410 What You Need to Know to License Your Technology Outside of the U.S.

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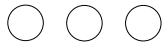

Employment Law: Year in Review

Xan Raskin, Esq.
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ACC Annual Meeting
Washington, DC
October 17-19, 2005

1

Overview

- U.S. Supreme Court decision on ADEA
- Expansion of Hostile Environment Claims
- OFCCP Proposed Regulations
- California Case Law
- NLRB decision on leased workers in bargaining unit
- Retiree health benefits and the ADEA
- Medical Inquiries - Application Process
- New Circuit Decisions on Waivers
- Civil Rights Tax Relief Act

Disparate Impact under ADEA

U.S. Supreme Court upholds the validity of disparate impact claims under ADEA for the first time and resolves Circuit split. *Smith v. City of Jackson, MS (March 2005)*

Court had long held that disparate impact claims were permissible under Title VII of the Civil Rights Act

Non-discriminatory business practice that has an adverse impact on people age 40 or older

Employer's burden less onerous under ADEA compared to Title VII

- ADEA disparate impact plaintiffs must identify a specific employment practice and employer can defend by showing the policy is based on "reasonable" factors other than age. (RFOA defense)
- Under Title VII, employers must show that a policy having adverse effect is due to "business necessity" and no alternative means exist to achieve goal

How Should Employers Respond to *Smith*?

Disparate Impact cases under ADEA will likely survive motion to dismiss as plaintiffs may state cause of action based on statistics

Use of "reasonable factor" defense available at summary judgment stage

- Can use defense in reductions in force to justify cutting costs by reductions in force based on wage level (often correlated to seniority and age)

Minimize liability by documenting and being able to justify legitimate business reasons for any change that may have an adverse impact on people over 40

Conduct adverse impact statistical analysis in mass layoffs based on race, gender *and* age

Hostile Environment Claims

- *Miller v. Dep't of Corrections*: CA Supreme Court unanimous decision that employee may have actionable hostile environment sex harassment claim based on a manager's consensual sexual affairs with *other* subordinates

- "Isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment. However, when such "sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment for those not engaged in the affairs."

Hostile Environment Claims

- Favoritism may indicate that employees are viewed as "sexual playthings" or that "the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management."

- Court reversed trial court's granting of summary judgment and the Court of Appeals affirmation of summary judgment. The underlying motion had been based, in part, on findings that the plaintiffs were not treated differently than male employees as they were not themselves subject to sexual advances – an argument which was rejected by the Supreme Court.

What Does *Miller* Mean for Employers?

Miller reinforces that employers should take all appropriate steps to ensure a hostile-free work environment, including when employees and/or supervisors are involved in consensual sexual relationships.

Employers should consider providing anti-harassment and non-discrimination training to all employees.

Review and update policies. Include provisions addressing consensual romantic relationships in the workplace

- Love Contracts
- Reporting obligation when conflict of interest arises (e.g., relationship between manager/subordinate, HR rep/client, attorney/client)
- Discipline for failure to report
- Transfer or terminate if conflict exists

New Federal Contractor Obligations

Nov. 2004 – OFCCP Proposed guidelines

- Addressing systematic compensation discrimination
- Employers may select framework for self-evaluation methodology
- Similarly situated employees and factors that influence comp decisions in those groupings
- Grade-focused analysis to be replaced by multiple regression analysis during compensation audits. Similar to analysis used by several courts.
- Selection of targets for audit used to be based on analysis of EEO-1 survey data. New method will also include past compliance history as a factor in determining prioritization for audits

OFCCP Proposed Regulations

March 2004, the OFCCP published proposed regulations which would amend the Uniform Guidelines on Employee Selection to incorporate a new definition of "Internet Applicant"
New Guidelines published in Federal Register 10/7/05; take effect 2/6/06. 41 CFR Part 60-1.

Four-part definition of Internet Applicant:

- Individual submits expression of interest in employment through the Internet or related electronic means
- Contractor considers individual for employment in a particular position
- Expression of interest indicates the individual has the basic qualifications for position
- Individual does not remove self from further consideration at any point prior to offer letter

Employers will be assessed by one standard when paper-based recruiting/selecting tools are used and a different standard when Internet or related technology is used

Job seeker does not have to apply for a specific position in order to meet definition of Internet Applicant

Federal contractors can exclude individual as an Internet Applicant if it is clear that job seeker would not be interested in position due to basic qualifications such as salary requirements or other factors such as preference for work location and type of work

While all such individuals need not be interviewed, the employer would have to justify the process of determining who is interviewed, and keep data for 2 years.

NLRB Changes Its Mind…Again

- In the absence of an employer agreement, the NLRB may not include in a single bargaining unit workers who are jointly employed by a staffing/leasing agency and an employer, with workers solely of the employer. *Oakwood Care Center, 343 NLRB 76 (Nov. 2004)*
- NLRB finds that bargaining units of jointly employed employees require parties' consent, and that the NLRA does not authorize the Board to direct elections in units encompassing the employees of more than one employer (joint employers).
- Decision overrules its own landmark decision in *M.B. Sturgis, Inc., 331 NLRB 1298 (2000),* which itself had dismissed at least 25+ years of precedent concerning the issue. *Sturgis* Board had held that the employer committed an unfair labor practice by refusing to apply collective bargaining agreement to temporary employees who were working in bargaining unit positions.

What's Going on in *Erie*?

- 2000: Third Circuit decision held that the ADEA provisions against age discrimination apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare. *Erie County Retirees Ass'n v. County of Erie* (3d Cir. 2000)
- July 2003: Concerned that employers would be discouraged from providing any retiree health benefits so as to not run afoul of the ADEA, EEOC issues proposed rule making to exempt coordination of retiree health benefit plans with Medicare (or comparable state health benefit) from the ADEA
- April 2004: EEOC votes to approve the rule

What's Going on in *Erie*? (cont.)

- **March 2005: Federal court in the Eastern District of Pennsylvania grants AARP a ruling permanently enjoining EEOC from publishing or implementing the final rule that would permit employers to provide lesser retiree health benefits to retirees who become eligible for Medicare without violating the ADEA.**
- **June 2005: EEOC filed appeal to the U.S. Court of Appeals (3d Cir.)**
- **Sept. 2005: District court reverses its own March 2005 decision and now denies AARP's motion for summary judgment against the EEOC. Decision vacating the injunction is stayed until case resolved on appeal**
- **If affirmed on appeal, employers may need to restructure health benefits by: increasing benefits for retirees over 65; terminating health benefits for all retirees; or limiting the duration of health benefits to a specific number of years without regard to age.**

California Leads the Way…

- California Supreme Court ruled that that costs and attorneys' fees in appeals of the CA Labor Commissioner findings were to be charged against the party who filed the appeal, unless the court's judgment was more favorable to the appealing party than the Labor Commissioner's award. ***Smith v. Rae Venter*** (Dec 2002)
- In response, California implemented a statute in 2004 which requires employers who appeal a decision of the Labor Commissioner regarding a wage claim to pay court costs and attorney's fees if the court awards the employee any amount of money on appeal.
- Employers, however, are not entitled to receive costs and attorneys' fees from an employee who appeals a Labor Commissioner's award and receives a reduced amount on appeal. Employers can recoup attorney's fees and costs on appeal only if the employee appeals the Labor Commissioner's decision and receives no award from the court.
- Employers may now face greater risk in attempting to seek relief from a Labor Commissioner's erroneous decision.

California Leads the Way…II

CA Assembly Bill No. 1093

- Approved by Governor 8/30/05. Effective 1/1/06.
- Under existing law, if an employee has authorized the direct deposit of paychecks, that authorization ends when the employee voluntarily or involuntarily terminates. An employer must make the final paycheck a hard copy check.
- This bill allows an employer to deposit a final paycheck into the employee's account.

California Leads the Way…III

Mandatory Sexual Harassment Prevention Training (Assembly Bill 1825)

Schedule & Frequency

- Employers with 50 or more employees
- *July 1, 2005 to Dec. 31, 2005:* Train all supervisors who have had no training since Jan. 1, 2003
- *Jan. 1, 2006 to June 30, 2006:* Train any new supervisory employees
- *Jan. 1, 2006 to Dec. 31, 2007:* Train all supervisors
- New supervisors must be trained within 6 months of assuming a supervisory position
- At least 2 hours every 2 years (can be one hour each year)

CA: Mandatory Sexual Harassment Training

Content

- Classroom or other effective interaction training and education
- Must include information on both state and federal statutory harassment guidelines, available remedies, and practical examples
- Trainers must have knowledge and expertise in preventing harassment, discrimination and retaliation
- Online training in conjunction with live training will comply

Proof that training occurred does not insulate employer from liability. Proof that training did not occur does not automatically render employer liable.

Medical Inquiries and Examinations in the Application Process

Leonel v. American Airlines, Inc., (9th Cir. 2005), held that the ADA and California's Fair Employment and Housing Act ("FEHA") prohibit medical examinations and inquiries until after the employer has made a "real" job offer to an applicant.

- A job offer is not "real" until an employer has collected and evaluated all relevant non-medical information that it reasonably can obtain and analyze prior to giving the offer.
- An employer cannot conduct medical inquiries or examinations or provide an offer of employment prior to collecting all non-medical information in the application process.
- Employers should determine whether its application process complies with the parameters set forth in *Leonel*; and to the extent it does not, they should consider conforming the process.

A wave of waiver cases #1: Too Much "Legalese" Can Be a Bad Thing

- Release under ADEA invalidated because it did not comply with a key requirement of the Older Workers Benefit Protection Act ("OWBPA") – that ADEA waivers be drafted in language calculated to be understood by the average recipient. ***Thomforde v International Business Machines Corporation*** (8th Cir. May 3, 2005)
- Agreement used terms "release" and "covenant not to sue" without defining them and was therefore confusing to an individual who wouldn't know the legal difference between the two
- Once an employer chooses to use legal terms of art, it has duty to carefully explain
- Fact that plaintiff had consulted with an attorney before signing had no impact on court's analysis
- 8th Circuit reversed trial court's decision and remanded for further proceedings
- Employers must take care to review their waivers of claims and make sure that they would not be difficult for a "layperson" to understand

Waiver Case #2: FMLA is "R" rated – supervision required

Waiver of FMLA claims barred absent prior approval by the U.S. Dep't of Labor or a court. ***Taylor v. Progress Energy, Inc.*** (4th Cir. July 20, 2005).

Plaintiff in Taylor claimed absences that resulted in a poor performance evaluation should have qualified for FMLA leave. Plaintiff laid off in reduction in force following evaluation where employees were selected, in part, based on performance ratings.

Plaintiff was eligible at termination for seven weeks paid administrative leave, and additional benefits for execution of a general release and agreement.

Release did not expressly include FMLA claims but did have "catch-all" category for all other claims under federal law

Court looked to DOL regulation, "[e]mployees cannot waive, nor may employer induce employees to waive, their rights under [the] FMLA."

- Court found regulation was not limited to prospective waiver and was based on permissible construction of FMLA

Decision conflicts with prior ruling from 5th Circuit holding FMLA claims may be waived without court or agency supervision

Waiver Case #3: The Devil is in the Details with OWBPA

- Releases signed by employees were unenforceable because the Company did not provide sufficient notice of who would be terminated during a reduction in force and how selections were made. ***Kruchowski v. Weyerhaeuser Co***. (10th Cir. 2005)
- Releases for ADEA claims must contain criteria for selection and description of decisional unit considered for impact
- Employees received group termination notification with attachment containing list of employees selected and eligible for severance and those not selected, identified only by job title and age. Employees selected were offered severance in exchange for general release, including claims under the ADEA (and OWBPA)
- Court found employer did not properly identify the decisional unit at the time of notice and failed to provide specific criteria used for selection
- Company has filed petition for rehearing en banc
- Employers may need to revisit their OWBPA notice in layoffs to determine proper balance of information of disclosure.

Relief! The Civil Rights Tax Relief Act

In response to rising costs of litigation for plaintiffs and defendants because successful litigants want higher settlement awards to cover tax implications, Congress passed certain provisions of the Civil Rights Tax Relief Act (CRTRA)

- An "above the line" deduction for amounts plaintiffs receive as attorneys' fees when settling or receiving judgment on claims of unlawful discrimination in the employment context.
- With attorneys' fees portion of a settlement or judgment taxable only to the attorney, the intention is to make settlements more attractive to plaintiffs.
- Claims covered under the CRTRA include discrimination and retaliation claims brought under Title VII, ADA, ADEA, FLSA, FMLA, and NLRA
- The CRTRA is not retroactive, however, and only applies to settlements received and judgments entered after October 22, 2004.

Relief! The Civil Rights Tax Relief Act

CRTRA – proposed but not enacted:

- Eliminates taxation of emotional distress awards in discrimination cases, by excluding such damages completely from taxable gross income.
- Provides for income averaging of back pay awards, which would permit those individuals recovering back wage awards to be taxed over the number of years for which the award was designed to compensate.

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1215–AB45

Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes

AGENCY: Office of Federal Contract Compliance Programs, Employment Standards Administration, DOL.

ACTION: Final rule.

SUMMARY: Office of Federal Contract Compliance Programs (OFCCP) regulations require covered federal contractors and subcontractors to collect information about the gender, race and ethnicity of each ''applicant'' for employment. The final rule published today modifies OFCCP applicant recordkeeping requirements to address challenges presented by the use of the Internet and electronic data technologies in contractors' recruiting and hiring processes. The final rule is intended to address recordkeeping requirements regarding ''Internet Applicants'' under all OFCCP recordkeeping and data collection requirements.

EFFECTIVE DATE: These regulations are effective February 6, 2006.

FOR FURTHER INFORMATION CONTACT: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693–0102 (voice) or (202) 693–1337 (TTY). Copies of this final rule, including copies in alternative formats, may be obtained by calling OFCCP at (202) 693–0102 (voice) or (202) 693–1337 (TDD/TTY). The alternate formats available are large print, electronic file on computer disk and audiotape. This document also is available on the Internet at *http://www.dol.gov/esa.*

SUPPLEMENTARY INFORMATION:

I. Introduction

OFCCP requires covered federal contractors to obtain gender, race, and ethnicity data on employees and, where possible, on applicants. See 41 CFR 60–1.12(c). OFCCP requires this data collection activity for several purposes relating to contractors' administration of nondiscrimination and affirmative action requirements and OFCCP's role in monitoring compliance with OFCPP requirements. See 65 FR 68023 (November 13, 2000); 65 FR 26091 (May 4, 2000). For example, contractors use gender, race, and ethnicity data in the ''job group analysis'' portion of their AAPs (41 CFR 60–2.12) and OFCCP uses the data to decide which contractor establishments to review and, among those reviewed, when to conduct an on-site investigation. Contractors must supply this information to OFCCP upon request. *See* 41 CFR 60–1.12(c)(2).

II. Rulemaking History

The Uniform Guidelines on Employee Selection Procedures (UGESP) were issued in 1978 by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the predecessor of the Office of Personnel Management (''UGESP agencies''). UGESP requires employers to keep certain kinds of information and details methods for validating tests and selection procedures that are found to have a disparate impact.

The Department of Labor is a signatory to UGESP, which is codified in OFCCP regulations at 41 CFR part 60–3. Section 60–1.12, OFCCP's Executive Order 11246 record retention rule, was amended on November 13, 2000, to require contractors to be able to identify, where possible, the gender, race, and ethnicity of each applicant for employment. OFCCP promulgated this regulatory requirement to govern OFCCP compliance monitoring and enforcement (e.g., to allow OFCCP to verify EEO data), consistent with the UGESP. Prior to these amendments, OFCCP regulations did not expressly require contractors to maintain, or submit to OFCCP, information about the gender, race, and ethnicity of applicants and employees. *See* 65 FR 26091 (NPRM May 4, 2000); 65 FR 68023, 68042 (Final Rule Nov. 13, 2000). The pertinent provisions of the November 13, 2000 final rule were codified in OFCCP regulations at 41 CFR 60–1.12(c).

In 2000, the Office of Management and Budget instructed the Equal Employment Opportunity Commission to consult with the other UGESP agencies to address the ''issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations'' under UGESP. *See* Notice of OMB Action, OMB No. 3046–0017 (July 31, 2000). In particular, the Office of Management and Budget instructed the agencies to ''evaluate the need for changes to the Questions and Answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism.'' *Id.*

On March 4, 2004, the UGESP agencies issued a Notice in the **Federal Register** seeking comments under the Paperwork Reduction Act about the burdens and utility of interpretive guidance intended to clarify how UGESP applies in the context of the Internet and related electronic data technologies. 69 FR 10152 (March 4, 2004). The preamble to the new interpretive guidance discussed the need for clarification of UGESP obligations in the context of the Internet and related electronic data technologies. *See* 69 FR 10154–155. The UGESP agencies expressly contemplated that ''[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities.'' 69 FR 10153.

On March 29, 2004, OFCCP published a Notice of Proposed Rulemaking proposing amendments to OFCCP regulations governing applicant recordkeeping requirements. 69 FR 16446, 16449 (March 29, 2004). OFCCP determined that additional regulations were required to clarify OFCCP applicant recordkeeping requirements in light of OFCCP's unique use of applicant data for compliance monitoring and other enforcement purposes.

In the proposed rule, OFCCP proposed to amend OFCCP regulations at 41 CFR 60–1.3 to add a definition of ''Internet Applicant.'' 69 FR 16449. The proposed definition of ''Internet Applicant'' involved four criteria: (1) The job seeker has submitted an expression of interest in employment through the Internet or related electronic data technologies; (2) the employer considers the job seeker for employment in a particular open position; (3) the job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and, (4) the job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual. 69 FR 16449. Under the proposed rule, ''advertised, basic qualifications'' were qualifications that the employer advertises to potential applicants that they must possess in order to be considered for the position. 69 FR 16449. The proposed definition further provided that ''advertised, basic qualifications'' must be noncomparative, objective, and job-related. 69 FR 16449–450.

The proposed rule also would amend 41 CFR 60–1.12(a) to require contractors to retain records of all expressions of interest through the Internet or related electronic technologies. 69 FR 16450.

Lastly, the proposed rule would amend 41 CFR 60–1.12(c)(1)(ii) to incorporate the new category of ''Internet Applicant,'' as defined in the proposed amendment to section 60–1.3 and to distinguish between ''applicants,'' i.e., expressions of interest in employment that are not submitted through the Internet and related electronic technologies, and ''Internet Applicants.'' 69 FR 16450.

OFCCP received 46 comments from 45 entities: four individuals, nine interest groups, an academic organization, the Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, seventeen employers who are covered contractors within OFCCP's jurisdiction, three trade associations, one law firm that represents contractors, and nine consultants that represent contractors.

The commenters offered a diverse array of views on the proposed rule. Almost all of the comments focused on four general areas: (1) The relationship between the proposed rule and the UGESP Additional Questions and Answers; (2) the specific criteria of the proposed ''Internet Applicant'' definition, especially the part of the definition involving ''advertised, basic qualifications;'' (3) the recordkeeping requirements of the proposed rule; and (4) the treatment of ''traditional'' expressions of interest, i.e., those made through means other than the Internet or related electronic data technologies.

Several commenters also addressed significant issues related to OFCCP compliance monitoring and enforcement activities under the proposed rule, including OFCCP's use of labor force statistics and the effective date of the final rule.

