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## Best Practices For Online Employment Applications

Law360, New York (January 13, 2009) -- Online and other computer-based applications are an excellent way for employers to solicit and accept applications from potential employees.

Online applications allow employers to reach a wider applicant pool, keep more accurate records, make more precise hiring decisions and eliminate hand-written, paper applications, which are easy to misplace and are often difficult to read.

Employers with federal contracts must proceed with caution to ensure they comply with the rules and regulations of the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP").

Even employers without government contracts can benefit from these best practices if they employ 15 or more employees as they are subject to the Americans with Disabilities Act, which provides similar requirements regarding accessibility to persons with disabilities.

The OFCCP requires that employers with federal contracts take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran, pursuant to Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Veterans' Readjustment Assistance Act of 1974.

As of Oct. 10, 2008, all OFCCP Compliance Reviews must include a review of the employer's on line application processes. (A copy of the new directive can be viewed at [www.dol.gov/esa/ofccp/regs/compliance/directives/dir281.pdf](http://www.dol.gov/esa/ofccp/regs/compliance/directives/dir281.pdf).)

An employer with federal contracts must take care to abide by OFCCP regulations when implementing an online or computer-based application system.

However, observing the following best practices will help employers with federal contracts

maintain their OFCCP obligations while enjoying the benefits of online employment applications. This article will use "online application" to mean any type of computer-based employer application and "employer" to mean an employer with federal contracts and subject to OFCCP regulations. 1) The application process must remain fully accessible to individuals with disabilities (veterans or otherwise). See OFCCP ADM Notice 281 (July 10, 2008). In the very least, this means an employer must have an effective policy for providing an alternative application for applicants who cannot use the online application due to their disabilities.

The OFCCP Web site states "[a]lthough major technological advances have been made in recent years, many online systems may not be fully accessible. For example, an individual with a visual disability may find the print or graphics on the webpage difficult to read. Or the system may not operate if an individual with a disability is using adaptive software.

Contractors may therefore find it beneficial (but are not required) to design, or re-design their online application systems to ensure the greatest degree of ready access to the greatest number of potential applicants with disabilities."

In order to achieve a cost-effective and efficient way to minimize the need for individual reasonable accommodations and to ensure that the contractor is reaching out to, and receiving applications from, the widest pool of qualified applicants, employers should strive to design their online application system to be simple, intuitive, flexible, and tolerant of user errors.

If an employer offers applicants multiple methods of applying for jobs and all application methods are treated equally, then an employer may not need to offer a fully accessible online application system.

However, if an employer uses only an online application system, then it must ensure that potential applicants with disabilities can either use the system or submit an application in a timely manner through some other means.

An employer should provide applicants a method to contact the employer to request any reasonable accommodation needed to provide a disabled applicant an equal opportunity to apply and be considered for the employer's positions.

This method of contact should be independent of the employer's online application system. Employers can easily comply with this by posting at its place of business and online, a toll free phone number and an address from which potential job applicants can obtain a written

job application and request reasonable accommodations for those individuals with disabilities.

Importantly, an employer should not establish a separate application system for use solely by applicants with disabilities, as such a system would operate as an unlawful pre-employment inquiry into an applicant's disability.

Those with disabilities must be given the opportunity to use an online application, but if they are unable to use the online system, they must be given the opportunity to submit an application through alternative means. This alternative application must be given equal treatment when compared to online applications.

Even if an employer's online application system includes many accessibility features and is compatible with many electronic accessibility technologies, an employer would still need an effective policy for providing an alternative application for individuals who cannot use the online application at all due to their disabilities.

2) In order to comply with its affirmative action obligations, an employer must periodically evaluate its online application procedures to ensure that its personnel processes provide for careful, thorough consideration of qualified applicants with disabilities. See 41 CFR Parts 60-2, 60-250.44, 60-300.44, and 60-741.44.

Also, an employer must conduct a periodic review to evaluate its online application procedures to ensure that they do not adversely impact members of protected classes. See 41 CFR Part 60-3.

