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PROPOSED FEDERAL DEFINITION OF "INTERNET JOB APPLICANT" SUGGESTS NEED FOR REVISED HUMAN RESOURCE POLICIES

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Abstract

After several years of discussion, the Equal Employment Opportunity Commission, along with several other federal agencies, has proposed a new definition of "Internet job applicant" to help employers understand how to treat such applicants. The explosion over the past decade of Internet recruiting prompted the need for clarification of how employers must treat applicants for purposes of federal anti-discrimination law and recordkeeping requirements. The new guidelines suggest that employers engaged in Internet recruiting should review their hiring policies to ensure that their treatment of Internet job applicants complies with the proposed guidelines. This Article suggests that employers avoid violating federal guidelines by drafting a clear Internet hiring policy, developing specific job descriptions, carefully crafting any pre-screening questions to avoid unintended discrimination, and continuing to permit applicants to submit paper applications.

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INTRODUCTION

<1> Job recruiting has never been easier – or more fraught with pitfalls for employers. With just a few keystrokes, job seekers today can electronically send out hundreds of résumés to companies all over the country, saving themselves expensive postage, the cost of paper, and valuable time. Employers can quickly and easily post job notices on electronic job boards (such as Monster.com, CareerBuilder.com, or HotJobs.com) or sort through thousands of résumés on online résumé banks to find the right employee. The job boards have amassed millions of résumés. For example, Monster.com reported over 22.5 million résumés in its database in 2003.²

<2> A survey by a California-based staffing firm reported that executives received just one-third of résumés via email in 2000, compared to more than half in 2003.³ Lockheed Martin receives about 80,000 résumés each month, while Microsoft receives 50,000.⁴ Many employers welcome the change to Internet job recruiting, finding that a paperless employment process is more manageable than dealing with mounds of paper, and Internet recruiting can save thousands of dollars a year or more in postage, paper and time costs depending on the size of the company.⁵

<3> Internet job recruiting brings with it new challenges as well. The sheer number of résumés an employer receives can be overwhelming, requiring employers to sift through hundreds of résumés before finding one candidate qualified enough to interview. New technology that allows employers to scan, sort and track electronic résumés or pre-screen applicants to weed out unqualified ones are increasingly popular with employers.⁶ However, these methods bring potential pitfalls for employers who use them without considering the impact of federal or state anti-discrimination protections.

<4> Title VII of the Civil Rights Act of 1964 (Title VII),⁷ the Americans with Disabilities Act (ADA),⁸ and the Age Discrimination in Employment Act (ADEA)⁹ obligate covered employers¹⁰ to avoid discriminating in any aspect of employment, including hiring. Title VII bans not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex. This means that a facially neutral hiring policy that disproportionately excludes a Title VII protected class can violate the law. Employers using or seeking to use technology to screen or sort job applicants need to be

aware of their obligations under the anti-discrimination law, particularly in light of proposed guidelines defining Internet job applicants put forth by the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing federal anti-discrimination laws in employment.

NEW EEOC DEFINITION OF "INTERNET JOB APPLICANT"

<5> Recognizing that existing guidelines did not adequately address electronic recruitment issues, the EEOC, Departments of Labor and Justice, and Office of Personnel Management began to meet in July 2000, to develop new guidelines defining an Internet applicant.¹¹ On March 4, 2004, the agencies published the results of these discussions in the Federal Register.¹² The guidelines affirm that the country's anti-discrimination laws continue to apply to all aspects of employment, including Internet recruitment.¹³ The guidelines also suggest that the four agencies may individually develop the guidelines further in order to carry out their particular areas of responsibility.¹⁴ While the effectiveness of the new guidelines will be tested only when actually adopted, they offer a clear course of action for an employer to take to manage the deluge of email applications in a non-discriminatory manner.

<6> The proposed guidelines set three standards, each of which must be met, that qualify an individual as an Internet applicant:

1. The employer acted to fill a particular position. This prong of the test does not mean that the mere act of searching the Internet for potential employees is enough to make job seekers applicants. However, if a company opens a position and communicates this opening to a database of job seekers, 100 of who express interest in the position, all 100 job seekers are considered applicants even if the company interviews only 10 (assuming the other prongs of the test are met).¹⁵
2. The individual has followed the employer's standard procedures for submitting applications. To meet this standard, a job seeker must follow all of the employer's application procedures.¹⁶ If a company requires job seekers to fill out an online personal profile, only those who complete the profile will be considered applicants.¹⁷
3. The individual has indicated an interest in the particular position. This prong of the test is the most

limiting of the three prongs.¹⁸ A job seeker who simply posts her résumé on an Internet résumé bank will not meet this standard and, therefore, will not be considered an applicant. Additionally, a job seeker who submits a résumé to a company and expresses interest in a general category of positions will not be considered an applicant.

