# Online Applicants and the EEOC Rules

Presented by:

**Mike Bourgon**
**Mike Conroy**

# Who is an Online Applicant?

When you are an employer, knowing who is defined as an "applicant" matters.  The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) focus on systemic hiring discrimination and obtain large monetary settlements every year.

NORTH RISK PARTNERS™

# Who is an Online Applicant?

Within the U.S. Department of Labor, the EEOC investigates charges of discrimination brought against employers, and the OFCCP conducts roughly 4,000 audits of federal contractors and subcontractors every year.

# Who is an Online Applicant?

And here's a well-kept secret: The agencies do not have to prove the employer intentionally discriminated; rather, under the disparate impact theory, they must demonstrate that the employer's hiring process negatively affected a group at a statistically significant level.  So, identifying and strategically presenting who is an "applicant" — who should count against the employer in these statistical analyses.— is critical in EEOC investigations and OFCCP audits.

# Who is an Online Applicant?

So, just who is an applicant?

# Who is an Online Applicant?

The Internet Applicant Rule is the single greatest idea ever contrived by the Department of Labor.  It defines the type of applicants federal contractors and subcontractors must include in these analyses — and therefore who can be removed — as follows:

NORTH RISK PARTNERS™

# Who is an Online Applicant?

- Candidates who submit an expression of interest

- Candidates who meet the basic qualifications

- Candidates who are considered (their substantive qualifications reviewed)

- Candidates who do not expressly (or who the employer may infer) remove themselves from consideration

NORTH RISK PARTNERS™

# Big Numbers are Bad Numbers

Many employers allow candidates to apply online, and for some employers, that is the primary or only way candidates can apply.  With this technology, employers are seeing significant increases in their candidate pools.  But they should also be thinking about how these large numbers may affect potential liability in EEOC investigations and OFCCP audits. (In systemic discrimination investigations, the agency often asks for three to five years of <u>applicant</u> data; for the OFCCP, the agency starts with one year and may expand to two years if it sees statistical indicators.)

NORTH RISK PARTNERS™

# Big Numbers are Bad Numbers

In statistical analyses, big numbers are bad numbers. The more applicants in the analysis, the more likely the employer is to tip over into statistical significance; a standard deviation greater than 1.96 is considered statistically significant.

NORTH RISK PARTNERS™

# Big Numbers are Bad Numbers

Often, employers remove candidates who were not considered and who withdrew — and who did not meet the basic qualifications; this allows them to present their applicant data in a better light.  It is this decrease in applicant numbers in the above example that brought the employer below statistical significance.

NORTH RISK PARTNERS™

# Develop Strategic Disposition Codes under the Internet Applicant Rule

If the candidate does not return calls, takes another job, or wants too much money, the candidate is not considered an applicant because he or she is not willing to do the job, and the employer can infer that the candidate will remove himself or herself from consideration.  Similarly, if the employer does not review the candidate's substantive qualifications because the job was filled and the candidate applied too late, the individual is not an applicant under the rule because the employer did not consider him or her.

NORTH RISK PARTNERS™

# Basic Qualifications

You can also use "basic qualifications" to weed out candidates to avoid the label of "applicant."

NORTH RISK PARTNERS™

# What is a Basic Qualification?

**Basic Qualifications are:**

- Qualifications that the *employer (e.g., Federal* contractor) identifies that must be possessed for a potential applicant to be considered for the position,

   **OR**

- Criteria that the *employer establishes in advance by* making and maintaining a record of such qualifications prior to considering any expression of interest to a particular position

NORTH RISK PARTNERS™

# Why are we concerned about Basic Qualifications?

**Basic Qualifications can:**

- Save employers' money and personnel resources

- Reduce the size of the applicant pool

- Filter for qualified job applicants

- Reduce the amount of time it takes to fill job openings

- Show applicants that the employer is serious about job standards

- Place value on applicant qualifications

NORTH RISK PARTNERS™

# A Few Things to Consider

**Is the Basic Qualification likely to:**

- Represent a true "minimum baseline" needed for the first day on the job?

- Be clearly understood by applicants?

- Be uniformly applied to all applicants?

- Distinguish between qualified and unqualified applicants?