While OFCCP regulations do not provide a firm definition of "periodic" review, the OFCCP has historically considered "periodic" to mean at least once a year. A larger employer with numerous federal contracts may find it necessary and helpful to conduct an internal audit of its online application procedures semi-annually, or even quarterly.

3) When implementing its online application system, an employer must comply with the OFCCP's rules regarding the preservation of electronic employment records. See OFCCP ADM Notice 279 (May 14, 2008). This means that an employer must keep all electronic employment records, including applications, on file and available for inspection by the OFCCP for two years.

4) An employer must comply with the Internet Applicant Final Rule ("the Rule"), 41 CFR 60-1.3, when implementing its online application system. This regulation sets out the online hiring records which an employer must maintain after implementing its online application

system.

The Rule requires an employer to keep records on the impact of its online application system on Internet applicants, and the Rule requires an employer to conduct an adverse impact analysis pursuant to 41 CFR Part 60-3. An "Internet applicant" is any individual who (1) submits an expression of interest in employment through electronic data technologies; (2) is considered by an employer for employment in a particular position; (3) indicates she possesses the basic qualifications for the position; and (4) does not remove herself voluntarily before an employer makes a decision.

"Electronic data technologies" include all applications initiated online or on a computer. The term also includes applications submitted via fax machine, but the term does not include oral expressions of interest communicated via telephone or VOIP.

The Rule does not apply to applicants who submit paper applications in response to online advertising; however, the rule would apply to paper applications submitted by a disabled person in lieu of an otherwise required electronic application.

The Rule also applies to applicants which an employer considers by way of an external online job application database, such as monster.com.

The Rule provides guidelines for employers when they are establishing the basic hiring qualifications for positions applied for online.

The basic qualifications for a position, which applicants have to possess in order to be considered for the position, must be (1) objective; (2) established in advance of accepting applications; and (3) relevant to performance of the particular position.

Additionally, basic hiring qualifications must involve non-comparative features of applicants. A non-comparative feature is a qualification that an applicant either possesses or does not possess.

For example, a basic qualification requiring applicants for an advertising position to have at least two years of advertising experience is a non-comparative feature. Such a minimal qualification would be proper under the Rule.

On the other hand, a comparative feature is a qualification used to compare one applicant to another. For example, an online application question might ask about the number of years of advertising experience an applicant possesses. This question calls for a comparative feature

of applicants.

While this question may be useful to an employer when making a final determination between qualified applicants, an employer may not use such a question to determine whether an applicant meets the basic qualifications for a position applied for online.

An employer "considers" an applicant if it looks at a particular online application specifically. Collecting all applications and then sorting them through appropriate data management techniques that limit the number of "hits" of qualified candidates does not result in an employer's "consideration" of those applications not selected as a "hit."

5) An employer should encourage online applicants to self-identify race, gender and ethnicity as part of the registration process to post their resume or complete an online application.

However, the demographic information must be electronically maintained separately from the resume information reviewed during the selection process. The OFCCP suggests the use of "electronic tear-off sheets" in order to accomplish this.

The OFCCP does not require that demographic information be collected at a specific point in the application process, but using an electronic tear-off sheet as part of the application registration process would help an employer comply with its reporting requirements.

6) If an employer is going to institute an online-only application process, it should set up one or more computer kiosks in its offices, so that applicants who may not otherwise have computer/Internet access have an equal opportunity to complete online applications.

These kiosks would help minimize or eliminate any potential adverse effects an online application system may have on members of protected classes. Of course, these kiosks would need to be set up in such a way so as to be completely accessible to people with disabilities.

The issues of online-only applications and Internet application record-keeping are two of the biggest issues facing the OFCCP currently.

Following the above best practices will help employers with federal contracts, and even those without, implement online employment applications systems and, at the same time, comply with the OFCCP's rules and regulations regarding affirmative action.

--By Angie Davis (pictured) and Jacob Dickerson, Baker Donelson Bearman Caldwell & Berkowitz PC

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