OFCCP Guidance on Defining a Job Applicant in the Internet Age: The Final Word?

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On October 7th of 2005, the Office of Federal Contract Compliance Programs (OFCCP) issued their final rule regarding government contractors’ “obligation to solicit race and gender data for agency enforcement purposes.” At the heart of this document, and the real issue at hand, is how employers should define who is an applicant in their Internet-based employee selection procedures. This definition is essential for calculating adverse impact for selection system elements, and it has a broad impact: a definition that declares individuals as applicants later in a selection process will result in smaller applicant pools and, thus, lower potential employer liability. Although the OFCCP’s new rule provides needed guidance on this issue and has been generally well received by employers, it also raises several issues of interest to I-O psychologists and the practice of personnel selection.

Readers who have been following this issue will recall that in March of 2004, both the OFCCP and the EEOC (in conjunction with the Office of Personnel Management, and the Departments of Labor and Justice) released separate draft guidance documents pertaining to how employers should define what a “job applicant” is when the recruiting and hiring process is managed through electronic media. The OFCCP’s definition appeared in a draft rule regarding the solicitation of demographic data from applicants. The EEOC version was released as a draft of Additional Questions and Answers to the Uniform Guidelines. Comments were invited from the public on each of these documents, and SIOP submitted comments regarding each. A summary of SIOP’s comments on these proposals was summarized in a prior TIP article (Reynolds, 2004).

Upon release of the final rule in October, SIOP reassembled the original review committee for a quick comment on the revised text. Many thanks, once again, to Jennifer Burnett, Michele Jayne, Nathan Mondragon, Mort McPhail, and Evan Sinar who provided reviews on very short notice. This article briefly summarizes the OFCCP’s Final Rule and highlights some of its implications for the practice of personnel selection using Internet-based tools.

The OFCCP’s Internet Applicant Definition

According to the final rule, an individual is considered an “Internet Applicant” when four criteria are met:

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

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2. The contractor considers the individual for employment in a particular position;
3. The individual’s expression of interest indicates the individual possesses the basic qualifications for the position; and,
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.

Each criterion is elaborated within the text of the rule and examples are provided to clarify several key concepts. The rule also specifies the requirements for employer recordkeeping and adverse impact calculation.

Regarding recordkeeping, employers are required to retain:
• All expressions of interest that are submitted through the Internet or related technologies, which the employer considers for a particular position, regardless of whether the individual is declared an “Internet applicant;”
• Internal resume databases, including items for each record such as the date each was added, the positions for which each search of the database was made, and the criteria used for each search;
• External database search information, such as the positions for which each search was made, the date of the search, the search criteria used, and records for each individual who met the basic requirements for the position;
• All tests, test results, and interview notes; and,
• The gender, race, and ethnicity of each Internet applicant.

Regarding adverse impact calculation, employers are required to evaluate adverse impact for all Internet applicants when evaluating employee selection procedures. Also, when tests are used in a selection process, adverse impact should be evaluated for all test takers, regardless of whether or not they are defined as Internet applicants. The OFCCP’s position on this topic is discussed in more detail later in this article.

Adverse impact evaluation is not required for basic qualification standards, however, the OFCCP will be likely to compare the percentage of women and minorities who meet these standards to “appropriate Census and other labor market data” to determine whether basic qualifications have an adverse impact. If impact is found, basic qualifications must be “relevant to performance of the particular position and enable the contractor to accomplish business-related goals.”

In a lengthy preamble to the final rule, the OFCCP reviews the major issues that were raised by the comments they received on the 2004 proposed rule and how these concerns were factored into the revision. SIOP’s comments are cited repeatedly throughout this part of the document. The preamble (titled “Supplementary Information”) provides useful insight into the
logic the OFCCP used when constructing their final version, as well as many hints and advice regarding how OFCCP will interpret and use the rule. I-O psychologists involved with the design and implementation of personnel selection systems should review the final rule in detail and will benefit from a slog through the dense and somewhat repetitive preamble as well. The full document is available at the following address: http://www.dol.gov/esa/regs/fedreg/final/2005020176.htm.

