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41 CFR Part 60-1

**Obligation to Solicit Race and Gender
Data for Agency Enforcement Purposes;
Proposed Rule**

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, DOL.**ACTION:** Notice of proposed rulemaking; request for comments.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations requiring covered federal contractors to maintain certain employment records for OFCCP compliance monitoring and other enforcement purposes. These regulations were amended on November 13, 2000, to require employers 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 purposes (e.g., to allow OFCCP to verify EEO data), consistent with the Uniform Guidelines on Employee Selection Procedures.

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

In 2000, the Office of Management and Budget instructed the Equal Employment Opportunity Commission to consult with the Department of Labor, the Department of Justice, and the Office of Personnel Management and "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."

The UGESP agencies recently have promulgated interpretive guidelines in question and answer format to clarify how the Uniform Guidelines on Employee Selection Procedures apply in the context of the Internet and related technologies. The recent interpretive guidelines expressly contemplate 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." The rule proposed today would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes to conform to the new interpretive guidance promulgated by the UGESP agencies.

DATES: Submit written comments on or before May 28, 2004.**ADDRESSES:** Comments should be submitted to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP.

Electronic mail is the preferred method for submittal of comments. Comments by electronic mail must be clearly identified as pertaining to the proposed amendment to 41 CFR Part 60-1, and sent to ofccp-public@dol.gov.

As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal.

Where necessary, hard copies of comments, clearly identified as pertaining to the proposed amendment to 41 CFR Part 60-1, may also be delivered to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Because of delays in mail delivery, OFCCP suggests that commenters planning to submit comments via U.S. Mail place those comments in the mail well before the deadline by which comments must be received.

Receipt of submissions will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202) 693-0102 (voice), or (202) 693-1308 (TTY).

FOR FURTHER INFORMATION CONTACT: Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693-0102 (voice), or (202) 693-1308 (TTY). Copies of this proposed rule in alternative formats may be obtained by calling (202) 693-0102 (voice), or (202) 693-1308 (TTY). The alternative formats available are large print, electronic file on computer disk, and audiotape. The proposed rule is available on the Internet at <http://www.dol.gov/esa>.

SUPPLEMENTARY INFORMATION:**I. Introduction**

OFCCP requires covered federal contractors to obtain, where possible, gender, race and ethnicity data on applicants and employees. See 41 CFR 60-1.12(c). OFCCP requires this data collection activity for several purposes relating to contractors' administration of required affirmative action plans and OFCCP's role in monitoring compliance with OFCCP requirements. See 65 FR 68023 (November 13, 2000); 65 FR 26091 (May 4, 2000). Contractors must supply this information to OFCCP upon request. See 41 CFR 60-1.12(c)(2).

OFCCP regulations require covered contractors to develop affirmative action programs (AAPs). See 41 CFR 60-2.1. One component of an AAP is a "job group analysis" in which the contractor is required to group various jobs that are similar with respect to job content, pay and promotional opportunities. See 41 CFR 60-2.12. Contractors must collect gender, race and ethnicity data and keep track of such data as to applicants and hires by job title or AAP job group. Many contractors use "applicant flow logs" for this purpose. See OFCCP's Federal Contract Compliance Manual at Section 2H01(b). OFCCP regulations require contractors to conduct self-analyses of their hiring practices to ensure against unlawful discrimination. See 41 CFR 60-2.17(b)(2).

OFCCP "selects" contractors for compliance audits based on statistical analyses of gender, race and ethnicity data contractors submit to OFCCP. Since the mid-1980s, OFCCP has used the Equal Employment Data System (EEDS), which analyzes data contractors submit on EEO-1 reports, to identify contractor-establishments for audits. In regulations adopted on November 13, 2000, OFCCP implemented an Equal Opportunity (EO) Survey that requires contractors to submit gender, race and ethnicity data for applicants and hires by EEO-1 job category or AAP job group. See 41 CFR 60-2.18. One of the purposes of the EO Survey is to collect data that OFCCP could use to select contractors' establishments for compliance audits. 65 FR 26100 (May 4, 2000). (An extensive study is underway regarding the validity of the EO Survey.) OFCCP has resources to conduct approximately 1,500 on-site compliance audits annually. This constitutes less than two percent of the universe of establishments operated by federal supply and service contractors within OFCCP's jurisdiction. Because of these factors, OFCCP must make accurate decisions about which workplaces to investigate, at peril of misdirecting

agency investigation resources. In general, OFCCP seeks to maximize the likelihood that agency investigation resources are committed to workplaces where systemic employment discrimination exists and to minimize commitment of resources to workplaces where such systemic discrimination is absent.