III. Summary and Explanation of the Final Rule

The final rule, for the most part, adopts the text that was proposed in the March 29, 2004 NPRM. However, in response to the public comments, OFCCP has modified the proposed text in certain respects. The discussion which follows identifies the significant comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed rule.

Discussion of Comments and Revisions

Comments Regarding the Relationship Between the Proposed UGESP Additional Questions and Answers and the OFCCP Proposed Rule

Many of the commenters expressed concern about the relationship between OFCCP's proposed rule and the Proposed UGESP Additional Questions and Answers. Most of these commenters argued that the proposals are not sufficiently coordinated, which could create confusion among employers, and could lead to inconsistent or even conflicting obligations.[1] Many of these commenters, such as Society for Human Resources Management (SHRM), ORC Worldwide (ORC), National Association of Manufacturers (NAM), and National Industry Liaison Group (NILG), pointed out that this perceived lack of coordination could lead to inadequate compliance with either of the rules and enormous recordkeeping burdens for employers. The Equal Employment Advisory Council (EEAC) believed that the OFCCP proposal conflicts in several important respects with the proposed UGESP Additional Questions and Answers. Gaucher Associates believed that the OFCCP proposal conflicts with OFCCP's prior informal interpretation of UGESP.

These commenters recommended an array of differing solutions for this coordination problem. Most of the commenters preferred that the UGESP agencies more explicitly adopt the ''basic qualifications'' component of the OFCCP applicant definition.[2] Several commenters argued against the OFCCP proposed rule altogether and asserted a preference for the UGESP proposal.[3]

OFCCP agrees with the commenters that coordination between this final rule and the proposed UGESP Additional Questions and Answers is desirable. While the Department believes that the NPRM was consistent with the proposed UGESP Additional Questions and Answers, 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.

Morgan, Lewis & Bockius LLP asked how OFCCP interprets procedures for evaluating Internet Applicant recordkeeping obligations under section 60–1.12 and UGESP. To make clear OFCCP's interpretation of procedures regarding Internet Applicant recordkeeping under both rules, OFCCP has added a new regulatory provision, section 60–1.12(d), to the final rule. The new provision, captioned ''Adverse impact evaluations,'' explains that when evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under Part 60–3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants and the impact of employment tests. As discussed below, OFCCP does not deem employment tests to be basic qualifications under the final rule and contractors must continue to collect and maintain records related to the impact of employment tests that are used as employee selection procedures, without regard to whether the tests were administered to Internet Applicants. However, OFCCP's compliance evaluations will not be limited to an evaluation of those records produced by the contractor. During compliance evaluations OFCCP will continue to look broadly at all aspects of a contractor's compliance with its obligations to refrain from discrimination in recruitment, hiring, and other employment practices, including the possible adverse impact of screens for basic qualifications.

As a technical matter, today's rule redesignates the former section 60–1.12(d), *Failure to preserve records,* as section 60–1.12(e), and removes former section 60–1.12(e), Applicability. The latter section was contained in the regulations merely to indicate the Office of Management and Budget's approval under the Paperwork Reduction Act of a previously published recordkeeping requirement. 62 FR 66971 (Dec. 22,

[1] *See, e.g.,* Blount International, Inc., Computer Associates International, Inc., Glenn Barlett Consulting Services, LLC, L–3 Communications, Maly Consulting LLC, Motorola Corp., Society for Human Resource Management, Southwest Airlines Co., ORC Worldwide, National Association of Manufacturers, National Industry Liaison Group, Morgan, Lewis & Bockius LLP, Thomas Houston Associates, Inc., TOC Management Services, Nancy J. Purvis, Sentari Technologies, Inc., Society for Industrial and Organizational Psychology, Louisiana Pacific Corp., and Premier Health Partners.

[2] *See, e.g.,* American Bankers Association, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Computer Associates International, Inc., L–3 Communications, ORC Worldwide, Motorola, Inc., National Association of Manufacturers, National Industry Liaison Group, Morgan, Lewis & Bockius LLP, Sentari Technologies, Inc., Siemens USA, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., TOC Management Services, Louisiana Pacific Corp., and Premier Health Partners.

[3] *See, e.g.,* Blount International, Inc., The Leadership Conference on Civil Rights, the National Women's Law Center, and the Lawyers' Committee for Civil Rights Under Law.

1997). Accordingly, it is no longer necessary.

General Comments on OFCCP's Proposed Definition of ''Internet Applicant''

Most commenters provided comments specific to one or more of the parts and subparts of OFCCP's proposed definition of ''Internet Applicant.'' OFCCP discusses below these comments in relation to each specific part or subpart of the proposed ''Internet Applicant'' definition to which they apply.

However, several commenters, including EEAC, NILG and Glenn Barlett Consulting Services, Inc. (GBCS), expressed general concern that OFCCP's proposed definition is too precise and prescriptive, in light of the variety of recruiting and selection practices that employers utilize. These commenters requested that OFCCP adopt more general guidelines that afford employers significant discretion in determining whether an individual qualifies as an ''applicant'' under the employer's own recruiting and selection systems. For example, GBCS argued that employers should be permitted to determine any point in the selection process in which race, ethnicity, and gender data would be collected. GBCS noted, ''[m]any contractors currently solicit race, ethnicity, and gender at the interview stage.''

OFCCP disagrees with commenters that suggested that general guidelines are preferable to clear rules. OFCCP believes that general guidelines would not provide clear guidance on compliance requirements or ensure adequate protections for employees and applicants. As many commenters have pointed out, over the years, there has been significant controversy between OFCCP and the contractor community as to whether a particular applicant recordkeeping practice satisfies OFCCP requirements. This controversy was fueled by the lack of clear rules about applicant recordkeeping requirements, and, in particular, clear rules about applicant recordkeeping requirements in the context of the Internet and related electronic technologies. Without clear rules, OFCCP cannot secure general compliance with the requirements, either through compliance assistance or compliance monitoring.

Northern California and Silicon Valley Industry Liaison Group requested that OFCCP expressly state in the final rule that the regulatory definition of ''Internet Applicant'' provides a minimum requirement for contractors, but also permits contractors to voluntarily implement a more expansive definition of ''applicant'' for OFCCP recordkeeping purposes.

OFCCP is well aware that contractors utilize a variety of recruitment and selection practices. Nothing in the final rule alters contractors' discretion to determine their own recruitment and selection practices and procedures. Rather, the final rule simply requires contractors to maintain sufficient records to allow both the employer and OFCCP to monitor the contractor's selection practices for potential discrimination. OFCCP disagrees with the recommendation that contractors be afforded ultimate discretion to determine recordkeeping requirements. OFCCP prescribes recordkeeping standards in order to enforce E.O. 11246, which prohibits employment discrimination on the basis of race, color, national origin, religion, and sex. OFCCP regulations implementing E.O. 11246 require contractors to self audit their own selection practices to ensure nondiscrimination. *See* 41 CFR 60–2.17, 60–3.4. OFCCP could not enforce E.O. 11246 effectively to ensure nondiscrimination if contractors are themselves the ultimate arbiters of whether sufficient records are available for OFCCP compliance monitoring activities. Nor, in OFCCP's judgment, could contractors adequately self audit their own selection practices without adequate applicant recordkeeping. Thus, the final rule establishes minimum standards for applicant recordkeeping in the context of the Internet and related electronic technologies. Contractors, however, may voluntarily adopt recordkeeping practices that are broader than those mandated by the final rule.

Comments on OFCCP's Proposed Definition of ''Internet Applicant''

Part 1: ''Submits an expression of interest in employment through the Internet or related electronic data technologies;''

In the proposed rule, ''Internet Applicant'' was defined as any individual who satisfied four criteria. OFCCP has retained the four criteria in the final rule. The first criterion of the proposed definition required that the individual ''[s]ubmits an expression of interest in employment through the Internet or electronic data technologies.'' The preamble to the proposed rule made clear that this provision applied only to expressions of interest in employment through the Internet or related electronic data technologies and that the existing standards would apply to expressions of interest through traditional means.

OFCCP solicited comments on this subject in the preamble of the proposed rule:

> The new interpretive guidelines promulgated by the UGESP agencies apply only to the Internet and related technologies. Because OFCCP relies on applicant data to determine whether to conduct an on-site audit of a contractor's workplace, OFCCP is concerned that the data allow for meaningful analysis. The proposed rule creates differing standards for data collection for traditional applicants versus Internet Applicants for the same job. Accordingly, if an employer's recruitment processes for a particular job involve both electronic data technologies, such as the Internet, and traditional want ads and mailed, paper submissions, the proposed rule would treat these submissions differently for that particular job. We are unsure whether this dual standard will provide OFCCP with meaningful contractor data to assess in determining whether to commit agency resources into an investigation of a contractor's employment practices. Therefore, OFCCP expressly solicits comments on this issue.

69 FR 16447 (March 29, 2004). OFCCP received many comments regarding whether the standard for ''Internet Applicant'' should be applied to individuals who submit an expression of interest through a means other than the Internet or related electronic data technologies. Many of the commenters addressed this subject and virtually all argued that the definition of applicant should not depend on the means by which an expression of interest comes into the employer's possession.[4] Most of these commenters asserted that the differing definitions of applicant would cause confusion and impose significant burdens on employers who would have to maintain two different recordkeeping systems.[5] Several of the commenters,

[4] *See, e.g.,* American Bankers Association, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Computer Associates International, Inc., Glenn Barlett Consulting Services, HR Analytical Services, Kairos Services, Inc., Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, L–3 Communications, Lorillard, Inc., Maly Consulting LLC, Morgan, Lewis & Bockius LLP, Motorola Corp., ORC Worldwide, National Women's Law Center, National Industry Liaison Group, Northern California and Silicon Valley Industry Liaison Group, Siemens USA, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., TOC Management Services, and U.S. Chamber of Commerce. As discussed below, several of these commenters, including Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, and National Women's Law Center, disagreed with the proposed rule's reference to ''basic qualifications'' in defining ''Internet Applicant.''

[5] *See, e.g.,* American Bankers Association, Computer Associates International, Inc., Gaucher Associates, HR Analytical Services, L–3 Communications, ORC Worldwide, Morgan, Lewis & Bockius LLP, Motorola Corp., Nancy J. Purvis, National Women's Law Center, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., and U.S. Chamber of Commerce.

including HR Analytical Services, L–3 Communications, and the U.S. Chamber of Commerce, noted that the applicant data employers would obtain under the proposed rule would not provide for meaningful analysis of recruitment and hiring practices. Several commenters, such as Siemens USA (Siemens), Gaucher Associates, and SHRM, also asserted that a dual standard may create an incentive for employers not to consider expressions of interest through traditional means, such as mailing a paper resume, which would work to the disadvantage of persons who do not have ready access to the Internet.

In response to the comments, OFCCP added a related provision in the final rule which eliminates the proposed rule's dual standard for Internet versus traditional applicants, but only as to positions for which the contractor considers expressions of interest through both the Internet and traditional means. To make this rule clearer, the final rule adds three examples that explain this new provision. In the first example, the contractor solicits potential applicants for a position that is posted on its Web site. The contractor's Web site encourages potential applicants to complete an on-line profile to express an interest in the position. The contractor's Web site also advises potential applicants that they can mail a hard-copy resume with a cover letter that identifies the position for which they would like to be considered. In this example the contractor considers individuals expressing interest in a position using on-line profiles, an Internet technology, and mailed hard-copy resumes, a traditional method of application. Since the contractor considers expressions of interest through both on-line profiles and mailed hard-copy resumes, the Internet Applicant rule applies to both types of expressions of interest. In the second example, the contractor posts an opening for a position on its Web site and encourages potential applicants to complete an on-line profile. The contractor also receives a large number of unsolicited hard-copy resumes in the mail each year. The contractor scans the hard-copy resumes into an internal database that also includes all the on-line profiles that individuals have completed for various jobs. The contractor uses this internal database to find potential applicants for a position posted on the contractor's Web site. In this example, the Internet Applicant rule applies to both the on-line profiles and the unsolicited paper resumes. In the third example, the contractor does not consider potential applicants using Internet or related technologies, and, therefore, the Internet Applicant rule does not apply.

OFCCP agrees with the commenters that the bifurcated standard contained in the proposed rule would not have provided useful data where the contractor considers both types of expressions of interest for a particular position. Indeed, this bifurcated standard would result in essentially two applicant data pools—one describing individuals who possess the basic qualifications and another describing some individuals who do not possess those basic qualifications—depending on the manner in which the employer obtained the expression of interest. Because the pools are composed differently, OFCCP could not draw meaningful conclusions from analysis of the combined pool. OFCCP also shares the concerns regarding the complexity of such a framework and the corresponding difficulty in achieving substantial compliance through compliance assistance and compliance monitoring. Thus, in the final rule, OFCCP eliminated the differing standards for data collection for traditional applicants versus Internet Applicants for the same job when the employer considers both types of applicants. Under the final rule, where the Internet Applicant standard applies to a particular position, a particular expression of interest that does not qualify as an ''Internet Applicant'' for that position (*e.g.*, because the individual did not possess the basic qualifications for the position), will not qualify as an ''applicant'' for that position, as the term ''applicant'' is used in OFCCP regulations at 41 CFR 60–1.12(c). Further, pursuant to section 60–1.12(d), where the Part 60–1 Internet Applicant standard applies to a particular position, OFCCP will only require those records under Part 60–3 (other than those related to job seekers screened by a test used as a selection procedure) that relate to job seekers that are Internet Applicants as defined in 41 CFR 60–1.3. OFCCP modified the text of section 60–1.12(c)(1)(ii) in the final rule to make clear that either the ''applicant'' standard or the ''Internet Applicant'' standard would apply for a particular position, but not both. In the final rule, section 60–1.12(c) requires contractors to maintain records that identify ''where possible, the gender, race, and ethnicity of each applicant or ''Internet Applicant'' as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.''

However, OFCCP does not believe that these problems and concerns are present to the same extent, if at all, where the contractor considers *only* traditional expressions of interest for a particular position. In such a situation, a single standard is used to determine who is an applicant. For example, a manufacturer that hires for assembly line positions and considers only individuals who fill out and submit a hard copy application form has a single data pool—no member of which are Internet Applicants. This contractor can solicit race, ethnicity, and gender information through a voluntary self-identification form provided with the application form. In this example, the applicant pool consists of those individuals who completed and submitted an application form, applying a single, traditional standard for who is an applicant.

OFCCP received several other comments about this part of the proposed rule. The Leadership Conference on Civil Rights (LCCR) requested that OFCCP ''make clear that there are multiple ways for a potential applicant to submit an expression of interest in a particular position.'' LCCR's concern was that an employer might refuse to consider the expressions of interest of individuals who do not follow the employer's desired process for making such expressions of interest. LCCR also was concerned that employers might make *ad hoc* exceptions to their standard process for accepting expressions of interest. LCCR argued that ''any guidance that is developed should make clear that individuals who reasonably believe, based on the information they received from the employer, that they have applied for a particular position should be considered applicants for that position and recorded a (sic) such.''

OFCCP has addressed these comments fully in the section that discusses the second criterion for the ''Internet Applicant'' definition. OFCCP agrees that contractors should not be permitted to selectively determine who will be considered for employment based on the qualifications information contained on an expression of interest. OFCCP has added an explicit definition of ''considers the individual for employment in a particular position.'' Under the final rule at subsection (3) of the definition of Internet Applicant, '' 'considers the individual for employment in a particular position,' means that the contractor assesses the substantive information provided in the

expression of interest with respect to any qualifications involved with a particular position.'' This definition forecloses the possibility that a contractor could evaluate an individual's qualifications for a particular position without thereby having ''considered'' the individual.

At the same time, OFCCP does not provide a blanket requirement that contractors must consider any and all expressions of interest they receive, regardless of the manner or nature of the expression of interest. OFCCP makes this clear in the final rule (subsection (3) of the Internet Applicant definition) through the definition of ''considers the individual for employment in a particular position,'' which further provides that ''[a] contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position.'' Under the final rule, it is the contractor's actual practice with respect to a particular expression of interest that determines whether the contractor has ''considered'' that expression of interest and similar expressions of interest. For example, if the contractor's policy is to accept expressions of interest only through its Web site, but its actual practice is to also review faxed resumes and scan those it is interested in into its database, the contractor's actual practice is to consider faxed resumes as well as expressions of interest received through its Web site. This is consistent with OFCCP's longstanding policy to permit contractor's to dispose of unsolicited resumes if the contractor has a consistently applied policy of not considering unsolicited resumes.

OFCCP investigates whether a contractor has such a protocol by reviewing the contractor's hiring procedures and policies and by reviewing the contractor's hiring practices to determine whether those procedures and policies were consistently and uniformly followed.

Several other commenters, including EEAC, Louisiana Pacific Corp., and Premier Health Partners, criticized the proposed rule for not including a requirement that the individual make an expression of interest in accordance with the employer's standard procedures for submitting applications.

Several commenters, including EEAC, ORC, SHRM, and the Society for Industrial and Organizational Psychology (SIOP), requested that this part of the proposed definition expressly require that the expression of interest must be an expression for a particular position. Otherwise, these commenters argued, any expression of interest might qualify an individual as an applicant for any position, which would impose significant burdens on contractors if the potential applicant pool is voluminous. ORC offered the example of an employer that searches Monster.com and finds over 20,000 resumes of individuals who satisfy the basic qualifications for a particular position. ORC argued that all 20,000 of these individuals would be applicants under OFCCP's proposed definition, unless the definition is somehow limited to those individuals who express an interest in the particular position for which the contractor is considering the individual. SIOP argued that contractors will face significant recordkeeping burdens if expressions of interest are not limited to those for a particular position because the proposed rule would require contractors to retain all expressions of interest, regardless of whether the individual qualifies as an Internet Applicant.

OFCCP agrees that the proposed data collection and recordkeeping requirements would be unreasonable in the example ORC offered. To address these situations, the agency has modified or clarified several provisions of the proposed rule. Specifically, OFCCP expressly states in the final rule (subsection (3) of the definition of ''Internet Applicant'') that ''[i]f there are a large number of expressions of interest, the contractor does not 'consider the individual for employment in a particular position' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.'' Data management techniques are not ''appropriate'' under subsection (3) if they are not facially neutral or if they produce disparate impact based on race, gender, or ethnicity in the expressions of interest to be considered. Further, OFCCP modified the fourth part (subsection (1)(iv)) of the proposed definition of ''Internet Applicant'' to require that ''[t]he 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.''

OFCCP also added a related provision (subsection (5) of the definition of ''Internet Applicant'') to clarify that, ''a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.'' Data management techniques are not ''appropriate'' under subsection (5) if they are not facially neutral or if they produce adverse impact based on race, gender, or ethnicity in the job seekers that will be contacted by the contractor to discern interest in the job. Finally, in the final rule (§ 60–1.12(a)), OFCCP clarified that, when a contractor uses a third-party resume database, the contractor must retain the electronic resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor, not all the resumes contained in the third-party resume database, along with records identifying job seekers contacted regarding their interest in a particular position, a record of the position for which each search of the database was made, the substantive search criteria used, and the date of the search.

