From: David W. Peterson [davidwp@mindspring.com]

Sent: Saturday, May 22, 2004 10:56 PM

To: Joseph DuBray

Subject: 41 CFR Part 60-1 Proposal

Mr. DuBray – Please consider the suggestions contained in the attached letter. Thank you. D.

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Via e-mail
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May 22, 2004

Mr. Joseph DuBray Jr., Director
Division of Policy, Planning and Program Development
OFCCP, Room C-3325
200 Constitution Avenue NW
Washington DC 20210

Re: Proposed Amendment to CFR Part 60-1

Dear Mr. DuBray:

I would like to suggest a definition of an applicant that differs from the one published in the March 29, 2004 Federal Register (v. 69 n. 60), page 16447. The definition I propose pertains not just to internet applicants, but to applicants in general.

Definition of an Applicant

I suggest that to be an applicant, an individual job seeker must satisfy the following three conditions:

(1) The individual indicated an interest in a particular job or position;

(2) The individual indicated this interest following the employer's standard procedures for submitting applications; and

(3) The employer acted on the substance of the expression of interest.

Discussion of Three Conditions

(1) The individual indicated an interest in a particular job or position.

The core of being an "applicant" is asking to be hired to do a particular job for a specific employer. An individual can only accurately assess her interest in an employment opportunity of which she is aware. With respect to Internet recruiting, this means that people who post resumes in third party resume banks or on personal Web sites are not Uniform Guidelines "applicants" for all employers who search those sites. By posting a resume, the individual is advertising her credentials to the world and indicating a willingness to consider applying for new positions that may be brought to her attention. The individual is not indicating an interest in a particular position with a specific employer. If an employer contacts this individual about a particular position after finding her resume or personal profile online, and the individual indicates an interest in that

position, then the individual becomes a Uniform Guidelines "applicant," if she also meets the second and third prongs of the test set forth above. Similarly, if an employer contacts an individual about a particular position in response to an unsolicited resume submitted online, and the individual indicates an interest in that position, then the individual becomes a Uniform Guidelines "applicant" if she also meets the second and third prongs of the test. Furthermore, even if the individual expresses an interest in a whole category of positions in response to an employer's solicitation— for example, marketing opportunities— the individual is not an applicant but is identifying the kinds of positions in which she may be interested. She is not indicating an interest in a particular position with a specific employer. It is only with respect to a particular position that an individual can assess her interest and choose whether or not to apply. If an individual submits a resume or personal profile repeatedly to the same employer (for example, by adding numerous online job listings to her "shopping cart") or simply sends resumes (for example, by using automated online tools that identify job listings and submit resumes), the individual again is identifying the kinds of positions in which she is interested and is not automatically an applicant. In certain circumstances, however, actions by a job seeker in response to an employer-hosted job listing will display hallmarks of an actual, individual assessment of interest in a particular position that the employer is acting to fill. For example, a job seeker's interest in a particular position becomes evident when the job seeker complies with an employer's procedural requirements that are unique to that position. Thus, completion and submission of an electronic application form, which form is unique for a particular position, indicates that the job seeker has a specific interest in that particular position.

Example A: Game Park is hiring park rangers, who perform specified duties and receive a starting salary within a particular range. Game Park posts an announcement on its Web page stating that it is accepting applications for its next park ranger training class, which starts in six months, and that all people who complete the required forms within one month will be evaluated for entrance into the class. Job seekers are directed to complete a detailed questionnaire asking about their experience in wildlife management, forest fire prevention, firearm safety and first aid. This profile is only suitable for the position of park ranger; it cannot be used for other Game Park positions. When these profiles are compiled into a database, all of the job seekers will be "applicants" if they satisfy the second and third prongs of the above-referenced test.

(2) The individual indicated this interest following the employer's standard procedures for submitting applications.

If everyone who applies online must complete an online personal profile, only those individuals who do so can be Uniform Guidelines applicants. If job seekers must use an electronic kiosk or contact a store manager to apply for a sales position, only those who do so can be Uniform Guidelines applicants. If an employer e-mails online job seekers to ask if they are currently interested in a particular vacancy, only those who meet the employer's deadline can be Uniform Guidelines applicants. These procedures and directions must be nondiscriminatory because recruitment and the application processes are subject to Title VII and Executive Order 11246.

(3) The employer acted on the substance of the expression of interest.

An example under this third prong is:

Example B: Individuals who register online for Customer Service Representative positions with an Internet and cable television service provider complete online personal profiles for the employer's resume database. The company seeks to fill two vacancies at its Greater New York Service Center, and identifies 300 recruits from the database who have indicated that they are available to work in the New York area. The employer sends an inquiry to each of these 300, and 100 of them respond affirmatively and timely to the employer's inquiry, expressing interest in the particular New York vacancies. The employer chooses 25 of these 100 people using random sampling and interviews only these 25. It never considers further the remaining 75 people. Only the 25 people interviewed are "applicants." None of the 75 people are applicants because the employer did not terminate their candidacy based on the substance of their expressions of interest. Their candidacy was terminated because of the luck of the draw in the formation of the sample and not because of anything pertaining to their personal or professional qualifications. Had the employer reviewed all 100 expressions of interest and chosen to interview the 25 candidates who seemed most promising, then all 100 candidates would be applicants, because the employer made a decision about each based on the substance of his or her application.

Further Remarks

A key element of being an applicant is having one's quest for a job terminate either by being hired or else by being denied hire by virtue of some personal characteristic or qualification. As soon as the employer bases a selection decision on a qualification or characteristic of a would-be applicant, that person becomes an applicant provided he or she has fulfilled the first two prongs of the proposed definition. In contrast, a job seeker whose quest for a particular job fails because the employer does not fill that job or because of not being chosen in a random selection (to which the job seeker had fair access) cannot reasonably be considered an applicant.

Definition of A Qualified Applicant

Some Practical Considerations Concerning Demographic Information

In formulating the above remarks, I have adhered I believe to the scope and spirit of the definition of "applicant" envisioned by the Uniform Guidelines, and have simply clarified some aspects of that definition. There is a more fundamental issue on which I offer an opinion as well, concerning the link between the definition of an applicant and the practicality of collecting demographic information. If persons deemed applicants do not enter into the recruiting and hiring process far enough to disclose their demographic characteristics to the employer, it is unrealistic to hold the employer nonetheless

responsible for recording and retaining that information. Consequently, the OFCCP should consider incorporating a fourth condition a job seeker must satisfy before being deemed an applicant for the agency's record-keeping purposes:

> *(4) The individual job seeker progressed far enough in the application process that the employer could reasonably infer the demographic information it is required to retain on applicants.*

The Qualification Requirement

A qualified applicant (for the OFCCP's record-keeping purposes) is a job-seeker who meets the above four conditions, and, in addition, satisfies the following condition:

> *(5) The job seeker's expression of interest indicates that he or she possesses the advertised basic qualifications for the position.*

Concluding Remarks

The above definitions preserve the notion of an applicant in the sense apparently contemplated by authors of the Uniform Guidelines, and uses the phrase Qualified Applicant to label those particular applicants who meet the terms apparently contemplated by the OFCCP in its March 29, 2004 proposal. I respectfully suggest that the terminology outlined above be used instead of that in the March proposal because I believe it is clearer and less subject to misinterpretation than that proposed. I also urge that the definitions given above be used instead of those in the March proposal, for similar reasons. I believe my suggested terminology and definitions accurately reflect distinctions between applicants, qualified applicants, and other job seekers that both the OFCCP and employers will find useful and meaningful in monitoring hiring processes.

Thank you for considering my suggestions.

Sincerely,

David W. Peterson, PhD