Critical Concepts and Interpretation

Available public commentary and reviews from SIOP members have been generally positive regarding the final version of the rule. Many of the most significant issues identified by SIOP and other organizations that submitted comments on the proposed rule were addressed by the revision or a specific rationale was provided for areas where OFCCP’s views diverged from those of their reviewers’. The interpretation and proper implementation of the new guidance is, of course, dependent upon how various concepts are defined. The OFCCP elaborated on each of the primary criteria within the text of the final rule and gave detailed rationale for nearly all elements of the guidance within the preamble. Readers are encouraged to review the full text and formulate their own interpretation; several of the concepts that are of likely interest to I-O psychologists are discussed below.

Internet applicants vs. traditional applicants. The final rule indicates that all applicants for a position will be treated as “Internet applicants” if the employer considers any expression of interest in the position that was submitted through the Internet or a related technology. The traditional rules apply only when all candidates are obtained through traditional (i.e., paper-based) means. This clarification is a substantial improvement over the draft version that would have required separate definitions of an applicant within the same pool, depending on how each expression of interest was made to the employer.

Consideration for employment. An employer considers an individual for employment, and satisfies the second criterion in the Internet applicant definition, when he or she “assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.” The OFCCP explicitly allows methods for reducing the number of job seekers whose expressions of interest are considered, as long as these methods do not rely on substantive information. Examples provided include the use of random sampling or the imposition of a strict limit to the number of job seeker expressions of interest that will be considered. Given that these techniques are wholly unrelated to workforce quality, employers will be well served to consider the other methods of reducing the pool of potential applicants. Fortunately, two additional avenues for reducing the pool are available under the rule that may be applied even before job seekers are declared as Internet applicants: (a) consideration of the individu-
als’ basic qualifications for the position, and (b) determination that an individual does not have an interest in the specific position.

Basic qualifications. The OFCCP provides elaborate guidance on what constitutes a basic qualification. These are qualifications that are either “advertised” (e.g., posted on a Web site) or “established” prior to considering any expression of interest for a particular position (e.g., when searching an external resume database). Furthermore, basic qualifications must meet three criteria: (a) they must not involve comparison of qualifications between applicants (e.g., 2 years of job-related experience is noncomparative; the most experience of the available job seekers is comparative), (b) they must be objective (i.e., not dependent upon judgment), and (c) they must be “relevant to performance of the particular position and enable the [employer] to accomplish business-related goals.” Of particular interest to SIOP members, the “OFCCP does not deem employment tests to be basic qualifications.” The full text version of the rule provides examples and discussion for each of these criteria.

The basic qualifications portion of the final rule will likely have the broadest practical implications. To limit applicant pools to only those individuals who are qualified, employers need to carefully define the basic qualifications for the position prior to considering expressions of interest. The establishment of basic qualification standards, and the efficient assessment of these within Internet recruiting procedures, will become of increasing importance as government contractors implement the new rule. This portion of the rule provides an excellent opportunity for I-O psychologists to research and lead the advancement of these practices.

Interest in the position. One of the most substantial changes from the draft rule, and one where SIOP’s input is quoted directly, concerns the ability of the employer to reduce the number of job seekers who have expressed interest in a position based on information provided by the individuals. For example, an employer may eliminate from consideration those individuals who provide salary requirements, work location requirements, and other types of specific work preferences that do not match the available features of the position. It may be appropriately assumed that these individuals are not interested in a position that does not meet their stated preferences. These individuals would not be defined as Internet applicants, provided that the employer has uniformly and consistently applied the policy and did not consider similarly situated people.

This component of the rule has strong implications for the design of application procedures and the use of questions that assess job seekers’ willingness to work under a variety of conditions. The use of well-justified and consistently applied questions that assess individuals’ interest in features of the position may be used to reduce the size of the pool of declared Internet applicants. For example, a company advertises job openings for sales representatives, and Jane submits an expression of interest in positions that are located
in New York City. Jane may be justifiably excluded from the pool of Internet applicants for a position in Chicago. Here again, I-O psychologists are well suited to inform the processes by which these determinations are made.

Employment tests. As mentioned above, employment tests are distinguished from basic qualifications. The final rule states that, although adverse impact evaluations will only be required for Internet hiring procedures for Internet applicants, these analyses will continue to be required for all test takers, regardless of whether or not they are defined as Internet applicants, when tests are used as employee selection procedures. That is, the requirement to conduct adverse impact analyses for employment tests rests on whether the test results are used as a selection procedure rather than on whether the test takers are defined as Internet applicants. This is elaborated by the OFCCP in a set of examples (paraphrased below) that is certain to fuel contradictory interpretation:

Example A: 100 job seekers take an employment test, but the employer only considers the results from 50 job seekers who meet the pre-established basic qualifications. Demographic information must be solicited from just the group of 50 because the test result was used as a selection procedure only for those 50 job seekers.