Returning to ORC's example in light of these modifications, the contractor may reduce the burden from applicant recordkeeping obligations by determining which of the 20,000 individuals from Monster.com to contact through random sampling or an absolute numerical technique.[6] The contractor could also limit burdens from recordkeeping obligations by determining which of the 20,000 individuals are interested in the position through the individuals' stated preferences as to type or location of work, or salary requirements. The contractor would be required to retain only the resumes of job seekers who met the basic qualifications for the particular position and who were considered by the contractor, not 20,000 resumes or all the resumes in the Monster.com database.

Several commenters, including Gaucher Associates and Siemens USA (Siemens), argued that the term ''Internet and related electronic data technologies'' is vague and requested that OFCCP clarify the meaning of this term in the final rule. OFCCP will not provide a precise definition of this term in recognition of rapid changes in technology in this area. However, OFCCP does intend this term to include the types of technologies referenced in the preamble to the proposed UGESP Additional Questions and Answers as follows:

> Internet-related technologies and applications that are widely used in recruitment and selection today include:
>
> E-mail: Electronic mail allows for communication of large amounts of information to many sources with remarkable ease. Recruiters, employers, and job seekers use e-mail lists to share information about potential job matches. Recruiters send e-mails to lists of potential job seekers. These lists are obtained through various sources of information, such as trade or professional lists and employer Web site directories. Employers publish job announcements through e-mail to potential job seekers identified through similar means. Job seekers identify large lists of companies to receive electronic resumes through e-mail. E-mail allows all of these users to send the same information to one recipient or many, with little additional effort or cost.
>
> Resume databases: These are databases of personal profiles, usually in resume format. Employers, professional recruiters, and other third parties maintain resume databases. Some third-party resume databases include millions of resumes, each of which remains active for a limited period of time. Database information can be searched using various criteria to match job seekers to potential jobs in which they may be interested.
>
> Job Banks: The converse of the resume database are databases of jobs. Job seekers search these databases based on certain criteria to identify jobs for which they may have some level of interest. Job seekers may easily express interest in a large number of jobs with very little effort by using a job bank database. Third-party providers, such as America's Job Bank, may maintain job banks or companies may maintain their own job bank through their Web sites.
>
> Electronic Scanning Technology: This software scans resumes and individual profiles contained in a database to identify individuals with certain credentials.
>
> Applicant Tracking Systems/Applicant Service Providers: Applicant tracking systems began primarily to help alleviate employers' frustration with the large number of applications and resumes received in response to job postings. They also serve the wider purpose of allowing employers to collect and retrieve data on a large number of job seekers in an efficient manner. Whether in the form of custom-made software or an Internet service, the system receives and evaluates electronic applications and resumes on behalf of employers. For example, an employer could have the group of job seeker profiles from a third party provider's system searched, as well of those received on its own corporate Web site entered into one tracking system. The system would then pull a certain number of profiles that meet the employer-designated criteria (usually a particular skill set) and forward those profiles to the employer for consideration.
>
> Applicant Screeners: Applicant screeners include vendors that focus on skill tests and other vendors that focus on how to evaluate general skills. Executive recruiting sites emphasize matching job seekers with jobs using information about the individual's skills, interests, and personality.
>
> 69 FR 10155 (March 4, 2004).

Part 2: ''The employer considers the individual for employment in a particular open position;''

In the proposed rule, the second criterion of the ''Internet Applicant'' definition required that ''[t]he employer considers the individual for employment in a particular open position.'' Subsection (1)(ii). OFCCP made one change to this text in the final rule; the word ''open'' was deleted. The deletion was made to avoid confusion about whether the second criterion is met if an individual is considered for a position that may by open in the future, but is not currently open. Under subsection (1)(ii) it will be sufficient for a contractor to consider an individual for employment in a particular position.

In response to comments received from the LCCR, EEAC and others discussed above, OFCCP added a related provision at subsection (3) of the definition of Internet Applicant in the final rule:

For purposes of paragraph (1)(ii) of this definition, ''considers the individual for employment in a particular position,'' means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not ''consider the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

Subsection (3) explains that a contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures established by the contractor, or not submitted with respect to a particular position. However, the protocol must be uniformly and consistently applied to similarly situated job seekers. As previously mentioned, it is the contractor's actual practice that determines whether the contractor ''considered'' the expression of interest. If a contractor's policy is to accept expressions of interest only through its Web site, but its actual practice is to review faxed resumes as well and to scan those it is interested in into its resume database, then the contractor ''considers'' faxed resumes as well as expressions of interest received through its Web site.

Subsection (3) also provides that if there are a large number of expressions of interest the contractor may use data management techniques to reduce the number of expressions of interest that must be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest. Data management techniques used to reduce the number of expressions of interest to be considered must be facially neutral in terms of race, ethnicity, gender or other protected factors. Data management techniques that produce adverse impact based on race, gender or ethnicity in the expressions of interest that will be considered by the contractor would not be appropriate.

[6] Under a random sampling technique, the employer considers only a small subset of resumes drawn randomly from the 20,000 resumes; many spreadsheets and database software packages offer random sampling functions. Under an absolute numerical limit, the employer reviews only a predesignated number of resumes, such as the first 100 resumes.

Several commenters, including Maly Consulting LLC, ORC, Siemens, and the SIOP, commented generally that the term ''considers'' is ambiguous and requested that OFCCP clarify its meaning. ORC argued that ''considers'' should include the determination of whether an individual meets the basic qualifications for the position.

Siemens was concerned that the term ''considers'' could be interpreted to preclude contractors from searching an internal resume database using successively more precise qualification searches to narrow the pool of potential applicants to a manageable number. Siemens argued that the term ''considers'' should be interpreted to permit contractors to use database searches to narrow a large pool of potential applicants down to a manageable number for individual evaluation. Siemens also recommended that ''considers'' be restricted to the stage in which ''the recruiter or hiring manager evaluates an actual applicant against the employer's requirements and makes a judgment as to which individuals should continue in the process.'' Similarly, SIOP argued that the term ''considers'' should not include searching an external resume database or ''querying an internal database of recruit profiles.''

The U.S. Chamber of Commerce (the Chamber) recommended that the term ''considers'' be interpreted to permit an employer to count as ''applicants'' for OFCCP purposes only ''those individuals best qualified to fill its positions.'' The Chamber argued that this interpretation of ''considers'' is necessary to permit employers to manage large volumes of expressions of interest while retaining their prerogative to select only the best qualified candidates. The Chamber offered an example of how its recommended interpretation of ''considers'' might be applied: ''Hospital A'' has an opening for an emergency room nurse position and advertises that it is seeking registered nurses with hospital experience; Hospital A obtains fifty expressions of interest that meet the advertised, basic qualifications of registered nurse with hospital experience; Hospital A lacks the time or resources to ''consider'' all 50 of these expressions of interest, so it assesses which of the 50 expressions of interest indicate emergency room nursing experience, and finds that 20 of the 50 expressions of interest indicate such experience; Hospital A then looks at 10 out of these 20 expressions of interest with emergency room nursing experience, determines that they are ''good candidates for the job,'' and submits those ten candidates for ''consideration.'' Thus, under the Chamber's recommended interpretation, Hospital A has ''considered'' only the ten individuals whose expressions of interest indicate they are ''good candidates for the job.''

OFCCP agrees with the commenters who recommended that the agency provide clear rules on applicant recordkeeping requirements. It is the agency's intent to provide clear rules for applicant recordkeeping that will allow OFCCP to enforce these requirements and that will provide contractors with meaningful guidance on how to comply with them. Therefore, OFCCP has included an express definition of ''considers the individual for employment in a particular position'' in subsection (3) of the definition of ''Internet Applicant'' in the final rule. Under this definition, ''considers'' involves an assessment of the job seeker's qualifications against any qualifications of a particular position, including a determination of whether a job seeker meets the basic qualifications for the position.

With respect to Siemens' concern about searching a resume database, nothing in the definition of Internet Applicant precludes a contractor from engaging in multiple searches of a resume database, so long as each of the search criteria fall within the definition of ''basic qualifications.'' Moreover, a contractor need not search for all of the qualifications that constitute the ''basic qualifications'' for a particular position. If the contractor chooses not to search for all of the ''basic qualifications'' of the position, then it will collect race and gender information from a broader pool than that framed by search criteria that included all of the ''basic qualifications'' for the position. The final rule provides minimum standards for applicant recordkeeping. It does not prohibit contractors from voluntarily collecting race, ethnicity or gender information from potential applicants, nor does E.O. 11246 preclude contractors from voluntarily obtaining this information from potential applicants, as long as such information is used only for purposes of the contractor's affirmative action and nondiscrimination programs.

However, OFCCP disagrees with Siemens, SIOP and the Chamber with respect to their proposals essentially to eliminate the conditions on ''basic qualifications'' (*i.e.*, that basic qualifications must be noncomparative, objective, and ''relevant to performance of the particular position * * *'') from the proposed definition of Internet Applicant. OFCCP would not have sufficient records to evaluate contractors' recruiting and hiring practices under E.O. 11246 if contractors collected race and gender information in accordance with the recommendations of these commenters. Under these recommendations, OFCCP would be unable to assess a significant portion of a contractor's recruiting and hiring practices, including the impact of basic qualifications[7] and the comparative assessment of candidates. In the Chamber's example, only 10 individuals would be Internet Applicants under their proposal, while 50 would be under the final rule. Under some of these recommendations, OFCCP would be able to assess only the final stages of the contractor's hiring process, leaving open whether there was discrimination at any of the prior stages in the hiring or recruiting processes. Further, many of the recommendations were far too vague to provide a clear rule that OFCCP could enforce or that contractors could apply to their particular recruiting and hiring procedures.

In addition to the comments from LCCR discussed above, LCCR and the National Women's Law Center (NWLC) also expressed concern that the proposed rule leaves to the employer's discretion whom to ''consider'' for a particular position and argued that OFCCP should require employers to ''consider'' all individuals who are similarly situated with respect to the manner of making their expressions of interest. LCCR also noted concern that an employer might make exceptions to its internal procedures: ''[a] misguided employer could decide that he/she only wanted to ''consider'' applicants with certain credentials, or from a particular community, regardless of their actual qualifications for a job.''

As noted above, OFCCP agrees that, for purposes of defining applicant recordkeeping requirements, contractors should not be permitted to selectively determine who will be considered for employment based on the qualification information contained on an expression of interest. Otherwise, OFCCP would not have sufficient information to assess contractors' hiring practices for potential discrimination. As discussed above, OFCCP has addressed this concern through an explicit definition of ''considers the individual for employment in a particular position'' under which contractors do not have

[7] By contrast, under the final rule, OFCCP can assess the impact of ''basic qualifications'' by comparing the demographics of the pool of ''Internet Applicants'' with statistics on the qualified labor force. See discussion under ''Basic Qualifications,'' below.

discretion to assess information about a potential applicant's credentials against any qualification of a particular position without thereby having ''considered'' the potential applicant.

In addition, the final rule (at § 60–1.12(a)) requires contractors to retain records of qualifications used in the hiring process and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a position, including records such as on-line resumes or internal resume databases and records identifying job seekers contacted regarding their interest in a particular position. The rule also specifies that with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. In addition, with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. These records are to be maintained regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3. Existing recordkeeping requirements (under § 60–1.7 and 1.12) and OFCCP's investigative rights (under § 60–1.20) enable OFCCP to determine whether a qualification actually was used for a particular position. The recordkeeping requirements embodied in the final rule combined with the existing OFCCP recordkeeping requirements will ensure that OFCCP has adequate information to assess whether employers are selectively ''considering'' only certain candidates or imposing qualification standards that do not meet the definition of ''basic qualifications'' under the final rule.

Part 3: ''The individual's expression of interest indicates the individual possesses the advertised, basic qualifications for the position;''

In the proposed rule, the third criterion of the ''Internet Applicant'' definition required that ''[t]he individual's expression of interest indicates that the individual possesses the advertised, basic qualifications for the position.'' 69 FR 16446, 16447 (March 29, 2004). The proposed rule defined ''advertised, basic qualifications'' as ''qualifications that the employer advertises (*e.g.*, posts a description of the job and necessary qualifications on its Web site) to potential applicants that they must possess in order to be considered for the position and that meet all of the following three conditions * * *.'' *Id.* at 16449.

A. ''Advertised, basic qualifications''

1. ''Advertised''

Several commenters argued that the ''advertised'' component of the proposed definition of Internet Applicant conflicts with the way employers recruit for employees in many instances. EEAC argued that many employers use ''broadcast recruitment,'' under which the employer permits job seekers to submit a resume or register an expression of interest ''in being considered for a range of positions, a broad category of positions, or in some cases simply any position for which the employer might currently or at some time in the future consider the individual to be a good candidate.'' Siemens asserted that the proposed requirement that the basic qualifications be advertised could place ''undue emphasis on the drafting of the initial announcement of the vacancy and qualifications.'' Siemens argued that employers cannot know in advance whether an advertised qualification will produce too few or too many candidates who meet the basic qualifications, and recommended that the final rule afford contractors flexibility to be able to ensure an adequate, but manageable applicant pool. SIOP provided comments similar to both EEAC and Siemens. HR Analytical Services noted that employers may at times truncate qualifications listed in an advertisement or job posting to save cost or space. ORC, SHRM, and Thomas Houston Associates, Inc. argued that many job seekers submit expressions of interest without ever viewing an advertisement for a specific position. Most of these commenters suggested that OFCCP revise the proposed definition of Internet Applicant to include qualifications that are ''advertised or established.''

OFCCP acknowledges that in certain circumstances a contractor may not have an opportunity because of emergent business conditions to advertise a position before hiring a new employee. To address this issue, the final rule provides an alternative for qualifications that are not advertised. The final rule provides that if the contractor does not advertise for the position, the contractor may use ''an alternative device to find individuals for consideration (for example, through an external resume database),'' and establish the qualification criteria by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that position. Contractors must retain records of these established qualifications in accordance with section 60–1.12(a).

In response to the comments, OFCCP modified this part in the final rule by eliminating the word ''advertised.'' Thus, subsection (1)(iii) of the definition of ''Internet Applicant'' in the final rule provides, ''[t]he individual's expression of interest indicates the individual possesses the basic qualifications for the position. * * *''

2. ''Basic Qualifications''

Many commenters expressed general approval of the ''basic qualifications'' component of the proposed rule.[8] Several commenters approved generally of the concept of ''basic qualifications,'' but requested modifications of the proposed rule. For example, several commenters, such as HR Analytical Services, SHRM, and Thomas Houston Associates, Inc., argued that the term ''basic qualifications'' would cause confusion because it is not a term that is commonly used by employers, job seekers, or recruiters. These commenters recommended that the term ''minimum qualifications'' be used instead of ''basic qualifications,'' and argued that employers, job seekers, and recruiters already understand and use the term ''minimum qualifications.''

SHRM and HR Analytical Services also expressed concern that the word ''basic'' in the term ''basic qualifications'' somehow could be interpreted as a substantive limit on the types of qualifications that could qualify under the definition, over and above the substantive limits contained in the proposed definition of ''basic qualifications,'' *i.e.*, that they are noncomparative, objective, and job related. SHRM and SIOP recommended that OFCCP provide more guidance on what qualifications are ''basic'' in the final rule.

OFCCP disagrees with these commenters that a term other than ''basic qualifications'' is desirable for purposes of the final rule. OFCCP believes that borrowing a term from common usage would cause more confusion, not less. The term ''basic qualifications'' is carefully defined in

[8] *See* note 4, above.

the final rule to satisfy OFCCP compliance monitoring purposes. Under this definition, any qualification that is noncomparative, objective, and ''relevant to performance of the particular position and enabl[ing] the contractor to accomplish business-related goals'' may be a ''basic qualification.'' However, employment tests used as employee selection procedures, including on-line tests, are not considered basic qualifications under the final rule. Contractors are required to retain records about the gender, race and ethnicity of employment test takers who take an employment test used to screen them for employment, regardless of whether test takers are Internet Applicants under section 60–1.3. For example, if 100 job seekers take an employment test, but the contractor only considers test results for the 50 who meet the basic qualifications for the job, demographic information must be solicited only for the 50 job seekers screened by test results because the test was used as a selection procedure only for those individuals. By contrast, if the contractor used the test results from 100 test takers to narrow the pool to 50 job seekers whose basic qualifications are considered, the test is used as a selection procedure and demographic information from all test takers must be solicited.

The term ''basic'' is not intended to provide any substantive limit on the type or range of qualifications that could meet this definition. Rather than offer examples of qualifications that meet the definition of ''basic qualifications'' for particular jobs—which would require OFCCP to describe the actual duties and responsibilities corresponding to the job titles referenced in such examples—OFCCP provides additional discussion of the components (*i.e.*, noncomparative, objective, and ''relevant to performance of the particular position * * *'') of the definition in response to comments under separate headings below.

A job seeker must meet all of a contractor's basic qualifications in order to be an Internet Applicant under today's rule. For example, a contractor initially searches an external job database with 50,000 job seekers for 3 basic qualifications for a bi-lingual emergency room nursing supervisor job (a 4-year nursing degree, state certification as an RN, and fluency in English and Spanish). The initial screen for the first three basic qualifications narrows the pool to 10,000. The contractor then adds a fourth basic qualification, 3 years of emergency room nursing experience, and narrows the pool to 1,000. Finally, the contractor adds a fifth basic qualification, 2 years of supervisory experience, which results in a pool of 75 job seekers. Under this final rule, only the 75 job seekers meeting all five basic qualifications would be Internet Applicants, assuming other prongs of the definition were met.

Several other commenters asserted that OFCCP's proposal was unclear about whether screening for criteria other than qualifications would be deemed ''basic qualifications'' under the definition of Internet Applicant. For example, Morgan Lewis & Bockius LLP asked whether job seekers' salary requirements used to define the applicant pool would be deemed ''basic qualifications.'' SIOP questioned whether ''willingness to work in a specific geographic location,'' ''willingness to travel a certain percentage of time,'' and ''willingness to work certain days or shifts'' would qualify as ''basic qualifications.'' Several commenters, such as NAM and Maly Consulting LLC, asked whether contractors' use of random sampling or specific numerical limits (*e.g.*, first 30 reviewed out of 10,000) to manage large volumes of expressions of interest would be deemed ''basic qualifications.''

OFCCP recognizes that contractors may gauge a job seeker's willingness to work in the particular position through information the individual has provided about salary requirements and willingness to work in certain types of positions or certain geographic areas, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. OFCCP also recognizes that contractors may need to use additional data management techniques (such as random sampling or numerical limits) to develop a reasonable applicant pool out of a large volume of job seekers who possess the basic qualifications for the particular position. OFCCP does not view use of such information or techniques to determine who is interested in a particular position to be consideration of ''basic qualifications,'' provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications. OFCCP addressed these comments in the final rule by modifying the fourth part of the Internet Applicant definition to require that ''[t]he individual at no point in the contractor's selection process * * * removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.'' The final rule includes a provision (subsection (5) of the definition of ''Internet Applicant'') under which ''a contractor may determine that an individual has removed himself or herself from further consideration * * * based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contactor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.'' In addition, as discussed above with regard to Part 2 of the Internet Applicant definition (subsection (1)(ii)), OFCCP added a definition of ''considers the individual for employment in a particular position,'' which also addresses these issues.

