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May 28, 2004

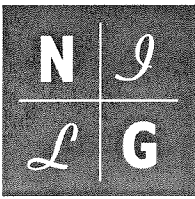
Mr. Joseph DuBray, Jr.  
Director, Division of Policy, Planning  
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U. S. Department of Labor  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue, NW  
Washington, D.C., 20210

**RE: National Industry Liaison Group's Comment Regarding the U.S. Department of Labor's Office of Federal Contract Compliance Programs' Proposed Amendments to 41 CFR Part 60-1 Concerning the Definition of "Internet Applicant" and Related Recordkeeping Obligations**

Dear Director DuBray:

The National Industry Liaison Group (NILG) welcomes the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP) proposed amendments to 41 CFR Part 60-1 concerning the definition of "Internet Applicant" and related recordkeeping obligations to conform the OFCCP's regulations with the recently proposed interpretive guidance published by the Equal Employment Opportunity Commission (EEOC) relating to the definition of Internet applicant. On May 3, 2004, the NILG submitted a Comment to the EEOC in response to the proposed interpretive guidance.

As background, the Industry Liaison Group (ILG) concept started over 20 years ago with a partnership between the OFCCP and federal contractors as a forum for working together towards equality in the workplace. ILGs formed voluntarily to create a unique partnership of public and private sector cooperation to deal proactively with advancing workplace equal opportunity. Over the years, ILGs have reached out to other agencies, such as the EEOC, with mutual goals of fostering a non-discriminatory workplace. The NILG is comprised of members of the local ILGs from across the United States and links ILGs on a national basis by disseminating information, holding meetings with ILGs, and discussing equal employment opportunity and affirmative action initiatives.



The NILG acknowledges the efforts of the OFCCP, EEOC and related agencies that composed the Interagency Taskforce (“Taskforce”) to clarify the definition of “applicant.” We also acknowledge the effort made by those agencies to provide a common approach to interpreting these guidelines in the context of the Internet and related technologies.

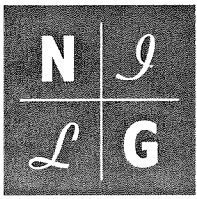
We have described below our specific comments regarding the proposed changes.

**EMPLOYERS NEED CLARIFICATION AND A UNIFORM APPROACH BY THE OFCCP AND OTHER FEDERAL EEO ENFORCEMENT AGENCIES REGARDING THE DEFINITION OF “APPLICANT” IN THE CONTEXT OF INTERNET AND RELATED TECHNOLOGIES**

The OFCCP’s proposed regulations certainly are helpful in attempting to clarify how the definition of an applicant might be applied in the Internet environment. However, the absence of a common interpretation regarding the definition of “applicant” between the OFCCP, EEOC and other agencies is cause for some concern. The “conforming regulations” published by the OFCCP provide federal contractors with different guidance, in comparison with the recently proposed interpretive guidance published by the EEOC, regarding the definition of “applicant.”

The impact of having to comply with two separate and distinct approaches in defining an Internet applicant will most likely lead employers to collect and retain data and records in accordance with the broadest definition, which is the one contained in the recently proposed interpretive guidance published by the EEOC. That more expansive definition of applicant will likely take precedence for those employers who are federal contractors, since a contractor will not know which federal agency may seek to obtain applicant data and related records at some later point in time. Therefore, we request that the OFCCP and the Taskforce seek to reconcile the broad definition offered by the Taskforce with the OFCCP’s differing definition of applicant. It is unclear from these two proposed sets of guidance whether the federal EEO enforcement agencies are in agreement with respect to providing guidance concerning the applicant definition and are in alignment regarding an approach to defining “applicant”. Employers want and need clear, uniform guidance.

Without knowing if the OFCCP, EEOC and related agencies will seek a uniform approach in defining “applicant”, it is difficult to fully assess the



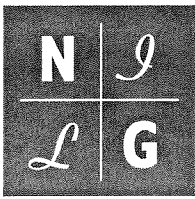
potential impact and burden on employers for implementing these regulations. Since we understand that the original intent of the Taskforce was to provide a “common” interpretation of “applicant”, we respectfully request that the OFCCP and the other agencies on the Taskforce reconsider the approach of permitting a different definition of an applicant, depending on which federal agency is seeking the data from employers. The Taskforce’s proposed interpretive guidance and the OFCCP’s proposed companion regulations should not be implemented until that coordination is achieved.

