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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

DECEMBER 2005

This newsletter is intended to provide an update of developments at OFCCP since our August 2005 newsletter. This issue contains information provided by Mr. Leonard J. Biermann, National Director, Human Resource and Affirmative Action Activities, as a courtesy to those in the employment community who have utilized NELI's affirmative action training services. Mr. Biermann may be reached at NELI at 301.865.0500 or by email at neli@neli.org.

Mark Your Calenders
2006

AFFIRMATIVE ACTION WORKSHOP

*New Internet Applicant
Regulations*

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New Labor Department regulations defining an “Internet Applicant” are found by contractors to be complex and difficult to interpret. Conflicting interpretations continue to be advanced as employers struggle to understand the impact of the rule.

The final regulations issued by the Department of Labor on October 7, 2005, which define an “Internet Applicant” for purposes of impact analysis and record-keeping, have certainly created a whirlwind of interpretations and controversy. Most contractors are now aware of the basic thrust of the new regulations. A short synopsis may be helpful.

In these regulations, an Internet Applicant is defined as an individual who expresses interest through the internet or related electronic data technologies, whom the contractor considers for employment, whose expression of interest indicates he/she possesses “basic qualifications” for the position, and who, at no point through the selection process prior to receiving a job offer, removes him- or herself from consideration. Importantly, the final rule clearly adopts a qualification standard as a condi-

tion of the definition. Further, the definition may apply to both Internet and traditional applicants if the applicant pool is intermingled with both kinds of candidates.

The regulations go on to permit contractors to use data management techniques to reduce candidate pools to a workable size.

Lastly, and clearly the most controversial, are the recordkeeping requirements of the regulations. Different recordkeeping obligations, particularly those associated with solicitations for demographic data, pertain to internal electronically created pools of job seekers and external electronically created pools of job seekers. These different requirements are complex and likely the most burdensome aspect of the regulations.

Among the most difficult decisions contractors must make in applying the Labor Department regulations are the following:

- How should contractors define the word “consider” in the definition of an Internet Applicant?
- Is there a difference in applying the “basic qualification” standard

to a pool of job seekers from internal and external data bases?

- Similarly, how does the record-keeping obligation concerning identification, race and gender information, and qualifications of job seekers differ between external electronic data bases as opposed to internal electronic data bases?

- At what point is the contractor required to seek race and gender data from job seekers? If the contractor chooses to seek such data as a part of the first advertisement for candidates for an open position, must such data be retained, even from clearly unqualified candidates?

- If the contractor is in possession of demographic data submitted by job seekers who are not later defined as Internet Applicants, is the contractor required to conduct an adverse impact analysis on these job seekers to determine if the basic qualification standard had an adverse impact?

- When using an internal electronic database, may the contractor employ the basic qualification standard (possibly in addition to the use of statistical methods such as a random 20% sampling) to manage the size of the applicant pool?

- Is there ever a time contractors can employ human resource staff to review an electronic database

to screen for basic qualifications without triggering the “consideration” protocol? Does such screening initiate a record-keeping obligation for all resumes and related demographic data in the initial pool of job seekers?

- In managing the size of an external electronic data base, may the contractor use the basic qualification standard through sequential increases in the basic requirements until the data base is small enough to meet the contractor’s self-determined need?

The answers to these and other questions require extensive discussion and analyses. NELI will hold one-day workshops exclusively addressing the Internet Applicant rule in six cities this January and February in order to offer clear and precise guidance to all of the issues raised in the Department of Labor rule to assure that contractors attending the workshops clearly understand their obligations. The Workshop schedule is in the left column of page 1 of this Newsletter, and the complete brochure can be downloaded from NELI’s Website.

Senior management vacancies continue at OFCCP.

Vacancies in Senior Executive Service positions continue at the OFCCP. There are still no selections expected in the immediate

future for openings in the national office for the Director of Policy, and in the field for Regional Director positions in Philadelphia, San Francisco, and, effective in three weeks, Dallas. Recently, the position of Regional Director in New York was filled by Lorenzo Harrison, who was formerly with the Employment and Training Administration in the Department of Labor. The selection of Mr. Harrison is consistent with a trend at the agency to place individuals in high-level management positions who are already a member of the Senior Executive Service. Doing so has allowed Director Charles James to fill the positions without the lengthy investigation and security checks needed to clear new Senior Executive candidates, and also allows Mr. James to select individuals with prior high-level management experience. The downside, of course, is that such candidates do not usually have OFCCP or other equal employment opportunity enforcement experience. Contractors should look for a continuation of this trend as the above listed vacancies are filled.

Guidelines on investigative standards for systemic compensation discrimination analysis are not yet finalized.

As most contractors are aware, and as I have discussed in previous Newsletters, OFCCP issued two proposed compensation

guidelines on November 16, 2004. One consisted of a legal discussion of how, pursuant to Title VII case law, systemic investigations for potential compensation discrimination should be conducted. Discarding the “median/mean” studies of the prior administration, the OFCCP detailed how OFCCP would conduct these investigations in the future, and identified the use of multiple regression analyses as the technique of choice.

In a second proposal, issued the same day, the OFCCP proposed how contractors should follow these same techniques, and if, in so doing, they could be assumed to comply with the self-auditing requirements of 41 CFR 60-2.17 (b) (3).

There is the possibility the first guidelines (the OFCCP procedure) may be finalized soon. If it is, it is expected there will be little change. Contractors should look to a continued delay in the issuance of the self-audit proposal. Most contractors are not applying the suggested procedures, for reasons involving both burden and exposure to liability, and the OFCCP may eventually decide to drop the proposal. Not a proposed rule, it would never have any obligatory effect on contractors, and employers’ option to apply the standards would not be impacted.

Interestingly, the OFCCP has been applying these investigative

standards for over a year, and no finding of systemic discrimination in compensation has yet been made. The agency continues to have problems in developing appropriate similarly situated employee groups (SEEG’s) and in identifying prior related experience without the use of a proxy. We will keep close watch on events in this area, and advise contractors as they occur.

Our best wishes to an old friend, Fred Azua.

As we indicated earlier, Fred Azua, the Regional Director for the Southwest and Rocky Mountain Region headquartered in Dallas, will retire soon after the first of the year. Fred has been a most effective and fair-minded regional director, and will be missed by many in the contractor community, and by me personally. We at NELI wish him the very best in any new endeavor he may choose for his next career. We are certain he will do well.

Please contact Leonard Biermann if you have any further questions. He can be reached on his direct line at 301-865-0500 or by fax at 301-865-7399. You should also watch for updates concerning these and other matters on NELI’s web site www.neli.org

2005 AFFIRMATIVE ACTION WORKBOOK

This new and expanded edition has been revised in accordance with OFCCP regulations and policy initiatives currently in effect, and provides practical details on how to develop affirmative action programs compliant with Executive Order 11246, as amended, together with extensive support materials addressing compensation analyses, who is an applicant, OFCCP case decisions, advanced audit strategies and techniques, Affirmative Action “Basics,” and featuring the step-by-step details for writing an AAP.

Current through November 2005 (*to be supplemented in February 2006 with analyses of OFCCP’s new Internet Applicant Regs*).

List Price: \$200.00

The Workbook is available on our website at:

www.neli.org