- Allow an equal opportunity for all applicants to demonstrate that they possess the required levels?

- Be used in such a way that addresses important OFCCP (Office of Federal Contract Compliance Programs) recordkeeping requirements?

NORTH RISK PARTNERS™

# The Four Criteria to be Considered an "Internet Applicant"

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

2. The employer *considers the individual for employment* in a *particular position.*

3. The individual's expression of interest indicates that the individual possesses the *basic qualifications for the* position.

4. The individual at no point in the contractor's selection process prior to receiving an offer from the contractor, *removes himself or herself from further consideration* or otherwise indicates that he or she is no longer interested in the position.

NORTH RISK PARTNERS™

# Internet Applicant Definition – Criteria 3

*The individual's expression of interest indicates that the individual possesses the <u>basic qualifications</u> for the position.*

**Basic qualifications are:**

- Qualifications that the contractor identifies must be possessed in order for a potential applicant to be considered for the position,

  **<u>OR</u>**

- Criteria that a contractor establishes in advance by making and maintaining a record of such qualifications prior to considering any expression of interest to a particular position

NORTH RISK PARTNERS™

# Internet Applicant Definition – Criteria 3

**The three criteria for establishing basic qualifications are:**

1. **Non-Comparative** (e.g., If a minimum of three years of experience is required and three people, all with at least three years experience apply, then they are all applicants. You cannot simply consider the one with the most experience and ignore the other two. They ALL pass the minimum qualification and must be considered applicants);

2. **Objective** (e.g., a Bachelor's degree in Accounting rather than a technical degree from a good school); and,

3. **Relevant to Performance** of the particular position and enable the contractor to accomplish business related goals.

NORTH RISK PARTNERS™

# Two Important Concepts to Remember

**Important Concept #1:**

- If Basic Qualifications have Adverse Impact, they Need to be "Validated"

**Important Concept #2:**

- "Validation" requires a MORE STRINGENT demonstration of "job-relatedness" than the "job relevant" Basic Qualification requirement cited in the Internet Applicant Regulations

  Validation *sometimes requires a different development process* than what might be used to set up "job relevant" Basic Qualifications under the Internet Applicant Regulations

NORTH RISK PARTNERS™

# What is Adverse Impact?

Adverse Impact is defined as a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group.

NORTH RISK PARTNERS™

# Implement Best Practices

To minimize the number of applicants, employers should consider implementing the following best practices:

# Implement Best Practices

- **Close requisitions when filled.**  Closing requisitions when filled will reduce the number of candidates applying.

NORTH RISK PARTNERS™

# Implement Best Practices

- **Make one hire per requisition.**  One hire per requisition also makes the data cleaner to defend since all candidates in the requisition were considered for that specific position.  "Evergreen," or "continuous," requisitions, on the other hand, are difficult to defend because it is not clear who was considered for each position.  When this happens, the agencies can count the candidate multiple times, which leads to larger numbers.

# Implement Best Practices

- **Do not move between requisitions.** Similarly, moving candidates between requisitions suggests that the employer considers candidates for more than one position and allows the agencies to count them multiple times. Instead of moving them, consider inviting them to apply for another suitable requisition.

NORTH RISK PARTNERS™

# Implement Best Practices

- **Use data management techniques (DMTs).** DMTs allow employers to consider some of the candidates, and those not reviewed do not count against the employer. This technique is especially helpful for entry-level, high-volume positions. To use this technique, look at the candidates in batches, such as 10 or 20 at a time, by a qualification-neutral means, such as timing — first received or most recently received. Once you have enough successful candidates to move on to the next phase, stop reviewing. Once the position is filled, disposition the remaining candidates who were not reviewed as "Never Considered – Data Management Technique."

# Implement Best Practices

Using these suggested best practices and the Internet Applicant Rule can help employers reduce their applicant pools, thus minimizing EEOC and OFCCP liability.

NORTH RISK PARTNERS™

# Synergy Contact Information

**Mike Bourgon**

**651-270-2281**

**mike@synhr.com**


**Michael Conroy**

**651-325-5395**

**mconroy@synhr.com**

www.SynHR.com
1-888-603-7872