**THE OFCCP’S PROPOSED REGULATIONS SHOULD BE REVISED TO CLARIFY THAT EACH CONTRACTOR WILL RETAIN THE DISCRETION TO ESTABLISH ITS PRECISE DEFINITION OF “APPLICANT” ACCORDING TO EACH CONTRACTOR’S RECRUITMENT AND SELECTION PROCEDURES**

We applaud the OFCCP for recognizing and agreeing that the Internet and related technologies are tools that should be encouraged, in that, they allow both employers and job seekers to explore that labor market more broadly and freely. We also acknowledge the perceptiveness of the OFCCP in recognizing that the submission of a resume or personal profile via the Internet or related technologies, including email, does not automatically make a person an applicant. However, we are concerned that the OFCCP’s proposed definition *precisely* defines “Internet Applicant” and does not appear to provide any discretion for individual contractors to establish their particular definitions of “applicant” according to their own recruitment and selection procedures.

Recognizing that every employer has their own processes and systems for recruitment and selection, we believe that the *precise definition* of an applicant is best determined by the employer, based upon its own application process. Indeed, a key aspect of the Uniform Guidelines on Employee Selection Procedures (Q & A 15), which provides guidance on defining an applicant, states that “the *precise definition* of the term applicant depends on the user’s recruitment and selection procedures.” Furthermore, the recently proposed interpretive guidance published by the EEOC explicitly provides that an individual shall be considered an Internet applicant only if, *inter alia*, “the individual has followed the employer’s standard procedures for submitting applications.”

However the OFCCP’s proposal does not refer in any way to a contractor’s discretion to determine the definition of applicant in accordance with its own recruitment and selection procedures. Moreover, the OFCCP’s proposed definition of Internet applicant appears to define precisely who *must be*



considered an Internet applicant, leaving no flexibility for individual contactors to develop a definition of applicant that departs from the OFCCP's proposed regulations. We strongly believe that the OFCCP's proposed amendments should emphasize that they are '*guidelines*' only. Contractors must be permitted the flexibility to define "applicant" so that the definition make sense given each contactor's differing recruitment and selection procedures.

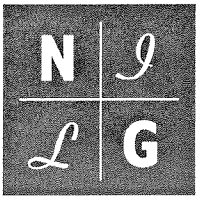
**THE OFCCP'S FINAL REGULATIONS SHOULD SET FORTH A DEFINITION OF "APPLICANT" THAT IS THE SAME FOR BOTH "INTERNET" APPLICANTS AND APPLICANTS APPLYING THROUGH "TRADITIONAL", NON-INTERNET-RELATED MEANS**

The definition of "applicant" is an issue that has been discussed and often debated for many years, even prior to the introduction of Internet recruiting. We now have an opportunity to address this issue in its entirety. However, while the proposed regulation attempts to clarify for employers how to define an applicant utilizing Internet technologies, it does not provide similar guidance on defining non-internet applicants and indeed requires employers to utilize two different applicant definitions in the employment process.

Since many employers do not have comprehensive and integrated on-line staffing and employment systems, with the OFCCP's proposed amendments, applicants must be defined, *e.g.*, along with the associated tracking, record keeping and analyses, via two distinct processes: one for individuals seeking jobs via the Internet and another for those seeking jobs utilizing a traditional "paper" process. Many employers currently are using a combination of on-line and paper processes. The lack of clarity regarding how to define "applicant" in a combined process will result in inconsistent interpretation of the regulation. Moreover, it will create extraordinarily burdensome and unnecessarily complicated recordkeeping obligations for contractors. Instead, employers should be able to develop a single, consistent definition of applicant that applies to both the Internet and non-Internet environment. An individual should be considered an applicant regardless of the methods that individual uses to apply for employment.