In response to the comments, OFCCP modified subsection (4) of the definition of ''Internet Applicant'' by defining ''basic qualifications'' as: ''qualifications (i)(A) that the contractor advertises (*e.g.*, posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or (B) for which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position, if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (*e.g.*, through an external resume database), and (ii) that meet all of the following three conditions * * *'' In the final rule, OFCCP retained most of the text of the proposed rule with respect to the ''three conditions'' referenced in the definition of ''basic qualifications.'' Thus, the final rule provides:

(A) The qualifications must be noncomparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, ''a Bachelor's degree in Accounting'' is objective, while ''a technical degree from a good school'' is not. A basic qualification is objective if a third-party, with the contactor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

Several commenters opposed the use of ''basic qualifications'' in defining ''Internet Applicant'' for purposes of OFCCP recordkeeping requirements. The Leadership Conference on Civil Rights, the National Women's Law Center, and the Lawyers' Committee for Civil Rights Under Law generally offered three arguments against the use of ''basic qualifications'' as a way to determine applicant recordkeeping obligations: (1) Established nondiscrimination legal standards do not require an individual to be qualified for a job in order to be an applicant for the job; (2) employers could use the ''basic qualifications'' to manipulate the composition of the applicant pool, exclude qualified individuals, and mask discrimination; and (3) the purpose of applicant recordkeeping is to ensure that the qualifications standards employers use, including ''basic qualifications,'' do not discriminate against individuals on the basis of race, ethnicity or sex. In sum, these commenters essentially were concerned that OFCCP would not be able to find and remedy particular cases of hiring discrimination under the proposed rule.

OFCCP disagrees with the three arguments presented by these commenters. As to the commenters' first argument, OFCCP is proposing a definition of applicant for the limited purposes of OFCCP recordkeeping and data collection requirements pursuant to Executive Order 11246. Accordingly, OFCCP is not purporting to define who is an applicant for any purposes which would affect the substantive interests of any individual, such as for purposes of litigation of employment discrimination claims under any federal, state, or local antidiscrimination statute. Moreover, OFCCP is not aware of any case in which a court relied on OFCCP's recordkeeping definitions for purposes of determining liability or remedy under Title VII or any other federal, state or local antidiscrimination statute. OFCCP itself may not rely on recordkeeping definitions to frame the appropriate analysis for liability or remedy purposes when alleging a violation of the nondiscrimination requirements of Executive Order 11246 (as opposed to recordkeeping requirements).

As to the commenters' second argument, contractors will not be able to manipulate basic qualifications in order to effectuate discrimination, because the final rule provides adequate safeguards against this problem. First, the final rule requires a contractor to retain all the expressions of interest it considered, even those of individuals who are not Internet Applicants.[9] OFCCP will have access to these records during a compliance evaluation and will review them as appropriate to determine if discrimination exists. Second, OFCCP has carefully defined ''basic qualifications'' in the final rule, requiring that they be noncomparative, objective, and ''relevant to the performance of the particular position and enabl[ing] the contractor to accomplish business-related goals.'' Under the final rule, a contractor must retain records of all such basic qualifications used to develop a pool of Internet Applicants. Again, OFCCP will have access to these records during a compliance evaluation.

Finally, OFCCP will rely on Census and other labor market data to assess contractors' hiring practices for potential discrimination and will carefully review the basic qualifications themselves. The Supreme Court of the United States has authorized the use of comparisons between actual hiring rates and population or labor force statistics to prove hiring discrimination. *See Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 339 n.20 (1977) (population statistics); *Hazelwood Sch. Dist.* v. *United States,* 433 U.S. 299, 307 n.12 (1977) (labor force statistics). As noted in the preamble of the proposed rule, hiring discrimination cases frequently rely on population and labor force statistics. *See, e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 n.6, 431 (1971) (relying on Census data about the general population to find that a high school degree requirement had a disparate impact on African-Americans); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329–330 (1977) (''The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.''); *E.E.O.C.* v. *Joint Apprenticeship Comm. of Joint Industrial Bd. of Elec. Indus.,* 186 F.3d 110, 119 (2d Cir. 1999) (general population and qualified labor market data ''often form the initial basis of a disparate impact claim * * *''). OFCCP also will directly review whether the qualifications appear to be relevant to the position at issue and whether they are of a type that have been subject to disparate impact litigation, such as requirements as to height and weight, arrest records, and high school degree or GED. *See, e.g.*, 41 CFR 60–3.4(C) (requiring users to evaluate individual components of hiring process ''where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances'').

As to the commenters' third argument against ''basic qualifications''—that OFCCP will miss particular cases of disparate impact discrimination—OFCCP disagrees that the proposed applicant recordkeeping standards will make OFCCP less effective at finding and remedying hiring discrimination. Indeed, OFCCP has determined that applicant data under the proposed definition of Internet Applicant will make the agency much more effective at finding and remedying hiring discrimination across the range of cases. OFCCP's rationale can be appreciated only through an understanding of how the agency uses applicant data. OFCCP's use of applicant data is broader than determining whether a particular contractor has engaged in hiring discrimination. The distinction in uses of applicant data reflects OFCCP's historical mission of focusing on systemic workplace discrimination. In *Reynolds Metal Co.* v. *Rumsfeld,* 564 F.2d 663, 668 (4th Cir. 1977), the court described OFCCP's mission and contrasted it with the EEOC's:

Both agencies are charged with the responsibility of eliminating employment discrimination, but their specific missions differ. The compliance office monitors government contractors to determine whether they are meeting their commitments as equal opportunity employers. It gives priority to the eradication of systemic discrimination rather than to the investigation and resolution of complaints about isolated instances of discrimination.

In keeping with its unique mission, OFCCP uses applicant data broadly to deter all contractors under its jurisdiction from engaging in systemic hiring discrimination, either in the form of disparate impact or disparate treatment discrimination. OFCCP deters contractors in two ways: (1) By monitoring all contractors through a tiered-review approach that effectively targets contractors who have engaged in hiring discrimination; and (2) by effectively investigating contractors who have engaged in systemic hiring discrimination and obtaining significant financial awards (along with instatement obligations) to remedy such discrimination.

[9] With the exception of expressions of interest from external resume databases, where the massive volume of resumes makes such a requirement impracticable. As noted below, as of January, 2005, Monster.com reported that it had over 41 million resumes in its database.

OFCCP primarily uses applicant data with respect to the first part of the two-part deterrence model. OFCCP uses the data to target OFCCP investigations at workplaces in which hiring discrimination is likely to exist. OFCCP initially selects a contractors establishment for a compliance evaluation based, in part, on a statistical analysis of workforce demographic data the contractor submits on annual EEO–1 reports. Once OFCCP selects a contractor's establishment for a compliance evaluation, OFCCP sends the contractor a ''scheduling letter'' that asks the contractor to submit data on, among other things, applicants and hires for a specified period. After receiving the contractor's data, OFCCP analyzes the ratio of applicants and hires, and, based on this analysis, determines whether to investigate the contractor's hiring practices. This initial analysis of applicant and hire data is a part of the compliance evaluation process known as the ''desk audit.'' OFCCP considers desk audit results when determining whether to conduct an on-site investigation, and the scope of any such on-site investigation. OFCCP typically conducts many more desk audits than on-site reviews, and uses the desk audit analysis to allocate agency investigation resources toward workplaces where the likelihood of a discrimination problem is highest.

Thus, inclusion of basic qualifications in the definition of Internet Applicant under section 60–1.3 furthers OFCCP's goal of targeting for in-depth reviews contractor's that are potentially the worst offenders. If, during the desk audit, OFCCP were to target contractors for more in-depth review based on Internet applicant data that includes job seekers not meeting basic qualifications, OFCCP would select contractors that rejected a high proportion of job seekers because they were not even minimally qualified for the job. The result would be that OFCCP would waste finite resources by focusing its on-site reviews on contractors that were not the worst offenders. Under the OFCCP approach, targeting will be based on a contractor's rejection rate of qualified applicants, a better predictor of worst offenders. In determining who are potentially the worst offenders for more in-depth reviews, OFCCP will also analyze whether the contractor potentially discriminated in hiring by comparing the demographic characteristics of the applicants hired to the demographic characteristics of the qualified labor market. During an in-depth review, OFCCP will be able to analyze the contractor's use of basic qualifications by comparing the demographic characteristics of Internet applicants meeting basic qualifications with labor market data. Consequently, including basic qualifications in the definition of Internet Applicant furthers OFCCP's goal of focusing investigative resources on potentially the worst offenders, while preserving OFCCP's ability to efficiently and effectively review a contractor's hiring practices for discrimination.

In addition to the fact that such data would not permit meaningful analysis to guide OFCCP resource allocation decisions, some practical limits must be placed on collecting race, ethnicity, and gender information in this context because of the massive numbers of resumes in these databases. Otherwise, the applicant recordkeeping burdens would be excessive. Several commenters proposed various alternative definitions for ''basic qualifications'' that appeared to be attempts to address these practical problems. For example, Gaucher Associates contended that contractors could use sampling techniques to obtain race, ethnicity and gender data where there are large numbers of applicants. In limited circumstances contractors may use appropriate sampling techniques to collect information required by these regulations (See 41 CFR 60–3.4.A). However, sampling is not always appropriate. For example, a random sample that includes many individuals in a large resume database who have no interest in, nor basic qualifications for, a particular position would provide far less useful information than labor force statistics that are tailored for the position and geographic location.

One commenter, ChevronTexaco Federal Credit Union (CTFCU), argued that the proposed rule would impose undue burdens on small contractors where a significant number of individuals who meet the basic qualifications submit an expression of interest.

CTFCU contended that small contractors cannot afford automated applicant tracking systems and they cannot manually consider all individuals who meet the basic qualifications. CTFCU recommended that OFCCP apply the proposed ''Internet Applicant'' definition and associated obligations only to ''employees showing underutilization of women and/or minorities,'' based on workforce demographic data from EEO–1 reports.

OFCCP believes that data management techniques such as random sampling or absolute numerical limits, discussed above, will enable small contractors to comply with applicant recordkeeping requirements without undue burden. OFCCP does not agree that CTFCU's recommendation would necessarily help small businesses because the burden involved with this proposal depends entirely on the amount of ''underutilization.'' Nor would this proposal provide records that OFCCP requires to enforce E.O. 11246 for job categories in which there was no ''underutilization.'' As OFCCP understands this proposal, contractors would not be required to collect race, ethnicity or gender information about *any* individuals considered for positions in job categories that are not ''underutilized.'' However, the fact that a broad occupational category, such as an AAP job group or EEO–1 job category, is ''utilized'' does not necessarily imply that there is not a discrimination problem in the recruiting or hiring process for the jobs that make up those occupational categories.

3. ''Non-comparative''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''non-comparative.'' The proposed rule provided examples of qualifications that would and would not qualify as ''non-comparative'': ''a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.'' OFCCP retained this provision in the final rule.

The Chamber argued that ''[e]stablished caselaw permits employers to set job qualifications 'as high as [they] like [],' based on current business needs, and permits employers to craft selection procedures that enable them to identify the best-qualified candidates for the job.'' Based on this argument, the Chamber asserted that the ''noncomparative'' component of the proposed rule should not be interpreted ''to imply that a candidate becomes an ''applicant'' simply because he or she possesses the 'basic' qualifications for the position.''

OFCCP disagrees with the Chamber's comments. OFCCP's proposed definition of Internet Applicant determines contractors' recordkeeping obligations, it does not impose substantive limits on the qualifications a contractor may use to select employees. Under the interpretation suggested by the Chamber, OFCCP would not have sufficient records or information to evaluate whether a contractor's hiring practices were discriminatory. In particular, OFCCP would not be in a position to evaluate a contractor's comparative assessment of applicants' qualifications. Therefore, OFCCP retained in the final rule the requirement that ''basic qualifications'' must be noncomparative.

4. ''Objective''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''objective'' and not depend on the employer's subjective judgment. OFCCP used the term ''third party'' in the proposed rule to describe how to determine whether a qualification is objective: ''One way to tell an advertised, basic qualification is objective is that a third-party, unfamiliar with the employer's operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment.''

ORC expressed concern that the term ''third party'' is ambiguous and that OFCCP's proposed definition does not provide meaningful guidance about whether a qualification is ''objective.'' Similarly, Nancy J. Purvis argued that the reference to ''third parties'' would not work in ''situations where only someone with sufficient technical knowledge (of the company, of the industry, of the job, etc.) will be able to evaluate whether or not an applicant meets the basic requirements.''

OFCCP agrees with these commenters that, as described in the proposed rule, the term ''objective'' left unanswered whether the referenced ''third-party'' has the necessary technical expertise to understand whether a candidate possesses a technical qualification. It is not OFCCP's intent to preclude technical qualifications from being ''basic qualifications.'' Accordingly, OFCCP modified the second sentence of subsection (4)(b) to provide that a basic qualification is objective if a third party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

5. ''Job related''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''job-related.'' The proposed rule defined ''job-related'' as ''relevant to performance of the job at hand and enabl[ing] the employer to accomplish business-related goals.'' In response to the comments, OFCCP eliminated the term ''job-related'' and replaced it with the phrase, ''relevant to the performance of the particular position and enabl[ing] the contractor to accomplish business-related goals'' at subsection (4)(c) of the definition of ''Internet Applicant''.

The Lawyers' Committee for Civil Rights Under Law and the Leadership Conference on Civil Rights (LCCR) criticized the requirement in the proposed rule that ''basic qualifications'' must be ''job related.'' They noted that the Civil Rights Act of 1991 provides a defense to disparate impact claims if the criteria having the disparate impact can be shown to be ''job related for the position in question'' and ''consistent with business necessity.'' [10] These commenters argued that OFCCP's proposed rule leaves out the requirement that the basic qualifications must be ''consistent with business necessity.'' LCCR further argued that ''the explanation of what is meant by 'job-related' seems to understate what the law requires by suggesting that any 'relevant' job criteria is sufficient to satisfy the legal standard.''

OFCCP agrees with these commenters that use of the term ''job-related'' in the proposed definition of ''Internet Applicant'' could cause confusion because the term is also used in the Civil Rights Act of 1991. Indeed, there is uncertainty as to the meaning of ''job related'' under the Civil Rights Act of 1991.[11] Therefore, OFCCP has eliminated the term in the final rule and replaced it with the phrase, ''relevant to performance of the particular position and enabl[ing] the contractor to accomplish business-related goals.''

OFCCP disagrees with the commenters' suggestion that the ''business necessity'' standard should be incorporated into the definition of ''basic qualifications.'' OFCCP does not intend to limit the qualifications that could be ''basic qualifications'' only to those which meet the ''business necessity'' standard. That standard is applicable as a *defense* where a disparate impact has already been proven. By including the ''relevant to performance of the particular position * * *'' standard in the final rule as a limitation on qualifications that could qualify as ''basic qualifications,'' OFCCP intends to provide a reasonable limit on the nature of the qualifications used only to define recordkeeping obligations. OFCCP does not intend to define recordkeeping obligations through a presumption that every putative ''basic qualification'' involves a disparate impact. Of course, once it is established that a criterion caused a disparate impact, the contractor has the burden of justifying that the criterion is job related and consistent with business necessity.

Part 4: ''The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.''

In the proposed rule, the fourth part of the ''Internet Applicant'' definition provided that ''[t]he individual does not indicate that he or she is no longer interested in employment in the position for which the employer considered the individual.''

Several commenters, including EEAC, Morgan, Lewis & Bockius LLP, and the Chamber, argued against the negative phrasing of this part of the proposed definition of ''Internet Applicant'' because it implies that an individual is presumed to be interested in a particular position even before the employer contacts the individual. These commenters expressed concern that an individual who does not respond to an employer's inquiry would automatically qualify as an Internet Applicant because the individual has not indicated ''that he or she is no longer interested in the position.''

OFCCP does not believe that the negative phrasing of this part of the proposed rule implies—and OFCCP does not intend for the language to imply—a presumption that every individual who otherwise meets the

[10] The Lawyers' Committee for Civil Rights Under Law joined in LCCR's comments. However, the Lawyers' Committee did not expressly reference the Civil Rights Act of 1991 in its comments, but referred only to ''established legal precedent.'' We understand the Lawyers' Committee to be referencing the Civil Rights Act of 1991 with respect to the standard for defense of a disparate impact claim.

[11] The Civil Rights Act of 1991 does not define the terms ''job related'' or ''business necessity.'' Nor have the federal courts of appeals agreed upon any single explanation of these terms. *Compare Bew* v. *City of Chicago*, 252 F.3d 891, 894 (7th Cir. 2001) (finding that the Civil Rights Act of 1991 adopted the *Griggs* standard and noting that ''Griggs does not distinguish business necessity and job relatedness as two separate standards. It states that: 'The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.' To satisfy the standard, an employment test must 'bear a demonstrable relationship to successful performance of the jobs for which it was used.' '' (citations omitted)), with *Ass'n of Mexican-American Educators* v. *State of California*, 231 F.3d 572, 585 (9th Cir. 2000) (en banc) (explaining that a 'job related' test measures ''skills, knowledge or ability required for successful performance of the job''), with *Lanning* v. *Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 489 (3d Cir. 1999) (''Our conclusion that the Act incorporates this standard is further supported by the business necessity language adopted by the Act. Congress chose the terms 'job related for the position in question' and 'consistent with business necessity.' Judicial application of a standard focusing solely on whether the qualities measured by an entry level exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard.'').

definition of Internet Applicant is deemed by OFCCP to be automatically interested in the particular position, even before the contractor contacts the individual. Subsection (5) explains that a contractor may conclude that an individual has removed himself or herself from the selection process or has otherwise indicated lack of interest in the position based on the individual's express statement or on the individual's passive demonstration of disinterest. For example, if an individual declines a contractor's invitation for a job interview, he or she has removed himself or herself from the selection process. If the individual declines a job offer he or she has expressly shown disinterest in the job. If an individual repeatedly fails to respond to a contractor's telephone inquiries or emails asking about his or her interest in a job, the individual has passively shown disinterest in the job. In addition to determining an individual's abandonment of interest through an express or passive negative response to the contractor's inquiry as to whether the individual is interested in the position, a contractor may also presume a lack of continuing interest based on a review of the expression of interest. Statements pertaining to the individual's interest in the specific position or type of position at issue, the location of work, and his or her salary requirements may provide the basis for determining the individual is no longer interested in the position, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If the potential applicant withdraws from further consideration after the point at which the individual already has qualified as an ''Internet Applicant'' under this final rule, the employer must retain any race, ethnicity, or gender information which the individual already provided, as well as the individual's expression of interest.

In response to the comments, which expressed concern with the clarity of the proposed rule, OFCCP has slightly modified this part (subsection (1)(iv)) in the final rule to read: ''(iv) 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.'' OFCCP also explained in subsection (5) of the definition of ''Internet Applicant'' in the final rule that a contractor may determine whether an individual has removed himself or herself from consideration based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. Subsection (5) further explains that if a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

Comments on OFCCP's Proposed Revisions To Record Retention Requirements Section 60–1.12(a): Record Retention

In the proposed rule, OFCCP added to existing recordkeeping requirements a provision which would require contractors to maintain ''any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CFR 60–1.3).''