OFCCP initiates a compliance audit of a contractor's establishment by sending the contractor a "scheduling letter." OFCCP's Federal Contract Compliance Manual at Section 2B03 and Figure 2-2. The scheduling letter asks the contractor to provide, among other things, gender, race and ethnicity data on applicants and hires, by AAP job group or job title. *Id.* OFCCP determines whether to conduct an on-site audit of a contractor's workplace based in part on statistical analysis of applicants and hires information contractors submit to OFCCP.

Although the Department of Labor is a signatory to the Uniform Guidelines on Employee Selection Procedures, OFCCP regulations did not expressly require contractors to maintain and submit to OFCCP information about the gender, race and ethnicity of applicants and employees, prior to the November 13, 2000 amendments. *See* 65 FR 26091 [NPRM May 4, 2000]. The Uniform Guidelines on Employee Selection Procedures were issued in 1978 by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the predecessor to the Office of Personnel Management ("UGESP agencies"). In 2000, the Office of Management and Budget instructed the Equal Employment Opportunity Commission to consult with the Department of Labor, the Department of Justice, and the Office of Personnel Management and address the "issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations" under the Uniform Guidelines on Employee Selection Procedures. *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.*

The UGESP agencies recently 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 the Uniform Guidelines on Employee Selection Procedures apply in the context of the Internet and related technologies. 69 FR 10152

(March 4, 2004). The preamble to the new interpretive guidance discusses the need for clarification of UGESP obligations in the context of the Internet and related electronic technologies. *See*, especially, 69 FR 10154-10155. The UGESP agencies expressly contemplate 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. Because of OFCCP's unique use of applicant data for compliance monitoring and other enforcement purposes, OFCCP has determined that additional regulations are required to clarify how contractors must comply with OFCCP recordkeeping requirements. Therefore, the rule proposed today would amend OFCCP recordkeeping requirements for OFCCP compliance monitoring and other enforcement purposes, in light of this recent interpretive guidance issued by the UGESP agencies.

II. Analysis

The rule proposed today would implement, for OFCCP compliance monitoring and other enforcement purposes, the new interpretive guidance promulgated by the UGESP agencies. The proposed rule would amend § 60-1.3 to add a definition of "Internet Applicant." The proposed rule would also amend § 60-1.12 to require contractors to retain Internet submissions of interest and to collect gender, race, and ethnicity information from Internet Applicants.

The proposed definition of "Internet Applicant" provides sufficient specificity for OFCCP to enforce this data collection requirement and for contractors to understand how to comply. Under the proposed definition, "Internet Applicant" involves four criteria: (1) The job seeker has submitted an expression of interest in employment through the Internet or related electronic 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.

The proposed definition provides that "advertised, basic qualifications" are qualifications that the employer advertises to potential applicants that they must possess in order to be considered for the position. The

proposed definition further provides that "advertised, basic qualifications" must be noncomparative features of a job seeker. Under this standard, the employer cannot compare the relative qualifications of job seekers to determine which candidates have the best qualifications. In addition, the "advertised, basic qualifications" must be objective. They cannot depend on the employer's subjective judgment. Rather, a third-party, unfamiliar with the employer's decision process, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment. Lastly, the "advertised, basic qualifications" must be job-related. They must be relevant to performance of the job at hand and enable the employer to accomplish business-related goals.

The proposed rule also would amend § 60-1.12(a) to require contractors to retain records of all submissions of interest through the Internet or related electronic technologies. OFCCP requires these records to evaluate whether the contractor has complied with the definition of Internet Applicant.

Section 60-1.12(c)(1)(ii) requires contractors to obtain information, where possible, on the gender, race, and ethnicity of applicants. The proposed rule would amend § 60-1.12(c)(1)(ii) to incorporate the new category of "Internet Applicant," as defined in the amendment to § 60-1.3 and to distinguish between "applicants," *i.e.*, submissions of interest that are not submitted through the Internet and related electronic technologies, and "Internet Applicants."