**EMPLOYERS ARE WAITING FOR THE EEOC'S FINAL REGULATIONS ON RACE AND ETHNICITY REPORTING**

Employers are also awaiting guidance from the EEOC on race and ethnicity reporting associated with the EEO-1 filing requirement. Not having final regulatory guidance on these issues, nor any timeframe in which to expect the final regulation to be implemented, it is difficult to assess the potential cost in



time and resources to implement the proposed changes. Many employers may need to either change their systems or make enhancements to their current on-line systems to conform to the final regulations pertaining to guidance around the definition of an applicant for the Internet and related technologies. Additional system modifications may be required if the regulations on data collection regarding race and ethnicity are implemented at another date. Without having the benefit of both the final regulations on race and ethnicity, including the estimated timeframe needed to implement the proposals and re-survey employees, and the final regulations on the applicant definition, we cannot properly assess the impact. We therefore urge that the changes associated with the revisions to the EEO-1 form and the applicant proposal be implemented at the same time.

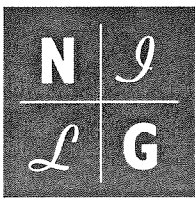
### **THE PROPOSED REGULATIONS SHOULD CLARIFY THE OBLIGATION TO COLLECT THE RACE, ETHNICITY AND GENDER OF APPLICANTS**

The collection of race, ethnicity and gender, and at what point in the recruitment process these data should be sought, has been a subject of much discussion and debate over the last several years. The conforming regulations proposed by the OFCCP state that the current 60-1.12 (c) (ii) requires employers to obtain information, *where possible*, on the gender, race and ethnicity of applicants. Employers need one, consistent approach on when gender, race and ethnicity must be collected by employers regarding applicants. Not knowing when it is considered acceptable to collect such data may lead to an inconsistent interpretation of regulations by employers, federal contractors, and the EEO enforcement agencies trying to enforce this aspect of the regulation.

Clarification concerning this issue is requested to provide employers with guidance on when the collection of race, ethnicity and gender should be sought in the recruitment process, and the permissible ways for collecting such data, *e.g.*, self-ID, and visual observation on individuals who choose not to self-ID.

### **EMPLOYERS NEED A UNIFORM APPROACH BY THE FEDERAL EEO ENFORCEMENT AGENCIES REGARDING THE USE OF QUALIFICATIONS IN DEFINING “APPLICANT”**

The employer’s ability to consider basic minimum qualifications in defining an applicant pool is important. Employers are encouraged to see reference to consideration of minimum qualifications clearly stated in the OFCCP’s conforming regulations. That proposal indicates that the advertised, basic



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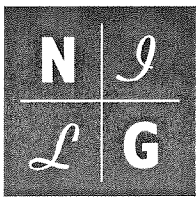
qualifications of the position can be considered in defining applicant. We recognize this reference as a welcomed enhancement to the guidance used in determining applicants. We are disappointed that the recently proposed interpretive guidance published by the EEOC does not clearly state that use of minimum qualifications is permissible. We would like consistency between the recently proposed interpretive guidance published by the EEOC with the language in the OFCCP proposal, as it will create less confusion, be less burdensome and the definition of applicant will be applied more consistently.

### **OFCCP SHOULD CLARIFY ITS ANTICIPATED USE OF LABOR FORCE STATISTICS TO COMPARE WITH THE RACE AND GENDER COMPOSITION OF CONTRACTORS' APPLICANT DATA**

In the proposed regulation, the OFCCP states that it intends to compare external labor force statistics with a contractor's applicant data "for enforcing E.O. 11246 with respect to recruitment processes that occur prior to collection of gender, race and ethnicity data" by contractors. Once again, as noted above, we urge the OFCCP to address in its final regulation the stage at which contractors must seek the gender, race and ethnicity of applicants. Separately, we encourage the OFCCP to clearly describe how it intends to use the labor force statistics referred to in the proposed regulation. The OFCCP does not set forth in the proposal a detailed description of how it will utilize the labor force statistics and we are concerned that those labor force statistics generally available often may not capture the realistic recruitment pools for contractors. For example, available census data does not offer race and gender information by specific industry nor does it allow defense contractors to account for security clearances.

Moreover, unlike the traditional availability analysis -- which a contractor prepares -- the OFCCP appears to be proposing that the Agency itself will determine the relevant labor force statistics that are appropriately comparable to a contractor's applicant pool. We are opposed to the OFCCP determining "availability" for contractors. Rather, it must be contractors who make that determination based upon each contractor's expertise concerning its own recruitment and staffing needs.