Many commenters expressed concern that the proposed record retention requirements would impose significant burdens on contractors, due to the massive volume of expressions of interest.[12] TOC Management Services (TOC) contended that the proposed rule would require employers to maintain all unsolicited expressions of interest, even those that were never considered by the employer. TOC asserted that this proposed requirement runs contrary to OFCCP's longstanding practice of allowing an employer to dispose of unsolicited expressions of interest if the employer adheres to a general policy of not considering them. The Chamber argued that the proposed recordkeeping provision ''would require employers to search all the computer and paper files of each of its employees to identify any expressions of interest that were sent to someone in the company but were never routed through the appropriate channels to those responsible for recruitment and hiring.'' Kairos Services, Inc. suggested that contractors should be required only to maintain records on individuals who qualify as ''Internet Applicants'' under the proposed rule.

In response to the comments, OFCCP modified section 60–1.12(a) of the final rule to require contractors to maintain any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases and records identifying job seekers contacted regarding their interest in a particular position. In addition, for internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. Also, for external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of any job seekers who met the basic qualifications for the particular position who are considered by the contractor. These records must be maintained regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3.

OFCCP agrees that the proposed rule could present unwarranted recordkeeping burdens if the contractor receives a large number of expressions of interest. Therefore, OFCCP modified this provision in the final rule to clarify that contractors must maintain ''expressions of interest through the Internet or related electronic data technologies *as to which the contractor considered the individual for a particular position* * * *'' [emphasis added]. ''Considers the individual for employment in a particular position'' (as defined in subsection 3 of the definition of ''Internet Applicant'') means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position.

If there are a large number of expressions of interest to be considered, the contractor does not ''consider'' the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

Under section 60–1.12(a), contractors avoid significant burdens even if there are large numbers of expressions of interest, because contractors are not required to retain records regarding individuals who were never considered for a particular position. However, OFCCP disagrees with the suggestion that contractors be required to maintain only expressions of interest of individuals who qualify as ''Internet Applicants.'' Part of the reason that OFCCP requires contractors to maintain such records is to ensure that they are actually complying with the definition of ''Internet Applicant.'' OFCCP could not verify the contractor's compliance with the ''Internet Applicant'' definition if the agency did not have access to records of individuals whom the contractor contends did not meet that definition.

Several commenters, including NAM, Siemens, and TOC, were also concerned that the proposed rule would require contractors to maintain a ''snapshot'' of the resume database for each search. These commenters suggested that OFCCP require employers to retain any resume databases, specific search terms used in each search, and the date of each search.

OFCCP agrees with these commenters and believes that their recommended approach avoids recordkeeping burdens and affords OFCCP adequate records to ensure compliance. Therefore, OFCCP added a provision to section 60–1.12(a) of the final rule which requires contractors to maintain the following information from internal resume databases: ''A record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search * * *.''

Maly Consulting LLC was concerned that the proposed rule would require contractors to download and retain all resumes on a third-party resume database, whenever the contractor searched the database for potential applicants. OFCCP agrees that it would be unreasonable to require an employer to maintain a copy of every record on a third-party resume database. For example, Monster.com reported that as of January, 2005, it had over 41 million resumes in its resume database. Therefore, in the context of a third-party resume database, the final rule requires contractors to retain resumes only of job seekers who met the basic qualifications for the particular position who are considered by the contractor, and records identifying job seekers contacted regarding their interest in a particular position, along with a record of the position for which each search of the database was made, the substantive search criteria used, and the date of the search.

Section 60–1.12(c)(1)(ii): ''Where possible, the gender, race, and ethnicity of each applicant (i.e., submissions that are not through the Internet and related electronic technologies) and Internet Applicant as defined in 41 CFR 60–1.3.''

In the proposed rule, OFCCP added the term ''Internet Applicant'' into an existing provision of OFCCP regulations which requires contractors to identify ''where possible, the gender, race, and ethnicity of each applicant.'' As discussed under Part 1 of the definition of Internet Applicant above, OFCCP modified this provision in the final rule to eliminate dual standards when the contractor accepts or considers expressions of interest submitted through either the Internet or traditional means for a particular position. Thus, under the final rule, the contractor must identify, ''where possible, the gender, race, and ethnicity of each applicant or Internet Applicant as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.''

Obligation To Solicit Race, Ethnicity and Gender Data

Northern California and Silicon Valley Industry Liaison Group (NCILG) argued that neither UGESP nor existing OFCCP regulations required contractors to solicit or obtain race, ethnicity, and gender data and that OFCCP misinterpreted UGESP and existing OFCCP regulations by asserting such a requirement in the preamble of the proposed rule. NCILG further contended that UGESP and OFCCP's existing regulations required only that contractors ''maintain'' race, ethnicity, and gender data, but there was no affirmative obligation to obtain or solicit such data. NCILG and Affirmative Action Partners, Inc. objected to any requirement that contractors solicit race, ethnicity, or gender information from applicants.

OFCCP disagrees with these commenters. OFCCP historically has taken the position that contractors have some obligation to collect race, ethnicity, and gender information from applicants. OFCCP intends to make clear that, under the final rule, contractors are required to solicit race, ethnicity, and gender information from ''applicants'' or ''Internet Applicants,'' whichever is applicable to the particular position. OFCCP intends this to be a mandate, not an option, because OFCCP requires this information to enforce E.O. 11246, as discussed throughout this preamble.

SHRM argued that requiring employers to collect race, ethnicity, and gender data from all Internet Applicants would impose significant burdens on employers. OFCCP disagrees that the final rule imposes significant burdens on contractors compared with existing recordkeeping requirements. The final rule draws an appropriate balance between, on the one hand, the need of OFCCP and the contractor for certain information and records to enforce and comply with E.O. 11246, and, on the other hand, the practical realities of Internet recruiting.

Several commenters, including GBCS, NILG, and SIOP, expressed concern that the OFCCP proposal does not clearly identify the point in the employment process at which contractors are required to collect race, ethnicity and gender data. Under the final rule, contractors are required to solicit race, ethnicity, and gender data from all individuals who meet the definition of Internet Applicant. OFCCP does not mandate a specific time or point in the employment process that contractors must solicit this information, so long as the information is solicited from all Internet Applicants.

Methods for Complying With the Rule

Several commenters, including NILG, Thomas Houston Associates, Inc., and SHRM, expressed concern that the OFCCP proposal does not provide clear guidance on permissible methods for collecting race, ethnicity, and gender data. NCILG requested that OFCCP ''reaffirm'' that contractors have no obligation to somehow obtain race, ethnicity or gender data from individuals who refuse to voluntarily disclose such information in response to the contractor's solicitation. GBCS questioned whether contractors would be required to make a visual observation of individuals who refuse to voluntarily disclose race, ethnicity or gender information on a written solicitation

[12] *See, e.g.*, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Kairos Services, Inc., Louisiana Pacific Corp., ORC Worldwide, Morgan, Lewis & Bockius LLP, National Association of Manufacturers, and U.S. Chamber of Commerce.

form. Nancy J. Purvis argued that contractors should be permitted to continue to use visual observation as a means of identifying the race, ethnicity and gender of applicants. SHRM recommended that employers be permitted to gather race, ethnicity, and gender data through either visual observation or self-identification. Affirmative Action Partners, Inc. (AAPI) offered several problems with collecting and maintaining race, ethnicity, and gender data on job applicants. In particular, AAPI noted that it does not promote EEO compliance to allow hiring managers to have access to candidates' race, ethnicity, or gender.

OFCCP agrees with these commenters that further clarification of these issues would promote compliance with applicant recordkeeping requirements. OFCCP recently issued a Policy Directive on this subject. *See* ADM 04–1, ''Contractor Data Tracking Responsibilities,'' which is available on OFCCP's Web site at *http://www.dol.gov/esa/regs/compliance/ofccp/directives/dir265.htm.* The Directive was prompted by the Office of Management and Budget's (OMB) 1997 Revision to the Standards for the Classification of Federal Data on Race and Ethnicity (62 FR 58782) and its Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity (2000). The OMB Standards and Provisional Guidance emphasize self-reporting or self-identification as the preferred method for collecting data on race and ethnicity. In situations where self-reporting is not practicable or feasible, observer information may be used to identify race and ethnicity. Prior to the 1997 Standards, the position of the Federal Government was that the preferred method of collecting race and ethnic data was visual observation and that self-reporting was not encouraged.

OFCCP issued the Directive on Contractor Data Tracking Responsibilities to make OFCCP's policy on collection of demographic information on applicants consistent with OMB's 1997 Standards. The Directive is applicable to collection of race, ethnic and gender information about applicants under all of OFCCP's regulations, including 41 CFR 60–1.12(c) and 41 CFR Part 60–3. The Directive encourages contractors to use tear off sheets, post cards, or short forms to request demographic information from applicants. These methods can be adapted to electronic formats for recordkeeping regarding Internet Applicants. For example, some contractors have developed ''electronic tear off sheets'' for use with electronic applications that separate reported demographic information to be maintained for record keeping from electronic applications reviewed by employers. Other contractors have sent e-mails to individuals submitting electronic applications, requesting additional information necessary to process the application, including demographic information. The contractor's invitation to an applicant to self-identify his or her race, ethnicity or gender is always to state that the provision of such information is voluntary. Visual observation may be used when the applicant appears in person and declines to self-identify his or her race, ethnicity or gender.

Use of Labor Force Statistics and Census Data

In the NPRM, OFCCP noted that it will ''compare the proportion of women and minorities in the contractor's relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. If there is a significant difference between these figures, OFCCP will investigate further as to whether the contractor's recruitment and hiring practices conform with E.O. 11246 standards.''

Several commenters, including EEAC, ORC, and the Chamber, expressed concern about OFCCP's proposed use of labor force statistics and Census data under the proposed rule. ORC, Gaucher Associates, and the Chamber argued that Census and workforce data may not provide a valid basis for assessing contractors' recruitment or hiring practices because these data do not reflect current labor market conditions or because the Census occupational categories are too general to provide accurate workforce data for specific jobs. ORC recommended that OFCCP should rely on each contractor's own availability statistics as a basis for assessing the contractor's recruitment and hiring practices.

OFCCP disagrees with these commenters that appropriate Census and other labor market data are not reliable benchmarks for assessing contractors' recruitment and hiring practices. As noted above, courts frequently approve of this type of data in recruitment and hiring discrimination cases under Title VII. OFCCP intends to use such data during compliance reviews to determine whether basic qualifications have an adverse impact on the basis of race, ethnicity, or gender. OFCCP does not agree that it should rely exclusively on availability data compiled by contractors, although OFCCP will generally consider such data. OFCCP must ensure that such data is accurate for compliance monitoring and enforcement purposes.

The NCILG urged OFCCP to rescind the requirement that contractors conduct adverse impact analyses of their hiring practices. OFCCP believes such self-analyses are important steps for achieving and maintaining an equal opportunity workplace. Furthermore, the final rule relates to recordkeeping and solicitation of demographic information under section 60–1.12. Accordingly, this final rule would not be the appropriate vehicle for amending UGESP, even if the agency were inclined to do so. A commenter raised concerns about how OFCCP will interpret procedures regarding Internet Applicant recordkeeping under both section 1.12 and UGESP. OFCCP has addressed these concerns by adding a new regulatory provision, section 60–1.12(d), to the final rule, as discussed above.

ORC requested that OFCCP clarify what ''significant difference'' means and recommended that it be defined as two standard deviations or more. 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.

Effective Date

Several commenters, such as EEAC and NILG, requested that contractors be afforded sufficient time to implement the new applicant recordkeeping standards to be promulgated in the final rule. These commenters noted that contractors will have to make significant changes in technology and personnel practices in order to implement the new requirements. For example, NILG asserted that ''[f]or some companies, this will involve an extensive process of clarifying need, requesting information from possible vendors, seeking proposals from vendors, allowing a period for vendor evaluation, selection and subsequent company customization, implementation and system testing.''

OFCCP agrees with these commenters that contractors should be afforded sufficient time to implement the recordkeeping requirements of the final rule. Therefore, OFCCP has established an effective date of one-hundred twenty days after the date of the publication of the final rule in the **Federal Register**.

Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. As noted in the preamble to the NPRM, this rule constitutes a ''significant regulatory action'' within the meaning of Executive Order 12866 (although not an economically significant regulatory action under the Order). As such, this rule is subject to review by the Office of Management and Budget (''OMB''). However, the Department has determined that this rule will not have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department has concluded that this final rule is not ''economically significant'' as defined in section 3(f)(1) of EO 12866. As a result, the cost-benefit analysis called for under section 6(a)(3)(C) of the Executive Order is not required.

Congressional Review Act

This regulation is not a major rule for purposes of the Congressional Review Act.

Executive Order 13132 (Federalism)

OFCCP has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Regulatory Flexibility Act

As explained in the Proposed Rule, this final rule will not change, but instead will help to clarify, existing obligations for Federal contractors. Consequently, under the RFA, as amended, 5 U.S.C. 605(b), it is certified that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This final rule does not include any Federal mandate that may result in increased expenditures by state, local and tribal governments, or by the private sector, of $100,000,000 or more in any one year.

Paperwork Reduction Act

This final rule does not introduce any new information collection requirements. It simply clarifies existing requirements already approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The information collection requirements for 41 CFR Part 60–1 are approved under OMB control numbers 1215–0072 (Supply and Service) and 1215–0163 (Construction).

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this final rule does not impose substantial direct compliance costs on Indian tribal governments.

Executive Order 12988 (Civil Justice Reform)

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The final rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

List of Subjects in 41 CFR Part 60–1

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, DC, this 3rd day of October, 2005.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

■ Accordingly, part 60–1 of Title 41 of the Code of Federal Regulations is amended as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Section 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 399, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258.

■ 2. In § 60–1.3, a new definition is added below ''government contract'' and above ''minority group'' to read as follows:

§ 60–1.3 Definitions.

* * * * *

Internet Applicant. (1) Internet Applicant means any individual as to whom the following four criteria are satisfied:

(i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

(ii) The contractor considers the individual for employment in a particular position;

(iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and,

(iv) 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.

(2) For purposes of paragraph (1)(i) of this definition, ''submits an expression of interest in employment through the Internet or related electronic data technologies,'' includes all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection processes for that particular position.

(i) Example A: Contractor A posts on its web site an opening for a Mechanical Engineer position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. The web site also advises potential applicants that they can send a hard copy resume to the HR Manager with a cover letter identifying the position for which they would like to be considered. Because Contractor A considers both Internet and traditional expressions of interest for the Mechanical Engineer position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to Contractor A meet this part of the definition of Internet Applicant for this position.

(ii) Example B: Contractor B posts on its web site an opening for the Accountant II position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. Contractor B also receives a large number of unsolicited paper resumes in the mail each year. Contractor B scans these paper resumes into an internal resume database that also includes all the on-line profiles that individuals completed for various jobs (including possibly for the Accountant II position) throughout the year. To find potential applicants for the

Accountant II position, Contractor B searches the internal resume database for individuals who have the basic qualifications for the Accountant II position. Because Contractor B considers both Internet and traditional expressions of interest for the Accountant II position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to the employer meet this part of the definition of Internet Applicant for this position.

(iii) Example C: Contractor C advertises for Mechanics in a local newspaper and instructs interested candidates to mail their resumes to the employer's address. Walk-in applications also are permitted. Contractor C considers only paper resumes and application forms for the Mechanic position, therefore no individual meets this part of the definition of an Internet Applicant for this position.

(3) For purposes of paragraph (1)(ii) of this definition, ''considers the individual for employment in a particular position,'' means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not ''consider the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

(4) For purposes of paragraph (1)(iii) of this definition, ''basic qualifications'' means qualifications—

(i)(A) That the contractor advertises (e.g., posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or

(B) For which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., through an external resume database), and

(ii) That meet all of the following three conditions:

(A) The qualifications must be noncomparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, ''a Bachelor's degree in Accounting'' is objective, while ''a technical degree from a good school'' is not. A basic qualification is objective if a third-party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

(5) For purposes of paragraph (1)(iv) of this definition, a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

* * * * *

■ 3. In § 60–1.12:

■ A. The third sentence in paragraph (a) is revised;

■ B. Paragraph (c)(1)(ii) is revised;

■ C. Paragraph (e) is removed;

■ D. Paragraph (d) is redesignated as paragraph (e); and

■ E. A new paragraph (d) is added.

The revisions and addition read as follows:

§ 60–1.12 Record retention.

(a) *General requirements.* * * * Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position (for purposes of recordkeeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; for purposes of recordkeeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor), regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3, tests and test results, and interview notes. * * *

* * * * *

(c) * * *

(1) * * *

(ii) Where possible, the gender, race, and ethnicity of each applicant or Internet Applicant as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.

* * * * *

(d) *Adverse impact evaluations.* When evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under part 60–3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants, as defined in 41 CFR 60–1.3, and those records relating to the analyses of the impact of employment tests that are used as employee selection procedures, without regard to whether the tests were administered to Internet Applicants, as defined in 41 CFR 60–1.3.

* * * * *

[FR Doc. 05–20176 Filed 10–6–05; 8:45 am]

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I. COMPENSATION

A. Forfeiture/Breach of Duty of Loyalty

Design Strategies v. Davies, 2005 WL 1944659, (S.D.N.Y. 2005). Federal district court held that under New York law an employee who breaches his duty of loyalty to his employer is disentitled to compensation (whether commissions or salary) attributable to the period of the breach, even if the employer suffered no provable damage as a result of the breach of fidelity. The employee advocated on behalf of a division of his employer's competitor for a lucrative contract during the period that he had ongoing negotiations for employment with, and ultimately joined that division of the competitor. Interestingly, while the court found that the former employer and new employer were not competitors in the particular niche of the computer industry that was the subject of the contract, the companies had sufficiently conflicting business interests at the time to be deemed competitors within the context of the employee's conduct.

B. Forfeiture/Violation of Non-Competition Covenant

Fraser v. Nationwide Mutual Ins. Co., 334 F.Supp.2d 755 (E.D. Pa. 2004). Federal district court upheld the forfeiture of approximately $350,000 in deferred compensation. The payment was conditioned on the former employee not working for a competitor for twelve months following termination of employment. The court reasoned that the forfeiture provision was more in the nature of an incentive program rather than a non-competition clause because it did not actually preclude employment with a competitor; rather, the provision simply required plaintiff to make a decision whether to disqualify himself from a monetary benefit.

C. Commission Advance/Chargeback

Steinhebel v. Los Angeles Times Communications. 24 Cal. App 4th 696 (Cal.App.2nd Dist. 2005). California law makes it unlawful for an employer to collect or receive from an employee any part of wages previously paid to the employee and defines wages to include commissions. In this case a commission sales plan defined a commissionable order as a sale that the customer keeps for a minimum of 28 days. The plan also provided the salesperson with an advance against commissions for orders taken during the preceding pay period, but stated that the advance for any order cancelled within 28 days would be deducted from subsequent commission payments. The California intermediate appellate court held that the advance is not a wage until all the conditions for performance have been satisfied and thus the charge-back on future commissions did not take back wages in violation of California law.

D. Commission Class Action

Snyder Communications v. Magana, 142 S.W.3d 295 (Tex. Sup. Ct. 2004). Texas Supreme Court held that it was inappropriate to resolve via a class action whether sales employees were due commissions for each residential customer that switched long-distance phone coverage to ATT pursuant to identical written employment contracts. While the court acknowledged that the plaintiffs shared a number of common issues, it concluded that individualized determinations were necessary on the major issue in the case (the customer authorization and various contractual reasons for rejecting such authorization).