Example B: 100 job seekers take an employment test, and the employer uses the test results to narrow the pool to 50 job seekers whose basic qualifications are then considered. In this case, demographic information should be solicited from all test takers because the test was used as a selection procedure for the full group.

This guidance may lead employers toward increasingly precise definitions of the elements and order of their selection systems. Carefully constructed selection systems can benefit from the appropriate exclusion of unqualified job candidates from the test-taker pool (as has always been the case). Alternatively, to ensure appropriate records are collected, employers may simply continue to solicit the gender, race, and ethnicity of all test takers and calculate adverse impact upon the full group.

Calculation of adverse impact. The OFCCP reinforced its preference for the two standard deviation rule for the definition of adverse impact; however, they leave the door open to the consideration of other factors also:

OFCCP agrees that the minimum standard for what is statistically significant is generally accepted to be two standard deviations, although the agency may allocate its investigative resources by focusing on larger statistical disparities or other factors, such as the size of the potential affected class.

Use of labor force statistics and Census data. Despite concerns raised by SIOP and other reviewers regarding the accuracy and specificity of the available labor force statistics, OFCCP affirmed that they would continue the practice of using these data for assessing disparate impact and underutiliza-
tion. The likely implication is that, even though employers are not required to collect demographic data from job seekers who do not meet the established basic qualifications, the results of the application of these qualifications will still be compared to available labor market statistics. Gaps compared to the available labor market will trigger the need to justify the job relevance of the qualification requirements. Thus, the validity of qualification requirements, and their potential to generate an adverse impact on protected groups, will continue to be a critical consideration for employers.

Coordination with EEOC. One of the biggest issues raised by the OFCCP’s final rule is the manner and degree to which the rule will be coordinated with the final version of the Additional Questions and Answers (Qs & As) to the Uniform Guidelines on Employee Selection Procedures (UGESP). At the time of this writing, the revised version of the Qs & As had not yet been released. The draft versions of the two documents had substantial variance between them. For example, the Qs & As document does not have a provision for the consideration of basic qualifications as a component of the definition of the Internet applicant. Many concerned reviewers of the draft rule viewed the differences between the documents as evidence that the regulatory agencies may be taking a step back to the period before 1978, when various agency guidelines were not uniform. The OFCCP responded simply: “the Department will work with the other UGESP agencies to coordinate the final UGESP Additional Questions and Answers to ensure that contractors do not face inconsistent applicant recordkeeping obligations.” Stay tuned for the result of this negotiation.

Effective date. Employers have until February 6, 2006 to comply with the new guidelines. Many reviewers were concerned that the requirements, several of which may require technical modifications to applicant tracking and search tools, would be difficult to meet within this time frame.

General Considerations

Internet-based recruitment and selection has been described as the “wild West” of personnel selection. Practitioners have had to stake out new territory when deploying new tools that rein in huge applicant pools, and there has been little guidance regarding how the usual rules apply. OFCCP’s new rule provides a bridge between these new practices and the existing legal and regulatory framework.

The final rule pushes employers toward more structured and standardized Internet-based selection systems. The rule will certainly raise several operational issues for employers; however, it is also generally consistent with the effective practice of I-O psychology. That is, employers with informal and diffuse selection systems that rely heavily upon the intuition of recruiters and hiring managers will likely be more challenged to meet the requirements than those with more structure and clear definitions of the criteria at each selection
point. I-O psychologists will be well positioned to assist employers to move in this direction.

It is likely that given the complexity of the final rule, it may be challenging for employers to rapidly adjust their hiring processes to fully align with the new rule. Assuming that this may be the case for some organizations, an analysis of how current practices map into the guidelines provided within the rule should provide an indication of the riskiest departures from the rule. Throughout the document, the OFCCP is clear to state that audits will focus on employer practices over stated policy. Thus, investigation of the consistency and application of specific Internet recruiting and selection practices is an important step toward understanding current operational risks.

The OFCCP’s definition of the “Internet applicant” is soon to be applicable to employers who are government contractors, but it may not be the final word on the topic. The UGESP agencies have yet to weigh in with the revised Questions and Answers to the Uniform Guidelines; consistency with the OFCCP version may then settle the issue, whereas inconsistency may have consequences that reach beyond the definition at hand.

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