

## Internet Applicant Rule Key Points

### Definition

An Internet Applicant is defined as an individual who satisfies the following four criteria:

**1. *The individual submits an expression of interest in employment through the Internet or related electronic data technologies;***

OFCCP eliminated the dual standard for those positions for which the contractor considers expressions of interest through **both** the Internet and traditional means. **In other words, if the contractor accepts only hard copy resumes/applications for a position, then the final rule does *not* apply to that position.** However, if the contractor solicits and accepts applications or resumes for the position via the Internet or other related electronic technologies, as well as in hard copy, the new rule applies.

**2. *The contractor considers the individual for employment in a particular position;***

An employer is **not** required to consider expressions of interest that either is not submitted in accordance with the contractor's standard procedures for applying for a job or that are not submitted with respect to a particular position. For example, if the contractor has consistently applied a practice of not accepting unsolicited resumes, it is under no obligation to start doing so under this final rule.

An individual is "considered" when the contractor "*assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position*".

One example of "considered" is when a contractor runs a basic qualifications search that brings up an individual's resume that shows the number of resume "hits." OFCCP will conclude the contractor has "considered" the resumes that are a result of such a search because a search that displays the resume "hits" is an assessment of the individual's qualifications.

**3. *The individual's expression of interest indicates the individual possesses the basic qualifications for the position;***

"Basic qualifications" refer to: (1) those qualifications that the contractor **advertises** to potential applicants that they must possess in order to be considered for the position; or (2) that are **preset criteria** used by the contractor for positions not advertised, such as for pulling resumes from an external resume database.

In addition, "basic qualifications" must be:

- **Non-Comparative.** Qualifications must not involve comparing the qualifications of job seekers (e.g., 3-5 years marketing experience requirement is acceptable; however, a requirement that the individual be one of the top 10 individuals in terms of experience is not).
- **Objective.** Qualifications must not depend on a contractor's subjective judgment (e.g., a requirement of a college degree in marketing is acceptable, while a requirement that the individual have a degree from a prestigious school is not).

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A third party unfamiliar with the contractor's operations should be able to evaluate whether the job seeker possesses the qualification.

- **Relevant.** Qualifications must be relevant to the performance of the particular post and enable the contractor to accomplish business-related goals.

**SPECIAL NOTE:** The OFCCP stresses the fact that employment tests used as employee selection procedures, including on-line tests, are not considered basic qualifications under the final rule.

**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.**

Individuals remove themselves from consideration when:

- the individual has indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that they are no longer interested; or
- the individual's passive demonstration of disinterest is shown through repeated non-responsiveness to inquiries from the contractor about the position in question (e.g., fails to respond to telephone calls, letters, etc.)<sup>1</sup>; or
- based on information the individual provides in the initial expression of interest (e.g., salary requirements, willingness to travel, shift availability, etc.) if the employer has been consistent in not considering similarly situated individuals.

<sup>1</sup> According to OFCCP "repeated" means "after two or more non-responses to inquiries by the contractor. OFCCP does not define how long the contractor must take to attempt the contacts. Regardless of the strategy used, contractors should make their approach part of a consistent practice.

## **Data Management**

The applicant rule permits contractors to limit the number of expressions of interest by "using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits".

The data management techniques can be used to limit the number of people considered for a position but they must be applied before giving consideration to or assessing the qualifications of individuals. Using software that identifies and ranks candidates who best match the basic qualifications is not a data management technique because the contractor is "considering" the candidates qualifications. As a data management procedure, contractors can conduct a search of resumes indicating an interest in the position, type of position, location or salary sought.

Example of a data management technique :

- Contractors conducts a basic qualifications search of a large resume database.
- The search produces 500 resumes.
- Before “considering” any individuals, the contractor runs another search of the 500 resumes using random sampling.
- The second search produces 100 resumes.

Only the final 100 resumes would be “considered” individuals, as long as the random sampling did not depend on the assessment of qualifications.

### **Solicitation of Gender, Race and Ethnicity Data**

Contractors must collect gender, race and ethnicity data for individuals who qualify as internet applicants. They must also maintain records of expressions of “interest” for all individuals “considered” for a particular position. Contractors do not have to retain all expressions of interest, but only those actually “considered”.

The OFCCP states that visual observation is permissible when the applicant appears in person and declines to self-identify their race, gender or ethnicity. The Rule does not, however, mandate a specific time in the employment process at which such information must be solicited. The OFCCP continues to encourage the use of applicant self-identification methods such as tear-off sheets, auto responses, *etc.*

### **Record Retention Requirements**

The final rule distinguishes what records the employer must maintain if it is using an **internal resume database** as opposed to an external resume database such as Monster.com. If the employer uses an internal resume database, it must retain all of the following information:

- A record of each resume added to the database.
- A record of the date the resume was added to the database.
- The position for which each search of the database was made.

For each search conducted, the date of the search and the search criteria used.

If, on the other hand, the employer uses an **external resume database**, it must retain the following information:

- A record of the position for which each search of the database was made.
- For each search conducted, the date of the search and the substantive search criteria used.
- The resumes of all job seekers who met the basic qualifications for the particular position and were considered by the employer without regard to whether the individual met the definition of an Internet applicant.

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Contractors are responsible for keeping records even if they contract with an outside vendor, such as an employment agency or recruiter, to assist in screening and referring candidates. Since the contractor is responsible for ensuring that the agency keeps for it whatever records the contractor is required to have, the contractor should consider drafting appropriate language in agreements with outside vendors to address OFCCP recordkeeping obligations.

### **Adverse Impact**

The OFCCP has always expressed concern that the definition of "applicant" used by a contractor not be so limited that it destroys opportunities for minorities and females. With the adoption of the new basic qualifications standard, the OFCCP's concern is magnified. The OFCCP states in the introduction to the final rule that it will refer to Census and "other labor market data" during compliance reviews to determine whether basic qualifications have an adverse impact on the basis of race, ethnicity, or gender. In other words, an applicant definition cannot itself have an adverse impact on minorities or females. To determine if this is occurring, the OFCCP may compare the composition of minorities or females in the resulting applicant pool, with their availability in the appropriate segment of the Census.