II. FLSA

A. Computer Exemption

Martin v. Indiana Mich Power Co, 381 F.3d 574 (6th Cir. Mich. 2004). Sixth Circuit held that a computer help desk technician who installed and upgraded hardware and software on workstations, configured desktops, checked cables, replaced parts and trouble shot problems was not an exempt computer professional under the FLSA. To be an exempt computer professional, the employee's primary duties must require theoretical and practical application of highly specialized knowledge in computer systems analysis, programming and software engineering. In the case, none of the plaintiff's duties involved computer programming or software analysis, nor did it involve systems analysis such as making actual analytical decisions about how the company's computer network should function.

Jackson v. McKesson Health Solutions, 2004 WL 2453000 (D. Mass 2004). Federal district court held that computer "troubleshooter" created a triable issue as to whether he was misclassified pursuant to the computer professional exemption from overtime. The court reasoned that the employer conflated the employee's obvious skill and training with discretion and independent judgment and improperly concluded that he was exempt simply because he responded to most computer service requests without consulting his supervisor.

Bobadella v. MDRC, 2005 U.S. Dist. LEXIS 18140 (S.D.N.Y. 2005). Network administrator was exempt despite his lack of formal education in computer technology and the fact that his predominate work was on an internal help desk.

B. Regular Rate of Pay/Sick Leave Buy-Back and Meal Allowance

Acton v. Columbia, Mo., 2004 WL 2152297 (W.D. Mo. 2004). Federal district court held that a payment resulting from an employee's "sale" of unused sick leave to the employer for 75 percent of the employee's regularly hourly wage is includable in determining the employee's regular rate of pay under the FLSA. The court reasoned that the buy-back practice is akin to a non-discretionary bonus that is remuneration for employment. The court also held that a meal allowance made for the employer's convenience and that reasonably approximates the expense employees incur are not part of the regular rate of pay.

C. Working Two Jobs

Wage and Hour Opinion Letter No. FLSA-2005-14 (March 17, 2005). In a letter of interpretation, the Department of Labor addressed situations in which an employee is working two jobs for an employer, only one of which is an exempt position. In such situations, the employer must pay overtime for all hours worked over 40 if the employee's primary duty is non-exempt in nature. For example, if an employee's day job is non-exempt, the employee must generally be paid overtime for all hours worked over 40 in a workweek, including those worked in the evenings at a second exempt position.

D. New Regulations Not Apply to Actions Prior To August 24, 2004 Effective Date

Campanello v. Anthony & Sylvan Pools Corp., 2004 WL 2049313 (N.DD. Tex. 2004); **Bobadella V. MDRC**, 2005 U.S. Dist LEXIS 181408 (S.D.N.Y. 2005); and **Robinson-Smith v. GEICO**, 323 F. Supp. 2d 12 (D.D.C. 2004).

III. REFERENCES

A. Negligent Misrepresentation

Singer v. Beach Trading Co., 876 A.2d 885 (N.J. Super.A.D.2005). While prior New Jersey cases affirm the viability of negligent misrepresentation claims based on providing false information that is relied on and causes economic injury, this case is the first New Jersey decision to apply the tort of negligent misrepresentation to an employer who provides a reference. An employer who voluntary provides a reference has a duty to exercise reasonable care or competence in its response, the court held. Consequently, it may be liable for making misleading or incomplete statements. In this case, an employer terminated plaintiff's employment in part based on a purported conflict between

plaintiff's description of his prior supervisory experience and his prior employer's characterization of his former job duties.

B. State Statute

Pennsylvania S. B. 69. On June 15, 2005 the Governor signed into law S. B. 69 that provides employers with a presumption of immunity from civil liability for responding in good faith to a request for a former employee's job performance from a prospective employer. To overcome the presumption, a former employee must show by clear and convincing evidence that the employer disclosed information knowing it was false or with reckless disregard for its truth or falsity.

C. Defamation

Popko v. Continental Casualty Co., 2005 Ill. App. LEXIS 28 (App. Ct., 1st Dist., 2005). Intermediate appellate court affirmed a jury award of $100,000 compensatory damages and $200,000 punitive damages on plaintiff's defamation claim arising from a termination memorandum sent from plaintiff's first line to next level manager. Plaintiff, an in-house counsel, was terminated based on his first line supervisor's assessment that plaintiff had used profanity during his mid-year performance evaluation, had a pattern of unacceptable conduct, and made derogatory comments to a colleague about both supervisors. In order to establish malice, Plaintiff alleged that no one at the company investigated whether his alleged misconduct had occurred, the termination decision had been made despite many good performance evaluations, and his supervisor conceded that plaintiff had been terminated solely for his misconduct during his most recent performance review.

D. Compelled Self-Defamation

White v. Blue Cross and Blue Shield of Massachusetts, 442 Mass. 64 (2004). An employee was told that his employment was terminated because a hospital complained that he had disclosed confidential financial information. While the employer did not reveal the reason to any third-party, the employee subsequently disclosed that reason to a prospective employer during his job search. The Supreme Judicial Court of Massachusetts declined to recognize plaintiff's compelled self-defamation claim because of its potential to chill discussion of employee performance in the workplace and because the cause of action is solely within the control of the former employee who could simply repeat the allegedly defamatory statement in order to ratchet-up damages or extend the statute of limitations.

Cweklinsky v. Mobil Chemical Co., 267 Conn. 210 (2004). After initially suspecting an employee of changing his return to work date, the company terminated his employment for taking leave without permission. After having to explain the reason for his termination to prospective employers, he sued and was awarded $837,000 on his breach of contract and defamation claims. The Connecticut Supreme Court reversed, and in so doing, rejected the plaintiff's contention that employers would not be unduly burdened by compelled self-defamation claims because they retain two defenses to liability: truth and a qualified privilege. The Court noted that neither defense spared an employer the cost of litigation and the consequent distraction to its business.

E. Privacy

White v. Woodinville Water Dist., 2004 WL 1444556 (Wash. Ct. App. 2004). Plaintiff was denied a job and his personal job recruiter quit due to disclosures made by plaintiff's former government agency employer about matters that allegedly occurred during the time he was the Finance Director. Among other claims, Plaintiff sued his former employer for invasion of privacy due to the disclosure of his alleged extramarital affair with a subordinate and his argument with his former wife at a company picnic. The court reversed a grant of summary judgment for the employer, holding that given the private nature of the matters and the lack of importance to the public because they apparently did not affect Plaintiff's job performance, the Plaintiff established a prima facie case for an invasion of privacy claim.

IV. HARASSMENT

A. Designated Complaint Intake/ Open Door Policies

Benefield V. Fulton County, Ga. 2005 WL 1006847 (11th Cir. GA. 2005) and **Olsen v. Lowe's Home Center** (11th Cir. 2005). In Benefield, the Eleventh Circuit affirmed summary judgment in favor of the employer on plaintiff's sexual harassment claim, holding that plaintiff, who did not contact the EEO Office designated in its policy to receive complaints, failed to take advantage of the employer's preventative measures, even though she had complained to the company's internal affairs group. In Olsen, the Eleventh Circuit reversed summary judgment in favor of the employer because of inconsistencies between the company's harassment prevention policy that required complaints to be brought to either the store manager or the audit department (which plaintiff failed to do) and its "Open Door Program" which permitted employees to complain to any "member of management." In this case, plaintiff had conversations on her break with the department manager about the alleged harassment.

B. Consensual Romantic/Intimate Relationships

Miller v. Dept. of Corrections, 36 Cal.4th 446 (Cal. Sup. Ct. 2005). California Supreme Court held that a prison warden's consensual affairs with three subordinates created a hostile work environment for other female employees, where the warden gave promotions to the women. The court reasoned that although there was no evidence of coercive behavior, unwanted sexual propositions, comments or jokes, the warden's conduct demeaned employees on the basis of gender. This may be the first case to extend EEO protections to employees because of their non-paramour status.

C. Employee's Harassment by a Customer

Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005). Plaintiff employee sued employer for customer's racial harassment. The Ninth Circuit reversed a jury verdict due to an erroneous jury instruction. The court made clear that an employer may be liable for third-party harassment if it negligently failed to prevent the harassment or if it ratified the harassment by failing to take adequate remedial measures.

D. Teacher Harassed by a Student

Plaza-Torres v. Rey, 376 F.Supp.2d 171 (D.P.R. 2005). In a third-party sexual harassment case, a schoolteacher sued the school for failing to prevent sexual harassment by a student. A federal district court denied summary judgment for the employer, concluding that if the teacher showed that the school took insufficient preventative actions, the school would be held liable for permitting the harassment.

E. National Origin/English Nicknames

El-Hakem v. BJY Inc., 415 F.3d 1068 (9th Cir. 2005). Ninth Circuit affirmed jury awards of $60,000 compensatory and punitive damages for a middle eastern employee based on a CEO's persistent use of the nicknames "Manny" and "Hank", despite the employee's protests. A groups' ethnic characteristics encompasses more that its members skin color and physical traits; names are often a proxy for race and ethnicity, the court reasoned. As to severity and pervasiveness, the court found that calling the plaintiff those nicknames in a weekly meeting for two months and in emails at least twice each month for a year was enough to establish actionable harassment.

F. Intentional Infliction of Emotional Distress

Hoffman-La Roche v. Zeltwanger, 69 S.W.3d 634 (Tex. Sup Ct. 2004). Texas Supreme Court held that state statutory proscription against sexual harassment preempted use of the tort of intentional infliction of emotional distress as a remedy for sexual harassment in the workplace.

G. Pattern and Practice

EEOC v. Carrolls Corp., 2005 WL 928634 (N.D.N.Y. 2005). Although over three hundred Burger King employees had filed sexual harassment complaints, a federal district court rejected the plaintiffs' pattern and practice claim because the complainants comprised less than 1% of Burger King's female employees.

V. RETALIATION

A. Opposition/Continuing Violation

Yanowitz v. L'Oreal USA Inc., 32 Cal.Rept. 3d 436 (Sup. Ct. 2005). In a closely watched case, the California Supreme Court held that the appropriate test for determining an adverse employment action is determined by whether the complained of actions materially alter the terms and conditions of employment, rather than the more lenient standard of whether the employer's action is reasonable likely to deter protected activity. In addition, the Court rejected the application to California law of the U.S Supreme Court decision in *National Passenger R.R. Corp. v. Morgan*, holding that the continuing violation theory of liability is only applicable to harassment claims. The Court held that the continuing violation theory of liability is applicable to a retaliation case under California law. In this case, while plaintiff did not expressly complain about her manager's behavior, she refused his instruction to fire a clerk deemed not attractive enough to sell women's care products retail and to replace her with "somebody hot."

B. Opposition/ Norman Rockwell Poster

Williams v. Marin County, 2004 WL 2002478, (N.D. Cal. 2004). Plaintiff had questioned the propriety of a manager's action in hanging in an office a Norman Rockwell print of a young African-American student being escorted by a federal marshall while walking past a tomato-strewn wall with the "N" word scrawled on it. In the context of a sometimes testy relationship between plaintiff and her manager, a federal district court held that plaintiff's action constituted protected opposition activity for purposes of making a claim of retaliation under Title VII.

C. Adverse Action/Harassment

Noviello v. Boston, 389 F.3d 76 (1st Cir. 2005). Noting that federal circuits are split 6-2 in favor, the First Circuit joined the majority view holding that workplace harassment can comprise a retaliatory adverse employment action. The 2nd, 4th, 7th, 10th, and 11th Circuits agree with the First Circuit while the 5th and 8th Circuits have reached an opposite conclusion.

D. Adverse Action/Performance Review

Gillis v. Georgia Dept. of Corrs., 400 F.3d 883 (11th Cir. 2005). Reversing entry of judgment summarily dismissing plaintiff's race discrimination claims, the Eleventh Circuit held that a discriminatory performance review that "directly disentitles an employee to a raise of any significance" is an adverse employment action under Title VII. The employer's compensation structure denied a pay increase to employees rated "did not meet expectations", gave a three percent increase to employee rated "met expectations" and a five percent increase to employees rated "exceeded expectations."

VI. NLRA/NLRB

Handbooks/Confidentiality Obligations

CINTAS Corp, 344 N.L.R.B No 116 (2005). The NLRB held that the confidentiality provision of an employee handbook notifying employees that they could be disciplined for disclosing confidential information interfered with the employees' rights under Section 7 of the NLRA to engage in protected concerted activity. The provision did not explicitly prohibit employees from discussing terms and conditions of employment and there was no evidence in the case that the employer had disciplined ay employee for breaching his or her confidentiality obligations. The union seeking to organize the workforce had circulated a flyer specifying the wage rates of several employees.

VII. RELEASES

A. Roll-Up of Independent Decisional Units

Burlison v. McDonalds Corp., No 03-2984 (N.D. Ga. 2005). Federal district court invalidated ADEA releases because the employer only gave employees subject to a group termination program the eligible employee list (ages and job titles) and the ineligible employee list (job titles) about employees within their "decisional unit" as opposed to providing the employees the eligible employee list for individuals outside of the recipient's decisional unit. The court based its decision on a literal reading of the ADEA, Section 626 (f)(1)(H)(ii) that requires that information be provided regarding "all individuals" selected for the program but only requires that information be provided regarded "all individuals in the same classification or organizational unit not selected." The court reasoned that information about employees selected in other decisional units may be helpful to assessing whether they have a potential ADEA claim, even though information about possible discrimination in one truly independent decisional unit generally would not be admissible or probative of discrimination in another independent decisional unit.

B. Plain English Requirement

Thomforde v. IBM Corp., 406 F.3d. 500 (8th Cir. 2005). Eighth Circuit invalidated a release and covenant not to sue under the Older Workers Benefit Protection Act. The court found that the use of the terms "release" and "covenant not to sue" were not self-defining and in the absence of further definition were confusing to a person without legal training. The court reached its decision notwithstanding the fact that the plaintiff had consulted counsel prior to executing the release.

C. Disclosure of Section Criteria and Decisional Unit

Krychowski v. Weyerhaeuser Co., 2005 WL 2212312 (Okla. 10th Cir. 2005). Tenth Circuit invalidated a release agreement because the OWBPA notice did not disclose the criteria used to select employees for a group termination and did not adequately describe the decisional unit from which employees were selected. Employees who were selected for lay-off received a list of employees selected for termination and those employees not selected. Each list identified employees by job titles and ages. OWBPA requires employers to provide employee selected for a group termination any eligibility factors for such program and any time limits applicable to such program. Among the factors not disclosed were employee leadership abilities, technical skills, behaviors and whether the employee has the skills that matched business needs. As to decisional unit, the company first described the unit as all salaried employees of the mill and later changed the description to all salaried employees at the mill who reported to the mill manager, thereby omitting over 10% of the employees of the mill from the lists provided in the OWBPA notice.

D. FMLA Claims

Taylor v. Progress Energy, 415 F.3d 364 (4th Cir. N.C. 2005). Relying on a Department of Labor regulation interpreting the federal Family and Medical Leave Act to preclude employees from waiving, and employers from inducing employees to waive, their rights under the FMLA, the Fourth Circuit held that a general release of claims agreement does not prevent an employee from pursuing FMLA claims against his or her employer. The Fourth Circuit reasoned that the

FMLA enforcement scheme is analogous to the Fair Labor Standards Act, which precludes unsupervised waivers of rights guaranteed under that statute. The Court rejected the reasoning of the Fifth Circuit in **Faris v. Williams WPC-1, Inc.**, which held that the DOL regulation at issue does not apply to waivers of retrospective claims and only precludes unsupervised waivers of prospective claims.

VIII. NON-COMPETITION COVENANTS

A. Forfeiture of Consideration in Event Covenant is Unenforceable

Olander v. Compass Bank, 363 F.3d 560 (5th Cir. 2004). Fifth Circuit upheld the forfeiture of stock options pursuant to the clause in the option agreement requiring the return of the options in the event that a court determined that the agreement's non-competition clause was unenforceable. The non-competition covenant was declared unenforceable for lack of consideration under Texas law; it was based on an illusory promise – the continued viability of the options was dependent on the executive's continued employment even though plaintiff was an at-will employee who could be terminated at any time for any reason. In order to meet the requirements of Texas law, the stock option agreement that contained the non-compete had to be ancillary to some other valid agreement, which could be the contractual obligation to provide plaintiff access to confidential business information.

B. "Any Activity That Adversely Affects "

Deutsche Post Global Mail v. Conrad, 116 Fed.Appx.435 (4th Cir. 2004)(unpublished). Fourth Circuit held that employment agreement language prohibiting an employee upon termination of employment from engaging in "any activity which may affect adversely the interests of the company or any related corporation and the business conducted by either of them" for two years went beyond merely restricting specific competition, and consequently was overbroad and unenforceable under Maryland law.

C. Geographic Considerations

Montana Mountain Products v. Curl, 112 P.3d 979 (Mt. 2005). The Montana Supreme Court invalidated a non-compete agreement that prohibited the departing employee from working for any competitor within a 250-mile radius. The court found that the agreement was unreasonably overbroad because the employer had only one principal customer in the area.

D. Blue-Pencil

Palmer & Cay v. Marsh & McLennan Co., 404 F.3d 1297 (11th Cir. Ga. 2005). In this case, an employer's former employee sought to invalidate a non-compete agreement that (among other restrictions) prohibited him from accepting business from clients who switched to the employee's new company on their own. Although the employer informed the former employee that it would not enforce that provision of the agreement, the Eleventh Circuit invalidated the agreement altogether under Georgia law. Under Georgia law, a partially unlawful non-compete agreement cannot be modified to correct it.

IX. INQUIRIES and INVESTIGATIONS

A. Medical Information

Carter v. Tennant Co, 383 F.3d 673 (7th Cir. 2004). Questions on an employment application about the applicant's prior work-related injuries, lost time for such injuries or whether the applicant ever saw a doctor for such injuries did not violate Illinois' Right to Privacy in the Workplace Act, 820 ILCS 55/1 *et. seq*. because the statute only bars employers from inquiring into whether the applicant ever filed a claim for workers' compensation or occupational disease or received benefits for the same. In this case, plaintiff failed to report a prior injury to his back; the omission was discovered when plaintiff applied for benefits after re-injuring his back while working for the defendant. The defendant's employment manual and application made clear that providing false or misleading information in personnel records could result in refusal to hire or termination of employment.

Karraker v. Rent-A-Center, 411 F.3d 831, 2005 U.S. App. LEXIS 11142, (7th Cir. 2005). Seventh Circuit held that the popular 550-question paper and pencil Minnesota Multiphastic Personality Inventory Test, administered by Rent-A-Center in conjunction with eight other tests to internal and external applicants for management positions, was a "psychological test designed, at least in part, to reveal mental illness." As a result, Rent-A-Center's use of the test to screen applicants prior to making employment offers violates the Americans With Disabilities Act's prohibition on the use of pre-employment medical tests. The Court relied on the EEOC's "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (1995) for guidance about what constitutes a medical examination. The factors include whether the test: is administered by or interpreted by a health care professional; is designed to reveal an impairment of physical or mental health; is invasive; measures an employee's performance of a task or measures his/her physiological responses to performing the task; normally is given in a

medical setting; and medical equipment is used. In this case, the only applicable was whether the test was designed to reveal a mental impairment. The Court rejected Rent-A-Centers contention that it uses the test solely to measure an applicant's "state of mood" on the day of the test and instead concluded that no matter how the test is used or scored it has the effect of hurting the employment prospects of one with a mental disability. The Court found that the test measures personality traits such as whether the individual works well in a group or a fast-paced environment as well as traits such as depression, paranoia, and other psychiatric disorders.

