



FENWICK & WEST LLP

JOHN C. FOX

EMAIL JFOX@FENWICK.COM
DIRECT DIAL 650.858.7144

May 3, 2004

VIA FACSIMILE
(202) 663-4114

Francis M. Hart, Executive Officer,
Executive Secretary Ariat,
U. S. Equal Employment Opportunity Commission
10th Floor
1801 L Street, N.W.
Washington, D.C. 20507

Re: *Comments to the March 4, 2004 Proposed Q&As to Supplement UGESP*

Dear Secretary Hart:

Enclosed, please find the Comments of the Northern California and Silicon Valley ILG Chapters re the EEOC's March 4, 2004 Proposed Q&As to Supplement the Uniform Guidelines on Employee Selection Procedures ("UGESP") for filing with the Commission.

Should you have any questions, please do not hesitate to call me direct dial in my Mountain View, California offices at (650) 335-7144.

Thanking you in advance.

With warmest personal regards,


John C. Fox

Enclosure

Silicon Valley Center
801 California Street
Mountain View, CA 94041

Tel 650.988.8500
Fax 650.938.5200

www.fenwick.com

Silicon Valley ▪ San Francisco

**COMMENTS OF THE NORTHERN CALIFORNIA AND SILICON
VALLEY ILG CHAPTERS RE THE EEOC'S MARCH 4, 2004 PROPOSED
Q&As TO SUPPLEMENT THE UNIFORM GUIDELINES ON
EMPLOYEE SELECTION PROCEDURES ("UGESP")**

The Industry Liaison Groups (ILGs) are a partnership of Equal Employment Opportunity and Affirmative Action professionals striving to positively change the equal opportunity employment climate, the SVILG in Silicon Valley, and the NCILG, in San Francisco, the East Bay and northern California. These two ILG Chapters desire to make a difference by providing a forum for members to raise questions, discuss real issues, exchange ideas and solutions, and receive information on trends and legislation pertinent to EEO and Affirmative Action. Our mission is to expand communication and share responsibility between private sector employers and the OFCCP as we work together to further opportunities for women, ethnic minorities and other under-represented groups as defined by law. Collectively, the two ILGs count over 300 of the top companies headquartered in Northern California among their membership.

The following attorneys have also lent their time to prepare these comments on behalf of the ILGs: **Fred W. Alvarez**, Chair of the Employment Group at Wilson Sonsini Goodrich & Rosati (headquartered in Palo Alto, California), a former Commissioner of the EEOC and a former Assistant Secretary of Labor at the United States Department of Labor; **John C. Fox**, Chair of the Employment and Labor Group at Fenwick & West LLP (headquartered in Mountain View, California), a former Executive Assistant to the Director, OFCCP; and **Gary R. Siniscalco**, a partner with Orrick, Herrington & Sutcliffe (headquartered in San Francisco, California), formerly Regional Counsel and Senior Trial Attorney for the EEOC in California.

The Industry Liaison Groups appreciate the fact that the federal agencies are preparing to publish written guidance to allow for a "level playing field" among employers subject to Title VII of the 1964 Civil Rights Act ("Title VII"), as amended, and those federal contractors and subcontractors ("contractors") covered by Executive Order 11246, as amended ("E.O. 11246"). Our specific comments about what language to keep, delete and modify follows.

1. The proposed Q&As fail to state, as they should, that all those persons interested in a position but who are *less than minimally qualified* for one or more essential elements of the job in question are not "applicants" subject to Title VII and E.O. 11246.

We note that E.O. 11246 expressly so requires. *See* Section 202(2). *Also see*, the U.S. Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Title VII case law is legion (and not contradicted) that a person less than *minimally qualified* is not an applicant. The Q&As should (must) reflect settled Title VII and E.O. 11246 case law.

Also, absent such a “minimum qualification standard,” those employers and federal contractors undertaking adverse impact analyses face the daunting prospect of including substantial “data clutter” in their adverse impact analyses, not just for hires off the street but also for promotions. Moreover, such data clutter not only unnecessarily adds to the cost of the analyses, but also may yield inappropriate results (both “false positive” and “false negative” adverse impact results). This is especially true in the context of Internet applications; given the ease of “spamming” as the agencies recognize in the preamble to their proposed Questions and Answers.

SUGGESTION: Supplement proposed Answer 96 to add a fourth required criterion as follows:

“(4) The individual is minimally qualified for all essential elements of the particular position for which the individual has indicated an interest.”

