does represent a significant change in the following areas:

*The scope of the applicant pool.* Confronted with the shift to electronic databases, employers have tended toward the view that the “applicant pool” that must be studied for disparate impact is only that subgroup of individuals whose résumés are responsive to the initial data search and whose credentials merit further review. Under this approach, it is only the criteria used to screen this subset of résumés that must be examined under UGESB. The EEOC and the OFCCP plainly reject that view and establish a requirement that employers examine the impact of both their search terms and their screening criteria in order to satisfy the requirements of Title VII and Executive Order 11246.

*Uniform application by the EEOC and the OFCCP.* The proposal contains another change — procedural rather than substantive — that may have even greater consequences for employers, particularly for government contractors, than the definition of an applicant itself. Breaking with the established pattern of issuing interpretations of the UGESB on which all signatories agree, the proposed guidance states that henceforth, “each agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities.” Much of the delay in issuing the current guidance stems from disagreements between the EEOC and the OFCCP concerning the “applicant” issue. Should each of these agencies decide to issue additional interpretations on its own, employers who are government contractors may well be confronted with inconsistent obligations under Title VII and the Executive Order.

## IMPACT ON EMPLOYERS

All employers, and government contractors in particular, need to examine their current recruitment and record-keeping practices to assess the changes, if any, that must be made to comply with the new guidance defining an applicant.

*Record-keeping.* Should it become final, the proposed guidance means that an employer’s decision to fill jobs through electronic recruitment and the use of bulletin boards and databases subjects it to a greatly expanded record-keeping requirement. (It should be noted that neither the UGESB nor existing guidance specifies the length of time that records relating to disparate impact analysis must be retained. Thus, any record-keeping burden is magnified by an unspecified duty to retain potentially voluminous material.)

*Validation of search terms.* In addition to documenting its treatment of individuals whose résumés are responsive to a computer search, a company must scrutinize the impact of the search itself. Further, the requirement that the search results be compared to the relevant census or workforce data conflates the impact of the search terms — which are subject to analysis under the UGESB — with the impact of the decision to rely on electronic databases for recruitment — which is not.

In other words, even if the employer’s search terms do not disproportionately exclude minorities who have elected to post their résumés on Monster.com, the analysis required by the new Qs & As may nevertheless show disparate impact. For example, if disproportionately fewer minorities in the workforce elect to place their résumés with that source, a comparison of search results to labor market or census data may reflect disproportion in the search results that is attributable to the “recruitment practice” rather than the search. Nevertheless, under the proposed guidance, the validity of the search could be called into question.

This possibility may influence employers to rely more heavily on their own Web sites or bulletin boards rather than on the large-volume databases currently available. Additionally, it may become advisable to avoid screening electronically generated résumés until the individuals posting them have completed a customized (hard copy or electronic) job application that standardizes responses and permits more objective consideration of applicants.

*Possible inconsistent interpretation.* Moreover, regardless of how they implement the guidance, government contractors may become subject to inconsistent and possibly conflicting requirements as the individual agencies — the EEOC and the OFCCP — each promulgate their own additional interpretations of the UGESB. To date, these agencies have harmonized their views; however, the long delay in issuing any guidance on this difficult issue surely suggests that this will not always be the case.

Comments on the new guidance of six pages or less may be submitted by fax or mail on or before May 3, 2004.

## CONTACT INFORMATION

If you would like additional information or feel we can assist you in commenting on or implementing this guidance, please contact:

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