

GONZALEZ
SAGGIO
HARLAN

The GSH 60-Second Memo

April 14, 2010

Sponsored by the GSH Employment Group



Kathleen M.
Paustian, Esq.

www.gshllp.com

(702) 366-1866

Want more
Information on
this topic?

[CLICK HERE!](#)

What Employers Should Know about Internet- Based Recruiting

By Kathleen M. Paustian, Esq.

In an effort to conserve recruiting resources, more and more employers are advertising for and finding job candidates through the Internet. Plus, web based personnel and headhunting services are increasing in number. However, the ease of using the Internet to locate prospective employees can be a tempting trap. It should never be an employer's sole recruiting method. Even if the job opening is a technical one, an open and fair hiring process that is geared toward encouraging applicants from all societal groups will not be restricted to only one advertising method. It is too easy for the EEOC or a plaintiff's attorney to argue that advertising jobs and accepting applications exclusively on the Internet is likely to have a disproportionate and adverse impact upon certain minority or socio-economic groups. This is because statistical evidence used in prior cases has shown that use of computers and the Internet is not as widespread in these groups as it is in non-minority groups.

The best strategy is to use Internet-based recruiting as one tool among several for finding qualified applicants. It is always a good idea to list job openings with the state's public employment service. Advertising the job openings in media that reach diverse groups is another method. If high-tech jobs are involved, advertise in publications read by people who are likely to be very computer-literate. Remember that Internet recruiting can also be done using public employment service databases, since most states have online job banks.

Who is an Applicant?

Under Executive Order 11246, many federal contract

employers are required to maintain records of their hiring, recruiting, and testing practices to ensure compliance with applicable equal employment opportunity nondiscrimination and affirmative action requirements. Specifically, the Department of Labor, Office of Federal Contract Compliance Program (OFCCP), requires these employers to track certain information about applicants. In addition, under Title VII, all employers must have evidence available to prove their employment selection procedures are valid and do not have a disparate impact on protected groups. This means the definition of the term "applicant" is pivotal to an employer's recordkeeping practices.

The definition has, in the past, been very broad. According to the Uniform Guidelines on Employee Selection Procedures (UGESP), "The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities."

In 2000, the federal Office of Management and Budget tasked the UGESP agencies, which include the EEOC, OFCCP, Department of Justice, and Office of Personnel Management, with developing a definition of "applicant" relevant to the increasing use of the Internet for recruitment and job hunting. On March 3, 2004, the UGESP agencies released a coordinated document clarifying who is an applicant in the context of the Internet and related technologies. The release acknowledged that the existing definition of applicant did not adequately address electronic recruitment issues. The four agencies created these additions to the broad definition stated above:

In order for an individual to be an applicant in the context of the Internet and related electronic technologies, the following must have occurred:

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

On March 26, 2004, the OFCCP issued its own rule. The OFCCP's definition of an Internet applicant is any individual who:

- Submits an expression of interest in employment through the Internet or related electronic data technologies;
- The employer considers the individual for employment in a particular open position;
- The individual's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and
- The individual has not indicated that he or she is no longer interested in the position for which the employer has been considering the individual.

GONZALEZ

SAGGIO

HARLAN

Office Locations:

Arizona
California
Illinois
Indiana
Iowa
Nevada
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

www.gshllp.com

These regulations apply exclusively to the Internet and related technologies, including Internet resume banks and job boards and employers' own web sites, resume databases, and online job listings. The broader definition of an applicant continues to apply to traditional nonelectronic recruitment and selection, such as hard-copy paper resumes sent to employers.

If an employer delegates its selection or screening authority to a third party, it must insist that the Internet recruitment service maintains applicant-flow data by race and gender, so that it can perform an adverse-impact analysis. Because not all individuals who complete an electronic application are willing to provide information on race and gender, the OFCCP allows federal contractors to perform statistical sampling based on the information provided and the size of the applicant pool.

It is worth remembering that regardless of how electronic applicant information is gathered or monitored, the obligation to comply with the law is always on the employer doing the hiring. As a result of this axiom, electronic recruiting, as is the case with any recruiting, must be carefully planned and executed.

The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Copyright 2010 Gonzalez Saggio & Harlan LLP. All rights reserved.