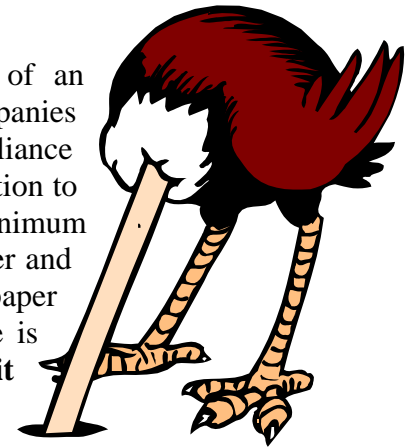


Ignorance Is No Excuse

In March 2004, the Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance Programs (OFCCP) issued new guidance on how to interpret decades-old equal-employment regulations in an age of Internet recruiting. HR professionals had hoped this guidance would both simplify and clarify the standards for compliance; in the end we got a little more clarity and a lot less simplicity.

You Can't Do It The Old Way Anymore

The original regulations, written in 1978, revolve around the notion of an “applicant” for a specific job opening. In practice, these rules allowed companies significant latitude in defining who was considered an “applicant” for compliance purposes. Most companies only considered someone who applied for a position to be an “applicant” in the legal sense if they met the specified minimum requirements for the position. Many other companies took this a step further and only considered someone an “applicant” if they actually filled out a paper application, which in the white-collar world happens only when someone is selected for an initial interview. **The March 2004 guidance makes it unambiguously clear that these practices are in violation of federal regulation.**



Defining an Applicant: the Three-Prong Test

The EEOC provided a three-pronged test (in layman’s terms, a list of three conditions) that must be met in order for an individual to be considered an applicant:

- (1) *The employer has acted to fill a particular position;*
- (2) *The individual has followed the employer's standard procedures for submitting applications; and*
- (3) *The individual has indicated an interest in the particular position.*

A detailed exegesis of this test is beyond the scope of this white paper, however, it is worth noting what these prongs do not include: any notion of the job’s minimum requirements or leeway for the employer to decide *ex post facto* who is and is not an “applicant.”

Practical Application (No Pun Intended)

If you post a job advertisement on your corporate website, or place an ad on Monster®, you have “acted to fill a particular position.” The second prong of the test allows you to require interested parties to follow a particular application procedure. For instance, you may require people to submit an online application through your website, or to apply through a board such as Monster®. However, this means of application must be publicly available; you may not selectively grant or deny access to it. Finally, the third prong of the test requires that the individual proactively indicate an interest in the specific position, and not simply send it to “jobs@company.com” or exist in a database. But the bottom line is that in most cases, a resume equals an applicant, and triggers reporting requirements. **If you are not collecting EEO demographics for every resume you receive, you are at risk for failure to comply with federal regulations.**

Adverse Impact and Selection Procedures

EEOC guidance has also clarified how companies may apply various screening and selection criteria in the process of making hiring decisions. The ultimate purpose of gathering EEO demographic information is to identify whether selection procedures are having an *adverse impact* on a particular group of people.

What is adverse impact?

Adverse impact occurs whenever a particular criterion or set of criteria are found to impact a particular group of people more heavily than others. For instance, a company might advertise that only applicants taller than 5'9" will be interviewed. Because women are on average shorter than men, this will adversely impact women as a group, even though some women will pass the test and some men will fail it.

When does adverse impact violate the law?

The mere occurrence of adverse impact is not *prima facie* evidence of racial or gender discrimination in violation of the law. However, the application of a test which has an adverse impact must be justifiable in business terms. While a "height test" clearly serves no legitimate business purpose for hiring a bank teller, a test of arithmetic skills would be permitted, even if it disqualifies more of certain groups of people than others. Employers must bear in mind however that any "test" they apply will be subjected to scrutiny in the event of an investigation. As such, it is best to avoid or limit the use of highly subjective criteria in the early stages of the process where the results of adverse impact are most apparent. Sticking to objective criteria, such as skill sets or years of experience in a title, are easier to explain and justify.

FACTS

In 2003, the EEOC litigated nearly 400 cases against employers

*The government won or settled in their favor in 93.7% of cases. **The average award was over \$400,000.***

"I'm not a big company, so I don't need to bother with all this."

Smaller businesses often think that they can ignore compliance issues because "they don't require me to file reports." In fact, most key federal anti-discrimination statutes apply to companies with **just 15 employees**. All you need is for one rejected applicant to feel jilted and file a complaint (all it takes is a brief letter) and the federal government is obligated to conduct an investigation. You may be required to provide documentation of hiring practices, receive on-site visits from investigators, and have employees give confidential testimony. There is no presumption of innocence, and even if the complaint is eventually dismissed, you will absorb the legal costs. Taking a proactive approach to monitoring your recruiting practices for compliance is your best insurance—if you ever are investigated, you will be able to quickly demonstrate your dedication to the spirit of the law, and stand the best chance of having charges dismissed before defense costs mount.

Are you a government contractor?

The OFCCP provides additional (and more stringent) rules for businesses working under contract to the federal government. The details are beyond the scope of this paper, but businesses with more than a dozen employees deriving a significant portion of their revenue from contracts should seriously consider voluntary recordkeeping. Simply being investigated can seriously damage your business prospects, and may even jeopardize contracts that have already been awarded to you.

Resume Direct: How it Helps

Compliance is a process, not a tool. But **Resume Direct** provides a helping hand by automating the most time consuming tasks of data gathering. When enabled, **Resume Direct** automatically sends a candidate self-identification survey to each person who submits a resume through the application process you choose.

Survey results are stored and presented in both an EEO Compliance Report format, which gives a broad overview of all hiring activities and can be used to quickly compile mandated reports, and also in a convenient recruiters-only Applicant Flow Log. With these reports, recruiters and HR managers have the data they need to ensure that your business is following best practices to reduce your risk.

For More Information

Contact us by phone, email, or visit our website to learn more about how **Resume Direct** can reduce both the risk and costs associated with EEO mandates.

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