Therefore, we urge the OFCCP to further clarify how it intends to use the labor force statistics in comparison with contractors' applicant data and we strongly encourage the OFCCP not to undertake its own determination of "availability". As set forth in the existing regulations, the determination of availability should only be performed by the contractor itself.



## **OUR ESTIMATE OF BURDEN OF THE PROPOSED CHANGES**

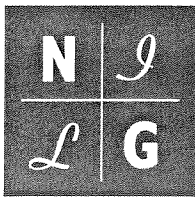
As previously indicated, it is difficult to estimate the anticipated cost in time and resources to implement the changes proposed by the OFCCP. However, a review of software currently available anticipates that costs per employer may exceed tens of thousands of dollars. The proposal will likely require employers to review on-line, Internet employment systems to determine if current processes comply with regulations. Employers may also be required to modify their on-line employment systems to collect, track, and analyze applicant data on a broader pool of individuals. In addition, the anticipated issuance by the EEOC of new race, ethnicity and gender collection regulations will impact costs to re-survey employees, and to purchase, re-program or upgrade an employer's systems to comply with the regulations. Other factors that employers will need to consider are the additional requirements that will need to be incorporated into their systems to comply with the OFCCP's conforming regulations that are different from the recently proposed interpretive guidance published by the EEOC.

## **RECOMMENDED TIMEFRAME FOR IMPLEMENTATION**

The proposed regulations -- in combination with the recently proposed interpretive guidance published by the EEOC and the EEOC's anticipated changes to EEO-1 race and ethnicity record-keeping and reporting -- undoubtedly will have a profound impact on employers' compliance obligations. Companies will need substantial time to make changes to their technology and computer systems. For some companies, this will involve an extensive process of clarifying need, requesting information from possible vendors, seeking proposals from vendors, allowing a period for vendor evaluation, selection and subsequent company customization, implementation and system testing.

The NILG believes that employers will need substantial time to accommodate these significant anticipated changes. Therefore, we suggest the following two alternative timeframes for implementation:

1. if the federal EEO enforcement agencies publish final regulations regarding the definition of applicant and the EEOC published revised EEO-1 race and ethnicity recording-keeping and reporting obligations by the end of 2004, NILG recommends that the OFCCP's proposal be implemented in 2006; and,
2. if either or both the revised applicant definition regulations or the EEO-1 race and ethnicity recording-keeping and reporting obligations are not finalized until 2005, the OFCCP's proposal should not be implemented until 2007.



## IN SUMMARY

The NILG appreciates the OFCCP's endorsement of the use of the Internet and related technologies as a viable recruitment tool and its understanding that individuals who post a resume are merely advertising their credentials and should not automatically be considered an applicant. We are pleased to see that the proposed regulations permit consideration of minimum qualifications, but would like to see this specific language included in the recently proposed interpretive guidance published by the EEOC. Both sets of regulations published by the EEOC and the OFCCP have elements that would help employers properly identify their applicant pool. However, we strongly recommend that the interpretive guidance published by the EEOC be revised to reflect some of the items from the OFCCP's conforming regulations to ensure consistency and ease of implementation. We urge that the same definition of applicant to apply to both the Internet and non-Internet environment. Moreover, employers must retain the right to determine the precise definition of an applicant, in accordance with the employer's own recruitment and selection processes, as indicated in the current Uniform Guidelines on Employee Selection Procedures, under Q & A 15. Lastly, we would like sufficient time to implement these new regulations, in conjunction with the changes to the new EEO-1 form filing requirements.

\* \* \*

Once again, NILG sincerely appreciates the opportunity to comment on this proposal and is pleased that the OFCCP has published the proposed regulation for comment. We hope our comments will provide an opportunity for the OFCCP to further clarify the issues and questions addressed herein before issuing the proposed regulations in final form. Please do not hesitate to contact us if you have any questions. You may contact NILG's Legal Counsel, Mickey Silberman at (631) 247-0404 or e-mail address [silbermm@jacksonlewis.com](mailto:silbermm@jacksonlewis.com).

Respectfully submitted,

The National Industry Liaison Group