

Recordkeeping And The Internet

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Since 1978, employers covered under Title VII and Executive Order 11246 have been required to maintain applicant job applications for one year after receiving them or taking the personnel action, whichever is later. To help employers understand and comply with this requirement, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued Uniform Guidelines on Employee Selections Procedures (“Uniform Guidelines”). For more than 25 years, the Uniform Guidelines have governed covered employers’ use of employment applications and other “selection Procedures” in hiring, promotion, demotion and other employment decisions.

Unfortunately, lawmakers did not anticipate the Internet or envision that a staggering number of applicants would access job listings and submit employment applications electronically. That reality has finally caught up with lawmakers, and they have taken steps to address the problem. On March 4, 2004, the EEOC, in conjunction with the U.S. Department of Labor’s Office of Personnel Contract Compliance Programs, the U.S. Department of Justice, and the Office of Personnel Management issued guidance (“Guidance”) to all employers covered by Title VII and Executive Order 11246 clarifying how the Uniform Guidelines apply to recordkeeping obligations in the context of the Internet and related technologies.

Uniform Guidelines Refresher: One significant purpose of the Uniform Guidelines is to prescribe recordkeeping for purposes of analyzing the disparate impact of selection procedures on protected groups. Such records must include information on “applicants,” defined generally as people “who ha[ve] indicated an interest in being considered for hiring, promotion, or other employment opportunities.” The Uniform Guidelines require employers to keep records regarding applicants’ gender as well as whether they belong to certain races and/or ethnic groups listed in the Uniform Guidelines.

New Guidance. Appearing in the form of Additional Questions and Answers, the Guidance sets out the following:

1. Title VII and Executive Order 11246, as amended, apply to covered employers when they use the Internet and related electronic data processing technologies for recruitment and selection.
2. Internet recruitment, like traditional recruitment, is exempt from the Uniform Guidelines, since it involves identifying and attracting potential recruits to apply for jobs.
3. An individual is an “applicant” in the context of the Internet and related technologies if (1) the employer has acted to fill a particular position; (2) the individual has followed the employer’s standard procedures for submitting applications; and (3) the individual has indicated an interest in the particular position.
4. All search criteria used by employers remain subject to disparate impact analysis.

5. Online tests, including tests of specific or general skills, are “selection procedures” because they are used as “a basis for making employment decisions” under the Uniform Guidelines.

The Guidance elaborates on each point made above and gives useful examples for understanding and applying them in your workplace. The Guidance is published in the Federal Register, Volume 69, Number 43, Pages 10152-10158 and can be accessed online at:

<http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=783434513090+1+0+0&WAISaction=retrieve>

How Should Employers Respond to this Guidance?

- ✓ The Guidance is still subject to further revisions. If you have an interest in helping to shape the final regulation, you can submit comments up to May 3, 2004. Information on how to submit comments is included in the Guidance.
- ✓ Covered employers should update their recordkeeping procedures to ensure they are maintaining the prescribed information for Internet applicants. Software programs are available to help retrieve, sort and store electronic application data.
- ✓ Review your company’s recordkeeping procedures to ensure overall compliance with the Uniform Guidelines.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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