Leonal v American Airlines, 400 F.3d 702 (9th Cir. 2005). Reversing a grant of summary judgment in favor of the employer, the Ninth Circuit held that an airline may have violated both the ADA and California state law by rescinding job offers for flight attendant positions based on the applicants' failure to disclose their HIV status and by requiring them to undergo a medical exam that included the drawing of blood (in order to test for anemia). The court reasoned that plaintiffs created a triable issue as to whether the medical exam process was premature because other components of the background check had not been completed and hence the conditional offers made were not "real." The court noted, however, that the employer might prevail if it can establish that it could not reasonably have completed background checks before subjecting the applicants to medical exams and questioning.

B. Criminal History

El v. Southeastern Pa. Transp. Auth., 2005 WL 1655880 (E.D. Pa 2005). In one of few recent decisions dealing with the legality of employee selection decisions based on criminal conviction history, a federal district court upheld a transportation authority's decision to require one of its contractors to terminate the employment of a driver of a bus based on his nearly 40 year-old conviction for a gang-related homicide when he was fifteen years old. Plaintiff disclosed his prior conviction on his employment application and authorized the conduct of a background check. The contract between the authority and its contractor prohibited the employment of individuals as drivers who had felony or misdemeanor convictions or a record of driving under the influence of alcohol or drugs. The court reasoned that the para-transit service transported elderly and disabled persons who receive semi-personal service and usually require close personal contact when getting on and off the bus. The plaintiff's statistical expert contended that minority employees were affected by prohibiting employment by individuals with prior convictions at a 200 percent higher rate. SEPTA countered that plaintiff's statistic assumed that all employees with prior convictions would be fired, which wasn't true. Indeed, the court rejected plaintiff's contention that SEPTA applied a double standard because its policies required a case-by-case determination for hiring its employees in contrast to the flat prohibition applied to contractor employees.

Barr v. Great Falls Int'l Airport Auth., 107 P.2d 471 (Mont Sup. Ct. 2005). The Montana Supreme Court affirmed the dismissal of an invasion of privacy claim under the Montana Constitution filed by a former security officer who challenged the disclosure of his criminal arrest record. Plaintiff was hired as a probationary security officer at an airport after a computerized criminal background check of the preceding ten years revealed no prior arrests. Shortly after beginning employment, a colleague obtained an unauthorized criminal background check, which revealed a 1968 arrest in Alaska for failure to pay child support. The colleague reported the result to his supervisor. Plaintiff was fired before the expiration of his probationary period. The Court held that plaintiff had no subjective or actual expectation of privacy in light of his job duties and the fact that his arrest record, while not easily accessible, was clearly public information.

C. FCRA

Kelchner v. Sycamore Manor Health Ctr., 2005 WL 503774 (3rd Cir. Pa. 2005). In an unpublished decision, the Third Circuit affirmed the dismissal of plaintiff's wrongful discharge claim challenging her termination for refusing to sign a blanket authorization entitling her employer to obtain her credit report anytime in the future, if and when the need arose. The Court held that the Fair Credit Reporting Act conditions an employer's ability to obtain a credit report for employment purposes on its making "a clear and conspicuous disclosure in writing…at any time before the report is procured…." The employer contended that waiting until it had to conduct an internal investigation before seeking the employee's authorization would substantially impair its ability to effectively investigate.

U.S. v. Imperial Palace Inc., No. 04-0963, settlement filed July 13, 2004, (D. Nev. 2005). Employer agreed to pay a $325,000 penalty for failing to provide job applicants the statutorily mandated notice informing them of their FCRA rights when their credit reports are used to make employment decisions. Those rights include: notice of the action and that the credit bureau did not participate in, and has no information about, the decision; the name and address of the credit bureau that supplied the report; and the applicant's right to receive a free copy of the report and to contest the accuracy of the information in the report.

D. No Duty To Disclose

K.M. v. Public Supermarkets, Inc., 859 So. 2d 1114, (Fla. Ct. App. 2005), 2005 Fla. App. LEXIS 599. Intermediate appellate court affirmed the dismissal of an employee's negligence claim arising from an employer's failure to tell its employee that a coworker providing day care for her daughter was previously convicted for attempted sexual battery on a 12 year-old. During the three months that the daughter was in the coworker's care, she was abused on at least two occasions. The Court held that because the babysitting duties involved non-work activities, the employer was under no duty to disclose its knowledge of the coworker's criminal history even though it was aware of the babysitting arrangement. "An employer has no duty to warn one employee about another employees criminal background, when the warning pertains to the employee's personal relationship outside of work," the Court concluded.

E. Polygraph

Polkey v. Transtecs Corp., 404 F.3d 1264 (11th Cir. 2005). Eleventh Circuit affirmed summary judgment in favor of plaintiff on her claim that her employer, a Department of Defense contractor who operated a naval base mailroom, violated the Employee Polygraph Protection Act, by asking that she take a polygraph as part of an investigation of improper mail handling. Fourteen opened but undelivered pieces of mail were found in a wastepaper basket near an employee who had given notice of his intent to quit. That employee took a polygraph test, which indicated possible deception when he denied opening the mail. Plaintiff and five others were asked to take the test in order to exclude them from suspicion, but they refused. Plaintiff was subsequently fired for accepting packages through the mailroom's back door in violation of security procedures. The Court found that the request to take the polygraph test was in connection with an ongoing investigation involving economic loss or injury to the employer's business and that the plaintiff had reasonable access to the mail that was the subject of the investigation. Nevertheless, the employer could not satisfy the additional statutory criteria that it establish a reasonable suspicion of the plaintiff's involvement in the mail incident, the Court reasoned.

F. Substance Abuse

Grammatico v. Industrial Comm'n, 117 P.3d. 786 (Az. Sup Ct., 2005).

Arizona Supreme Court held unconstitutional under its state constitution a state statute mandating the denial of workers compensation benefits by employees who test positive for drug or alcohol following a workplace injury unless the employee proves that such substance was not a substantial contributing cause of the accident. Arizona's state constitution provides that employees are entitled to compensation upon injury in any accident arising out of and in the course of their employment.

See also, **State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp**., 780 N.E.2d 981 (Ohio 2002 and **Rohrbaugh v. Wal-Mart Stores, Inc**., 572 S.E. 2d 881 (W.Va. 2002).

G. Global Positions Systems

French Data Protection Authority published a guide in mid-March 2005 summarizing employer obligations and employee rights concerning the use of GPS and other electronic location tracking devices in light of French privacy law. Employers are required to inform employees when such tracking devices are used and to notify the Authority of all computerized storage of location data, including a description of the type of data collected, its anticipated use, and maximum duration of storage (the Authority recommends a maximum of two months for employment movements and five years for employee work hours). The guide also reminds employers that employees have the right to review stored data and recommends that employers publish codes of conduct governing the collection and use of such data. Employers are subject to fines of Euro 1,500 for each failure to provide the requisite employee notice, and of up to Euro 300,000 for failing to file the required report with the Authority or not maintaining data per the report.

H. Computer Searches

Philippe K. v. Cathnet-Science, Cour de Cassation, Chambre Sociale, Arret No. 1089 May 17, 2005). France's top court held that an employer may not discipline an employee based on the results of an unauthorized search of the employee's computer files clearly marked "personal". The court rejected the employer's contention that it had "exceptional circumstances" to conduct the search after accidentally discovering erotic photos in a drawer of the employee's desk. It reasoned that employees must be present during such searches, the court ruled. In an earlier decision, Nikon France v. Frederic Onos, (Cour de Cassation, Chambre Sociale, Arret, No. 41-64, October 2, 2001), the Court held that an employer does not have the right to search an employee's word processing or email computer files marked "personal," despite the employer having prohibited personal use of the computer. In that case, the search revealed that the employee had been using the computer during work hours to conduct freelance activities.

X. DISABILITIES

A. Reasonable Accommodation/ Regarded As

Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751 (3rd Cir, 2004). The Third Circuit held that an employee who has been "regarded as" disabled by his employer is entitled to reasonable accommodation. (The First Circuit has reached a similar conclusion, but the 8th and 9th Circuits have reached contrary conclusions.) In this case, in response to being diagnosed with depression, plaintiff, a police officer, was deemed unfit to carry a gun and, hence, was reassigned to the radio room, but he continued to call-in sick. The employer concluded that plaintiff was unfit even to be around other police officers who carried guns and, as a consequence denied him reassignment. The Third Circuit reinstated plaintiff's "regarded as" claim, finding that a jury could reasonably conclude that the employer's determination that he could not work around anyone who carried a gun effectively precluded him for working in the broad category of any law enforcement jobs.

EEOC v. Echo Star Communications, No. 02-CV-00581 (D. Colo. 2005). A jury concluded that a Denver firm violated the ADA by failing to accommodate a sight-impaired applicant who sought a customer service position at a call center. Other area employers with call centers had accommodated sight-impaired customer service representatives by installing a software system that translated text into speech. The jury awarded the plaintiff $8 million in punitive damages, but the court reduced the award to $300,000 in compliance with the applicable damages cap.

Yindee v. Commerce Clearing House, 2005 WL 1458210 (N.D. Ill. 2005). The court concluded that plaintiff with vertigo was not disabled within the meaning of the ADA. Although the condition substantially limited the plaintiff's driving, driving was not a major life activity under the ADA.

Knight v. Metropolitan Govt. of Nashville and Davidson Co., 2005 WL 758239 (6th Cir. Tenn. 2005). The Court of Appeals upheld a jury verdict finding that an employer violated the ADA when it refused to rehire a former employee who was previously disabled. The employer regarded the former employee as disabled under a corporate policy that prohibited the hiring of disabled pensioners.

XI. REMEDIES

A. Punitive Damages

Lust v. Sealy Inc., 383 F. 3d 580 (7th Cir.2004). Seventh Circuit reduced a punitive damage award from the statutory maximum of $300,000 to $150,000 because the employer quickly rectified the alleged discrimination by promoting the plaintiff two months after initially denying her promotion.

Mac Gregor v. Mallinckrodt, 373 F.3d 923 (8th Cir. 2004). Company's failure to reprimand managers for sexist comments or communicate the results of a discrimination investigation to complainants supports the imposition of $300,000 punitive damages because such practices effectively allow managers to continue discriminatory conduct so long as they remain discrete and may discourage victims from making additional internal complaints.

B. Collateral Physical Injury/Workers' Compensation

Huffman v. Interstate Brands Cos., 17 Cal.Rept.3d 397 (Cal.App2d Dist. 2005). Plaintiff's emotional distress and bilateral knee replacement surgery after experiencing a recurrence of knee injuries after being demoted due to unlawful age bias are injuries covered by the exclusivity provisions of Workers' Compensation. The court reasoned that plaintiff's injuries were attributable to the physical requirements applicable to all who held the job rather than because plaintiff was unlawfully demoted and replaced by a younger employee.

XII. RIFs, REORGANIZATIONS

Reaction to Proposed Job Transfer

Owens v. Sprint/United Mgt Co., 333 F. Supp2d 1094 (D. Kan. 2004). Federal district court held that plaintiff created a triable issue as to age bias based on the selection of a younger employee for a job during a RIF after the plaintiff expressed a less than enthusiastic reaction to having to move out-of-state for the position. The court reasoned that management might have relied on plaintiffs' reaction during an informal, off-the-record initial discussion as an excuse because a few days later plaintiff told management that while she preferred to stay put, she would relocate if necessary to keep her job. The court was careful to note that its decision should not be construed to require an employer to present an employee with a formal take-it-or-leave proposition before making reassignment decisions.

XIII. ADEA

Bona Fide Early Retirement Incentive

Abrahamson v. Board of Educ. of the Wappinger Falls Cen. Sch. Dist., 374 F.3d 66 (2nd Cir. 2004). Collective bargaining provision that provided veteran teachers who met certain age and service requirements a choice between retiring early and receiving $20,000 payment or continuing work in exchange for an additional $7,000 per year for three years was based solely on age in violation of

the ADEA, the Second Circuit held. It reasoned that while the provision required 35 years of service, it was unlikely that a teacher who had not reached age 55 would have accumulated 35 years of service. The provision did not meet the safe-harbor that permits voluntary early retirement incentive programs that are consistent with the ADEA's goal because the program did not make retirement relatively more attractive than working.

XIV. EVIDENTIARY AND PROCEDURAL ISSUES

A. Offer Letters

Dore v. Arnold Worldwide, 2004 WL 575161 (Cal. App 2 Dist.) (unpublished). An offer letter that stated that employee was "at-will" and further stated that employment could be terminated "at any time" by either party did not negate "good cause" for termination because the letter failed to include language that employment also could be terminated "for any reason", an intermediate California appellate court held. The ambiguity was exacerbated, the court noted, by a 90-day assessment period to discuss initial performance and promotion possibilities.

B. Statistical Evidence/ Pattern and Practice

Morgan v. UPS, 380 F.3d 459 (8th Cir. 2004). Affirming summary judgment in favor of the employer, a divided Eighth Circuit held that the omission of variables from plaintiff's regression analysis, notably the employees' past pay and performance, did not provide the type of evidence necessary to create a triable issue as to a nationwide pattern-and-practice of race discrimination in compensation. UPS maintained a decentralized management and compensation structure among its seventy districts. The court also noted the absence of anecdotal evidence of intentional discrimination against any members of the class. In addition, the court rejected plaintiff's statistical evidence in support of a claim that it took longer for African-Americans to be promoted, because plaintiff's expert used the wrong test to measure time to promotion and when the correct test was used, there was no variance in promotions.

C. HR Dysfunction

Hussey v. Chase Manhattan Bank, 2005 WL 1787570, (E.D. Pa. 2005). In a lawsuit alleging breach of fiduciary duty under ERISA, a federal district court denied the employer's motion to exclude plaintiff's proffer of evidence of "administrative dysfunction" by the bank's Human Resources Department. The court reasoned that evidence of low participation rates by newly eligible participants in the bank's excess long-term disability plan may be relevant to whether they were told that they were eligible to enroll in the plan consistent with the banks' obligation under Third Circuit precedent to disclose all material information that exceeds ERISA' statutory disclosure requirements.

D. "Cat's Paw" Theory of Liability

Lust v. Sealy Inc., 383 F. 3d 580 (7th Cir. 2004). Disagreeing with the recent narrowing of the cat's paw theory of liability by the Fourth Circuit in *Hill v. Lockheed Martin Logistics Management*, 354 F.3d 277 (4th Cir. 2004 (*en banc*), the Seventh Circuit reaffirmed that an influential subordinate's discriminatory motives may be imputed to a supervisory decision-maker without regard to whether the supervisor was merely the "cat's paw" of the subordinate employee, if the subordinate's recommendations influenced the decision-making process.

E. EEOC's Policy On Disclosure of Confidential Business Information

Venetian Casino Resorts v. EEOC, No. 04-5098, (D.C. Cir. 2005). D.C. Circuit remanded to the district court for a determination of whether the EEOC has a current policy establishing the circumstances under which it will release to charging parties and/or their attorneys confidential business information employers submit in connection with their response to a charge.

E. Statutes of Limitations

Shea v. Rice, 409 F. 3d 448 (D.C. Cir. 2005). In this case, a white male challenged a diversity program under which higher pay grades were awarded to women and minorities at the time of hire. Nine years after the plaintiff was hired and his starting pay grade was determined, he challenged this determination and sought back pay to make up the difference between what he had earned and what he would have earned but for his race had he been placed at a higher starting pay grade. The Court of Appeals held that he could still bring suit, because each paycheck constituted a discrete act of discrimination, in that he received lower pay for a discriminatory reason; the court cited the Supreme Court's 1986 **Bazemore** decision in support of its ruling. The court noted, however, that the plaintiff could only recover back pay for those paychecks that were paid during the applicable limitations period, declining to find a continuing violation and citing the Supreme Court's 2001 **Amtrak** decision.

Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino, 410 F.3d 41 (1st Cir. 2005). Rejecting a district court's view that equitable tolling only applies where an employer "affirmatively misleads" an employee into sitting on his or her rights, the First Circuit held that an employer's failure to post the notices of workplace rights required by federal law may be

grounds for equitably tolling the charge filing requirement where the employee had no other actual or constructive knowledge of the complaint procedures.

XV. IDENTITY THEFT

A. Union's Fiduciary Duty to Protect Information

Bell v. Michigan Council 25, AFSCME, 2005 WL 356306 (Mich.App.). Plaintiffs, employed as municipal 911 operators, were victims of identity theft. They sued their union for negligence, alleging that it regularly permitted a union officer to take home copies of municipally provided records of personnel information pertaining to payroll deductions for union dues. When the union officer's daughter was arrested for her participation in the appropriation of a 911 operator's identity, in her possession was a notebook containing the names, social security numbers, driver license numbers and a list of illegally purchased goods and services next to each name of a 911 operator. In an unpublished per curium decision, the Michigan Court of Appeals held that a public employee union had a "special relationship" with its members such that the union owed them a "duty to protect them from identity theft by providing some safeguards to ensure the security of their most essential confidential identifying information which could be easily used to appropriate their identity." It expressly limited its holding to the facts of this case, where the union knew confidential information was leaving its premises and no procedures were in place to ensure the security of the information. Under Michigan law, the determination of whether a special relationship giving rise to a legal obligation exists requires consideration of the following factors: the societal interests involved, the severity of the risk, the burden on the defendant, the likelihood of the occurrence of the risk, the relationship between the parties, the foresee ability of the harm, the defendant's ability to protect itself, the cost of providing protection and whether the victim bestowed any economic benefit on the defendant. In this case, the Court held that: the relationship between the union and its members was akin to a fiduciary and part and parcel of that relationship is the responsibility to safeguard its members' private information; the union was in the best position to control who had access to its membership lists, which society had a right to expect would be guarded with the utmost care; the harm of someone misusing plaintiff's personal information was foreseeable and the issue of the union officer taking personnel records home and her daughter picking up such records to take to her mother had been periodically discussed at monthly executive board meetings; the severity of risk of harm in allowing personal identifying information to be taken to an unsecured environment is high; and the union had absolutely no procedures or safeguards in place to ensure that confidential information was not accessed by unauthorized persons.

B. State Statutes

Social Security Number Privacy Act, Act 454 of 2004, effective March 1, 2005. Michigan statute prohibits employers from the following uses of all or more than four sequential digits of an employee's, student's or other individual's Social Security Number: disclosing them to a third party; publicly displaying or including them in any document or information sent if the numbers are visible from the outside; using them as the primary identification for the individual or his or her account; requiring the individual to use or transmit them over a computer system unless the connection is secure or the transmission is encrypted; including them in any information mailed to the individual unless it is part of an application or enrollment process or was sent to establish, amend or terminate an account, contract or policy or to verify the number. Notably, the prohibition against disclosure to a third party would not apply to disclosure to a third party providing employment benefits or determining suitability for employment if the third party had written privacy policy making the use of the number confidential.