2. The Q&As should state explicitly that the employer/contractor must actually consider a person for an open job before a legal conclusion will attach that s/he is an “applicant.”
3. These Q&As raise such an important series of issues, the agency should voluntarily open a second and longer comment period.
4. The estimated costs to employers and contractors associated with recordkeeping and conducting adverse impact analyses are very badly underestimated. The cost of properly maintaining, sorting, marking and retaining records of “applicants” and those otherwise interested in the position, and the ensuing statistical analyses, procuring needed tracking software, data entry, e-mail follow-ups, vendor costs, internal review of data and adjustments to web application systems will easily annually exceed \$10,000 for a facility experiencing approximately 100 openings and most companies will spend at least \$50,000-\$100,000 per year to comply with the UGESP recordkeeping aspects alone.

Many companies will need to purchase or develop new systems to collect ethnicity and gender data. Several companies have estimated the costs for new/additional systems will be between \$500,000 and \$1,000,000. If, in the future, additional racial/ethnicity categories will need to be added, that will cost \$250,000 to \$500,000 more at such future time as guidance on the EEO-1 form changes. If the two could be developed simultaneously, there would be no additional cost for the racial/ethnicity expansion.

Avoidance of the above referenced costs would occur only if no adverse impact analyses are conducted. Accordingly, the UGESP agencies should make clear that “employers” subject to Title VII do not have a duty to prepare Applicant Flow Logs and undertake adverse impact analyses.

5. If the UGESP agencies reject the above suggestion, the federal agencies should post technical assistance aides on their websites containing algorithms to assist members of the public to conduct appropriate adverse impact analyses per the UGESP and noting when the data are too small for meaningful statistical analyses.
6. Question 94 should be rewritten to either delete any reference to “recruitment,” or to make clear in the Answer that only the non-discrimination prohibitions of Title VII and E.O. 11246 attach to recruitment and not UGESP (as Q&A 95 make clear).
7. The Chapters agree with Q&A 95. It would be very helpful, however, for the federal agencies to draw a “bright line” between what is properly considered “recruitment” and what is properly considered “selection.” Perhaps, the federal agencies could pose several examples of the typical and the more difficult cases.

In general, the ILG Chapters would define recruitment to involve advertising, outreach, networking and the use of search firms. Selection, on the other hand, would involve making a choice to whom to extend a job offer from among “applicants.”

8. The ILG Chapters agree with Q&A 96, other than the above referenced criticism that it lacks (importantly) a fourth criterion causing the person to have at least *minimum qualifications* to be considered an “applicant.”

We further note that the printer example contained in the proposed Answer to Question 97 expressly permits the employer to establish minimum qualification standards (i.e., minimum two years printing experience).

To the extent the federal agencies are concerned that employers and contractors will discard the expressions of interest of persons who express interest but who are not considered to be “applicants,” we note that both EEOC and OFCCP regulations already require employers to retain records relating to or pertaining to selections. Accordingly, should the federal agencies’ concern be that there will be no records to review whether unlawful discrimination has occurred as to those other than applicants, we note that there is already an existing obligation incumbent on the employers and covered federal contractors to retain such records for review upon Complaint or Compliance Evaluation.

Alternatively, if the federal agencies harbor any concern that their existing recordkeeping regulations are insufficient, the proper way to address that concern

would be to revise the recordkeeping regulations rather than to render artificially deficient the Answer to Question 96 by eliminating the minimum qualification standard.

9. Q&A 97 should be deleted or substantially modified to provide further clarification of what is meant by reference to the term “workforce data?” (i.e., do the federal agencies mean Census Bureau data?; Perhaps the EEO Special File?; or customized workforce data reports? (If so, what are those systems of reports?)) With specific regard to the printer example the federal agencies supply, how would one find “workforce data,” for example, regarding the race/sex/ethnic percentage of available and minimally qualified printers with two years or more of experience?

The UGESP agencies should also define what they mean by “search criteria” in Q&A 97 to assist the distinction between “recruitment” and “selection,” as noted above with respect to Q&A 95.

10. The Chapters agree with Q&A 98.

Filed on behalf of the Northern California and Silicon Valley Industry Liaison Group
Chapters:

Fred Alvarez, Esq.
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304

John C. Fox, Esq.
Fenwick & West LLP
801 California St.
Mountain View, CA 94041

Gary R. Siniscalco, Esq.
Orrick, Herrington, & Sutcliffe
400 Sansome Street
San Francisco, CA 94111

-----END-----

A9003/00000/LIT/1191516.1