Finally, the proposed rule would delete § 60-1.12(e), which provided that the requirements of § 60-1.12 "apply only to records made or kept on or after December 22, 1997." Because OFCCP requires employment records to be retained for two years, 41 CFR 60-1.12(a), this provision is now superfluous. Of course, the deletion of this provision does not affect a contractor's ongoing obligation to retain relevant employment records during the pendency of an OFCCP complaint investigation or compliance review.

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.

Under the proposed rule, the agency will rely on labor force statistics or other relevant data for enforcing E.O. 11246 with respect to recruitment processes that occur prior to collection of gender, race and ethnicity data. This approach is consistent with the longstanding approval of such statistics in hiring discrimination litigation and is especially appropriate because the proposed definition of "Internet Applicant" relates to "advertised, basic qualifications." 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."); *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 341-343 (1977) (use of population statistics to prove hiring discrimination); see also, *E.E.O.C. v. Joint Apprenticeship Committee of Joint Industry Bd. of Elec. Industry*, 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, especially in cases such as this one in which the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as being discriminatory.").

Thus, OFCCP 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. OFCCP routinely utilizes labor force statistics in order to assess contractors' compliance with the requirement to develop an "availability analysis" as part of their affirmative action programs. See 41 CFR 60-2.14. Specifically, OFCCP regulations require contractors to create an "availability analysis," defined as "an estimate of the number of qualified minorities or women available for employment in a given job group * * *" See 41 CFR 60-2.14(a). The availability analysis is required to be based on "the most current and discrete statistical information available." See 41 CFR 60-2.14(d). Among the most current and discrete data currently available is data derived from the 2000 U.S. Census, to which OFCCP has access for use in assessing contractors' compliance with these requirements.

III. Regulatory Procedures

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule would be a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action under the Order). Accordingly, OMB reviewed this proposed rule under the Order.

Regulatory Flexibility Act

If promulgated in final, this Proposed Rule would help clarify applicant recordkeeping requirements for Federal contractors in the context of the Internet and related technologies. Therefore, the Proposed Rule neither increases nor decreases burdens. The Rule would benefit smaller businesses just as much as larger businesses, by helping employers to understand what their applicant recordkeeping obligations are with respect to the Internet. The Proposed Rule would not have a significant economic impact on a substantial number of small business entities. The head of OFCCP has certified to the Chief Counsel for Advocacy of the Small Business Administration to that effect. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, as well as EO 12875, Enhancing the Intergovernmental Partnership, the Rule proposed in this NPRM would not include any Federal mandate that might result in increased expenditures by

State, local, and tribal governments, or increased expenditures by the private sector of more than \$100 million in any one year.

Paperwork Reduction Act

The paperwork burden associated with OFCCP's proposed rule is covered by OMB Number 3046-0017, Collection Title, "Recordkeeping Requirements of the Uniform Guidelines on Employee Selection Procedures, 29 CFR Part 1607, 41 CFR Part 60-3, 28 CFR Part 50, 5 CFR Part 300." OFCCP repeats verbatim the Paperwork Reduction Act statement submitted by EEOC in support of the above-referenced collection:

Type of Respondent: Businesses or other institutions; Federal government; State or local governments and farms.

North American Industry Classification System (NAICS) Code: Multiple.

Standard Industrial Classification Code (SIC): Multiple.

Description of Affected Public: Any employer, government contractor, labor organization, or employment agency covered by the Federal equal employment opportunity laws.

Respondents: 827,962 firms are included in the affected public, according to U.S. Census statistics.

Responses: 827,962.

Reporting Hours: 2,588,285.

Number of Forms: None.

Form Number: None.

Frequency of Report: None.

Abstract: The recordkeeping issues addressed by UGESP are used by respondents to assure that they are complying with Title VII and E.O. 11246; by the federal agencies that enforce Title VII and/or E.O. 11246 to investigate, conciliate and litigate charges of employment discrimination; and by complainants to establish violations of federal equal employment opportunity laws.

Burden Statement: There are no reporting requirements associated with UGESP. The only paperwork burden derives from the recordkeeping. With respect to paperwork burden, the proposed additional Questions and Answers would present a solution to problems employers currently face in applying the Guidelines on Employee Selection Procedures in the context of the Internet and related technologies. Therefore, the proposed additional Questions and Answers would not involve an increase in paperwork burdens associated with attempts to apply existing guidelines to the context of the Internet and related technologies.