Identity Theft Protection Act, Act No. 452 of 2004, effective March 1, 2005. Michigan enacted the Identity Theft Protection Act, which makes it unlawful for any person with intent to defraud or violate the law to use or attempt to use the personal identifying information of another individual or to conceal, withhold or misrepresent the person's identity to obtain credit, goods and services. An individual who is criminally prosecuted for concealing, withholding or misrepresenting another's identity to obtain credit, goods and services has an affirmative defense if he or she proves by a preponderance of the evidence that he or she acted in lawful pursuit of his or her legal rights, including an investigation of a crime or a collection of a debt, support obligation, tax liability, claim, receivable or account or that he or she gave something of value for the benefit or control of the person whose personal identifying information was used.. The statute also makes it unlawful for a person to obtain or possess personal identifying information of another with the intent to use that information to commit identify theft or another crime, or to transfer or sell such information to another if the person knows that the specific intended recipient of the information will use or further transfer the information to another person for the purpose of committing identity theft or another crime.

XVII. SARBANES-OXLEY COMPLIANCE

A. "Extraordinary Payments"

SEC v. Yuan, NO. 03-56129 (*en banc*) (9th Cir. 2005). En banc Ninth Circuit held that $22 million and $7 million termination fees paid to a

CEO and CFO, who continued employment with the company in other capacities after being terminated from their positions, were "extraordinary payments" within the meaning of Section 1103 of SOX subject to escrow while the SEC conducted its investigation of fraudulent financial practices by the company. Several "context-specific" factors guide the determination of whether payments are "extraordinary," including the circumstances under which the payments are made or contemplated, the purpose and size of the payment, the nexus between the suspected wrongdoing and the payment, and whether the payment deviates from an industry standard or practice of similarly situated businesses.

B. International Ramifications

French Law; Daily Labor Report, No 118, June 21, 2005, A-6. Relying on French privacy law, France's Data Protection Authority Commissions Nationale de L'Informatique et des Libertes refused to approve proposed fraud prevention and whistleblower protection practices of McDonalds and Exide Technologies designed to achieve compliance with the Sarbanes-Oxley Act of 2002. McDonalds sought approval of policies that permit employees to anonymously report, via fax or postal system to U.S. based ethics director, behavior that violated French law or the company's international Code of Ethics. The complaints were to be stored in the centralized U.S.-based computer file. Exide's complaint process, managed by external contractors responsible for cross-border data transfer between France and the U.S., would permit anonymous complaints to be filed about HR disputes, fraud or theft, accounting problems and unethical conduct.

C. Whistleblower Complaints/Scope of Coverage

Privately Held Subsidiaries of Publicly Traded Parents May Be Covered. In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 9, 2004), an administrative law judge ruled that a complainant could maintain an administrative proceeding by amending his complaint to include the parent corporation, even though the subsidiary for whom he worked was not publicly traded, where both entities were responsible for the retaliatory action. *See also Collins v. Beazer Homes, USA, Inc.*, 2004 WL 2023716 (N.D. Ga. Sept. 2, 2004); *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ August 20, 2004) (allowing action against non-publicly-traded subsidiary where publicly-traded parent was also named); *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56 (ALJ July 18, 2005) (denying employer's motion for summary decision where retaliating official worked for non-publicly-traded company that operated as an agent of a publicly-traded company, and where both entities were named in the complaint); *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004); *cf. Klopenstein v. PCC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004) (dismissing complaint against non-publicly-traded subsidiary where publicly-traded parent was not named in complaint). The complainant must demonstrate sufficient commonality of management and purpose to justify piercing the corporate veil. *Dawkins v. Shell Chemical LP*, 2005-SOX-41 (May 16, 2005) (requiring complainant to name parent in original complaint).

Extraterritorial Application. In *Concone v. Capital One Financial Corp.*, an ALJ held that Sarbanes-Oxley does not cover employees working outside the U.S. 05-SOX-06 (December 3, 2004). A federal court reached the same conclusion in *Carnero v. Boston Scientific Corp.*, No. 04-10031-RWZ (D. Mass. Aug. 27, 2004).

SOX Claims Not Exempt From Mandatory Arbitration Agreements. In *Boss v. Salomon Smith Barney Inc.*, 263 F. Supp. 2d 684 (S.D.N.Y. 2003), a federal court held that an investment firm employee's SOX claim was subject to arbitration under the employee's securities industry registration with the NASD. The registration requires all employment disputes to be resolved through arbitration. The court reasoned that "[t]here is nothing in the text of the statute or the legislative history of the Sarbanes-Oxley Act evincing intent to preempt arbitration of claims under the Act. Nor is there an inherent conflict between arbitration and the statute's purposes." *Id*. at 685.

D. Whistleblower Complaints/Protected Activity

In a number of cases administrative law judges have begun to define the scope of protected activity under Sarbanes-Oxley.

Requirement of Fraud on Shareholders. In *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (ALJ May 27, 2004), the ALJ found that the complainant's disclosure of an allegedly illegal release of sludge water into a ground water system was not protected, because it did not constitute or result in a fraud on shareholders. The ALJ concluded that an element of intentional deceit by the respondent is implicit in the concept of fraud under Sarbanes-Oxley. *See also Reddy v. Medquist, Inc.*, 2004-SOX-35 (ALJ June 10, 2004) (challenges to internal company policies not covered where no violation of federal law alleged); *Minkina v. Affiliated Physicians Group*, 2005-SOX-19 (February 22, 2005) (OSHA complaint regarding indoor air quality did not implicate shareholder fraud).

Some Specificity Required as to Facts, But Not Laws Violated. In *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004), an ALJ held that for a whistleblower disclosure to be protected under Sarbanes-Oxley, the reported information must have a certain degree of specificity. Thus, the ALJ reasoned, general inquiries about the propriety of certain

transactions without identification of particular concerns was insufficient. *See also Harvey v. Safeway, Inc.*, 2004-SOX-21 (February 11, 2005) (dismissing SOX claim alleging FLSA complaints as protected activity; to support assertion that systemic FLSA violations constituted shareholder fraud, complainant offered only facts pertaining to his own pay). At the same time, in *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (December 9, 2004), the ALJ concluded that SOX does not require the complainant to identify a particular securities law provision he or she believed to have been violated. It is insufficient, however, simply to allege violations of internal corporate policies or ethics rules. *Hunter v. Northrop Grumman Synoptics*, 2005-SOX-8 (June 22, 2005).

Evaluating the Reasonableness of the Complainant's Belief. SOX protects only those who make disclosures with a "reasonable belief" that the conduct in question represents shareholder fraud or other violations of securities laws. This inquiry requires scrutiny of the employee's belief under both subjective and objective standards. *Hunter v. Northrop Grumman Synoptics*, 2005-SOX-8 (June 22, 2005).

ALJs Split Over Applicability of Materiality Requirement in Assessing the Reasonableness of the Complainant's Belief. In several early cases, ALJs have reached different conclusions about whether the materiality of the alleged violation under securities law is relevant to the "reasonable belief" determination. In *Henrich v. Ecolab, Inc.*, No. 2004-SOX-00051, an ALJ found that SOX included no materiality requirement. In that case, the ALJ concluded that the company's incorrect characterization of $300,000 of inventory could serve as the basis for a reasonable belief that a securities law violation had occurred, even though the company's sales exceeded $4 billion per year. In a different case, another ALJ concluded that a corporate employee's SOX complaint was barred because the alleged violations were insufficiently material to serve as the basis of a reasonable belief that shareholder fraud had occurred. *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004) (while company's failure to disclose class action alleging systemic employment discrimination might reach the requisite materiality threshold under Sarbanes-Oxley in terms of the impact of potential liability on a corporation's financial condition, failure to disclose individual discrimination claims would not). Similarly, in *Harvey v. Safeway, Inc.*, 2004-SOX-21 (February 11, 2005), an ALJ concluded that while systemic FLSA violations might be material enough to implicate shareholder fraud, individual FLSA violations "fail to reach the requisite level of materiality." The circumstances under which worker safety and health risks, product liability problems, consumer fraud, and violations of environmental and employment laws are deemed to affect shareholder value may be defined in future cases, and it seems likely that ALJs and the courts will turn to the securities law concept of materiality for help.[1] *See also Hunter v. Northrop Grumman Synoptics*, 2005-SOX-8 (June 22, 2005) (falsification of report was not sufficiently material to constitute a fraud on shareholders). In one recent case, an ALJ held that the complainant's allegations of widespread environmental violations did not constitute protected activity in the absence of pending or contemplated government enforcement actions. *Nixon v. Stewart & Stevenson Services, Inc.*, 2005-SOX-1 (February 16, 2005).

Proof of Illegality Not Required. In *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), the ALJ observed that "[a] belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act's protections." Slip op. at 15 (footnote omitted). *See also Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56 (July 18, 2005).

E. Whistleblower Complaints/Defining Retaliatory Action

ALJs Split Over Scope of Prohibited Conduct. In interpreting what constitutes prohibited retaliation under SOX Section 806, ALJs and the courts have looked to the definition of an "adverse employment action" under Title VII of the Civil Rights Act of 1964. Thus, SOX decisions to date reflect the split in the federal circuit courts of appeals on this issue in Title VII cases; some SOX decisions limit the scope of prohibited conduct to terminations, demotions, and other employment actions that have an adverse economic impact on the complainant, while others take a broader view that Sarbanes-Oxley prohibits any retaliatory employment action that is reasonably likely to deter employees from making protected disclosures. *Compare Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004) (adopting broad definition); *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (December 9, 2004) (placement of complainant on preliminary layoff list constituted adverse action, but no causation established), *with Dolan v. EMC Corp.*, 2004-SOX-1 (ALJ Mar. 24, 2004) (negative performance evaluation was not an adverse employment action where it had no tangible job detriment); *Willis v. Vie Financial Group, Inc.*, No. Civ. A. 04-0435 (E.D. Pa. Aug. 6, 2004) (loss of job responsibilities did not constitute retaliatory action covered by Sarbanes-Oxley unless it constituted a material and adverse change in working conditions).

SOX Prohibits Creation of a Hostile Work Environment. In *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (December 9, 2004), an ALJ

[1] *See, e.g., TCS Industries, Inc. v. Northway*, 426 U.S. 438, 448-49 (1976) (information is material if a reasonable person's judgment would be changed by the information).

concluded that SOX prohibits employers from creating a hostile work environment as a form of retaliation against whistleblowers, if 1) the harassing conduct was sufficiently severe or pervasive so as to alter the conditions of employment, and 2) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. In *Hendrix*, however, the ALJ found that the facts alleged by the complainant—verbal abuse, assignment to the second shift, and denial of computer resources—caused the complainant no hardship and did not constitute a hostile work environment.

SOX Prohibits Constructive Discharge. An ALJ applied the constructive discharge theory to a SOX claim in *Harvey v. Safeway, Inc.*, 2004-SOX-21 (February 11, 2005) (concluding that facts did not support finding of constructive discharge). As in other contexts, the standard for constructive discharge is whether the employer made the employee's working conditions "so intolerable that a reasonable employee would feel compelled to resign." *Id.*

No Retroactive Application to Pre-Enactment Retaliation. The Sarbanes-Oxley law does not apply to retaliatory action that occurred prior to the effective date of the law. It may cover protected activity that occurred prior to the effective date of the law. *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23 (ALJ Jan. 16, 2004); *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004).

F. Whistleblower Complaints/Procedural Issues

Statute of Limitations. The 90-day filing requirement provided by SOX begins to run when the employer communicates the adverse employment decision to the complainant, even if the decision takes effect at a later point in time. *McClendon v. Hewlett-Packard Co.*, 2005 WL 1421395 (D. Idaho June 9, 2005) at *3.

Burdens of Proof. In *Collins v. Beazer Homes, USA, Inc.*, 2004 WL 2023716 (N.D. Ga. Sept. 2, 2004), the court stated that a Sarbanes-Oxley plaintiff must show by a preponderance of the evidence that the plaintiff's protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* 49 U.S.C. § 42121(b)(2)(B)(iii). The court noted that the plaintiff must show that (1) the plaintiff engaged in protected activity; (2) the employer knew of the protected activity; (3) the plaintiff suffered an adverse personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Proximity in time is sufficient to raise an inference of causation, the court held. The court also stated that the defendant employer may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." *Collins*, 2004 WL 2023716 * 7 (citations and footnotes omitted); *see also* 49 U.S.C. § 42121(b)(2)(B)(iv); *Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (December 9, 2004).

Decisions Split Over Availability of Jury Trial Rights. Ordinarily, the right to a trial by jury attaches whenever the plaintiff seeks "legal" remedies such as damages for pain and suffering or loss of reputation (as opposed to purely "equitable" remedies such as back pay and reinstatement). SOX Section 806 authorizes claimants to bring "an action at law or equity" in federal court if the Department of Labor fails to resolve their claims within 180 days, and specifically authorizes the recovery of compensatory damages. 18 U.S.C. § 1514A(c). Thus, in some decisions ALJs and courts have held that legal damages for loss of reputation and pain and suffering are available under SOX, implying that jury trials are available as well where such damages are sought. *See Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332-33 S.D. Fla. 2004) ("a successful Sarbanes-Oxley Act plaintiff cannot be made whole [as the statute expressly provides] without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity"); *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-34 (March 29, 2005) (awarding $90,000 in damages to former executive for loss of reputation, compromised ability to find work, and pain and suffering); *McClendon v. Hewlett-Packard Co.*, 2005 WL 1421395 (D. Idaho June 9, 2005) at *6 (denying employer's motion to strike plaintiff's demand for emotional distress damages and a jury trial, because the plaintiff's SOX claim was still viable). Nevertheless, in a recent SOX case, a federal court in Texas concluded that plaintiffs filing SOX claims are not entitled to a jury trial. *Murray v. TXU Corp.*, 2005 WL 1356444 (N.D. Tex. June 7, 2005). In *Murray*, the court concluded that SOX does not allow damages for loss of reputation, and that jury trials are thus precluded. The court reasoned that the statutory phrase "action at law" does not automatically trigger a jury trial right, and that the statute did not expressly mention any legal remedies. *Id*. at *3. It remains to be seen whether other courts or ALJs will follow this decision.

Preventing Duplicative Litigation. The DOL reports that most of the administrative complainants who have filed complaints in federal court have done so prior to the administrative hearing, and that upon the filing of a complaint in court administrative law judges have dismissed the complainant's request for an administrative hearing. *See, e.g., Albrecht v. Chevron Texaco, Chevron Production Co.*, 2005-SOX-32 (ALJ June 16, 2005); *Corrada v. McDonald's Corp.*, 2004-SOX-7 (ALJ Jan. 23, 2004). In addition, when an ALJ has issued a decision on a SOX claim, and the complainant subsequently files suit in federal court, the court may apply res judicata (claim preclusion) or collateral estoppel (issue preclusion) principles. Those principles would not apply, however, to OSHA's

preliminary findings based on its initial investigation. *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322, 1331 (S.D. Fla. 2004) ("preliminary orders are issued solely on the basis of an investigation of facts that OSHA deems relevant," and do not by themselves reflect a full and fair opportunity to litigate a claim).

Simultaneous DOL and State Court Actions. In another ruling, an administrative law judge allowed a complainant to continue with an administrative proceeding under Sarbanes-Oxley even after filing a state court complaint in Florida for violation of that state's whistleblower law, primarily on the grounds that the two laws were materially different. *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 9, 2004).

G. Whistleblower Complaints/Remedies

Reinstatement Orders. In *Bechtel v. Competitive Technologies, Inc.*, 2005 U.S. Dist. LEXIS 8857 (D. Conn. May 13, 2005), a federal judge enforced an OSHA order requiring preliminary reinstatement of two corporate executives during the pendency of their SOX administrative appeals at the Department of Labor. (The ALJ's preliminary order also awarded $760,000 in back pay and other relief to the two executives. The two had been fired for raising concerns about the company's failure to make certain disclosures in its financial reports.) In another case, an ALJ fined the employer $70,800 in administrative sanctions for refusing to reinstate the complainant after OSHA issued a preliminary reinstatement order and the ALJ denied the employer's motion for a stay. *Windhauser v. Trane, an Operating Division of American Standard, Inc.*, 2005-SOX-17 (June 1, 2005) (awarding complainant twice his lost wages for employer's intransigence).

Duty to Mitigate Damages. In *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56 (July 18, 2005), an ALJ stated that SOX complainants, like other complainants, have a duty to mitigate damages. The ALJ concluded that "rejection of the unconditional job offer [of reinstatement] ends the accrual of back pay liability."

Front Pay. Front pay is available to successful SOX complainants to compensate for loss of future earnings the complainant would have received but for the unlawful retaliation. *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56 (July 18, 2005) (awarding $150,000 in front pay).

Courts Split Over Availability of "Loss of Reputation" or "Pain and Suffering" Damages. In *Murray v. TXU Corp.*, 2005 WL 1356444 (N.D. Tex. June 7, 2005), a federal court held that SOX does not permit recovery of damages for loss of reputation or pain and suffering. Nevertheless, in *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-34 (March 29, 2005), an ALJ awarded $90,000 to one of the complainants for loss of reputation, compromised ability to find work, and pain and suffering. *See also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332-33 S.D. Fla. 2004) ("a successful Sarbanes-Oxley Act plaintiff cannot be made whole [as the statute expressly provides] without being compensated for damages for reputational injury that diminished plaintiff's future earning capacity"); *Kalkunte v. DVI Financial Services, Inc.*, 2004-SOX-56 (July 18, 2005) (awarding $22,000 in damages for pain and suffering).

No Punitive Damages. In *Murray v. TXU Corp.*, 2005 WL 1356444 (N.D. Tex. June 7, 2005), a federal court held that SOX does not permit recovery of punitive damages. *See also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332-33 S.D. Fla. 2004).

XVIII. ARBITRATION

A. Statute of Limitations

Thurman v. DaimlerChrysler, 397 F.3d 352 (6th cir. 2004) (unpublished). A provision of an employment application that required the individual to file any employment-related claim against the company within six months of the dispute was reasonable and hence enforceable under Michigan law, the Sixth Circuit held. Under Michigan law, terms in an employment application constitute part of the employee's contract of employment.

B. Notice

Campbell v. General Dynamics Government Systems Corp., 407 F.3d 546 (1st Cir. 2005). First Circuit held that a mass email to employees announcing a new internal dispute resolution policy incorporating binding arbitration was insufficient to put employees on notice that the policy was a contract that extinguished their right to judicial determination of statutory employment discrimination claims.

IXX. ATTORNEY'S FEES

Successful Defense Against Partially Frivolous Claim

Quintana v. Jenne, 414 F.3d 1306 (11th Cir. Fla. 2005). Eleventh Circuit held that a partially successful employer in an employment discrimination case may recover attorney's fees incurred in defending against frivolous claims even if some of the plaintiff's claims had merit. The First and Seventh Circuits have

agreed with this analysis. These cases may discourage plaintiffs from filing "kitchen sink" complaints containing every conceivable cause of action.

XVIII. RICO

Illegal Workers

Williams v. Mohawk Indus. Inc., 411 F.3d 1252 (11th Cir. 2005). Agreeing with recent decisions of the 2nd, 6th and 9th Circuits and disagreeing with a decision of the 7th Circuit, the 11th Circuit affirmed the denial of summary dismissal of a complaint alleging RICO violations based on an employer's and third-party staffing agency's agreement to hire illegal workers in order to suppress wages and workers' compensation claims. Each defendant's economic gain through the conspiracy satisfied the requirement that there be "common purpose" for the alleged violation.