Only employers covered under Title VII and E.O. 11246 are subject to UGESP. For the purpose of burden

calculation, employers with 15 or more employees are counted. Based on examination of the latest available U.S. Census Bureau firm data, the number of firms in this category is approximately 827,962. According to figures based on statistics from the U.S. Census Bureau, the total number of employees employed by firms in this category is 115,886,025. Assuming one record per employee, this results in 115,886,025 records. Additionally, statistics from the Bureau of Labor Statistics indicate that the number of individuals, both employed and unemployed, actively seeking employment from all employers, total 15 million. Assuming that each of these individuals submits on average five applications, this results in 75 million potential records from a recordkeeping perspective. Therefore, the total number of records reflecting employees employed by firms and all job seekers is 190,886,025.

From the private employer survey the Commission conducts, it determined that 80 percent of the private employers file their employment reports

electronically. From this same survey the Commission also learned that when records are computerized, the burden hours for reporting, and thus for recordkeeping, are about one-fifth of the burden hours associated with non-computerized records. Further, the proposed additional Questions and Answers apply to the Internet and related electronic data processing technologies, which involves computerized recordkeeping.

The proposed additional Questions and Answers would clarify how employers should address applicant recordkeeping in the context of the Internet and related technologies. In the absence of such clarification, employers would be faced with significant, additional paperwork burdens based on the rapid expansion of the Internet and related technologies for recruiting. The Commission is unaware of any systematic data to accurately quantify the burdens associated with how employers were attempting to address applicant recordkeeping in the Internet context prior to this clarification. The

Commission will be in a better position to assess these issues after the additional Questions and Answers have been implemented. At this time, the Commission assumes that, with this clarification, the basis for the estimate of the cost per record has not changed since the initial burden calculations in 1979. Inflation adjustments would derive a current cost per record (manual recordkeeping) of \$0.56 and current cost per record (computerized recordkeeping) of \$0.11.

The number of burden hours can be obtained by dividing the total cost of recordkeeping by the hourly cost of labor needed to collect and compile such data. The current cost per hour of personnel for UGESP recordkeeping is \$14.75/hr (hourly rate for personnel clerks from BLS compensation survey).

Computerized recordkeepers = (.80) × (190,886,025) × (\$0.11) = \$16,797,970.20

Manual recordkeepers = (.20) × (190,886,025) × (\$0.56) = \$21,379,234.80

Total recordkeeping cost = \$38,177,205

$$\text{Total hours} = \frac{\text{Total recordkeeping cost}}{\text{Cost per hour}} = \frac{\$38,177,205}{\$14.75/\text{hour}} = 2,588,285 \text{ hours}$$

Executive Order 13132 (Federalism)

OFCCP has reviewed this Proposed Rule in accordance with Executive Order 13132 regarding federalism, and has determined that the rule does not have "federalism implications." OFCCP has concluded that the Proposed Rule would not increase any recordkeeping burdens currently imposed by UGESP on the States. Therefore, 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," and the requirements of section 6 of Executive Order 13132 do not apply to this rule.

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

OFCCP certifies that this Proposed Rule does not impose substantial direct compliance costs on Indian tribal governments.

Request for Comments

OFCCP invites comments about the NPRM from all interested parties.

List of Subjects in 41 CFR Part 60-1

Affirmative action plans, Civil rights, Discrimination in employment, Employment, Labor.

Signed at Washington, DC on March 24, 2004.

Victoria A. Lipnic,
Assistant Secretary for Employment Standards Administration.

Charles E. James, Sr.,
Assistant Secretary for Federal Contract Compliance.

Accordingly, part 60-1 of Title 41 of the Code of Federal Regulations is proposed to be 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 who:

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

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

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

(iv) 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.

(2) For purposes of this definition, "advertised, basic qualifications" means 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:

(i) 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.

(ii) The qualifications must be objective; they do not depend on the employer's subjective judgment. For example, "a Bachelor's degree in Accounting" is objective, while "a technical degree from a good school" is not. 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.

(iii) The qualifications must be job-related; in other words, they are relevant

to performance of the job at hand and enable the employer to accomplish business-related goals.

* * * * *

3. In § 60-1.12, the third sentence in paragraph (a), and paragraph (c)(1)(ii), are revised to read as follows; paragraph (e) is removed in its entirety.

§ 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

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), tests and test results, and interview notes.

* * *

* * * * *

(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.

* * * * *

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