EMPLOYER CONCERNS WITH THE PROPOSED DEFINITION

<7> Although the third prong of the new guidelines eliminate a large number of job seekers, who have failed to specify which job they are seeking, from being considered applicants, some employers have expressed concern that the three-part definition of job applicant is not limiting enough. For example, the Society for Human Resource Management (SHRM) wants only job seekers who meet an employer's minimum qualifications for the job opening to be considered applicants.¹⁹ SHRM is concerned that without such a limitation, the definition is too broad and will increase the number of individuals who are considered applicants, requiring employers to keep records on these job seekers. Additionally, SHRM believes that the new guidelines will require a duplicative recordkeeping process for job seekers who apply online and those who apply by paper.²⁰

NEW DEFINITION OF SPECIAL CONCERN TO EMPLOYERS WITH EEO RECORDKEEPING REQUIREMENTS

<8> The new definition of Internet job applicant is of special significance to any company with more than 50 employees and a federal contract of more than \$50,000, or any private company with more than 100 employees.²¹ These employers are required to annually file EEO-1 Employment Information Reports,²² which report the gender and racial/ethnic make-up of their workforces.²³

<9> These employers must also preserve personnel records, including job applications submitted and other records having to do with hiring.²⁴ These records must be kept for at least one year or, if a discrimination claim has been filed, the employer must preserve the relevant records until final disposition of the claim.²⁵ Non-covered employers who are subject to an EEOC consent decree may also be subject to similar recordkeeping requirements.

<10> The United States Department of Labor and the EEOC use this information to ensure compliance with the nondiscrimination

requirements. Failure to file can result in fines or debarment from the federal contracting process.²⁶

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<11> Prior to the proposed rules, the growth of Internet job applicants created a gray area for employers who were unsure if they would have to maintain race, national origin and gender records on thousands upon thousands of unsolicited applicants who have sent a résumé through the Internet.²⁷ The guidelines clarify that EEO-1 filers must maintain the applications of job seekers that meet the new definition of applicant for at least one year to be in compliance.

UNINTENDED DISCRIMINATION AND PRE-SCREENING QUESTIONS

<12> The new guidelines address increasingly popular tools employers use to screen out unqualified applicants: sorting tools and the online test. Many employers skip posting job openings altogether and instead use sorting commands to extract résumés from an online résumé bank.²⁸ To avoid a deluge of incoming résumés, some companies have begun to require that job seekers complete questionnaires or tests before submitting applications.²⁹ Their answers are then ranked and only those who meet a minimum qualification level are invited to apply or are contacted.

<13> For example, Sprint Corporation requires online applicants answer a series of pre-screen questions after uploading their résumé in order to apply for a position, such as whether the applicant is willing to relocate at her own cost and the maximum percentage of time the applicant is willing to travel.³⁰ Pomerantz Staffing Services of New Jersey has taken online screening a step further by requiring applicants to complete a personality and behavioral test.³¹ Applicants' answers are then compared with the answers of Pomerantz's most successful salespeople.

<14> The new guidelines specify that online testing will be treated in the same manner as paper and pencil tests.³² In 1971, the Supreme Court held in *Griggs v. Duke Power Co.* that Title VII prohibits the use of practices, procedures, or tests that, although neutral on their face and in terms of intent, "operate to 'freeze' the status quo of prior discriminatory employment practices."³³ The Court held that the "touchstone" for determining the validity of such tests is "business necessity."³⁴ While Title VII § 703(h) explicitly authorizes the use of "professionally developed" tests in hiring,³⁵ if the test has a disparate impact on a Title VII protected group (such as women

or a racial minority), then the employer must be prepared to demonstrate how the test is job-related and consistent with

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business necessity.³⁶ If a test is challenged under Title VII, the Civil Rights Act of 1991 puts the burden on employers to demonstrate that a test with a disparate impact is sufficiently job-related and consistent with business necessity.³⁷ However, plaintiffs maintain the burden of proving sufficient disparate impact and the existence of a less adverse, while still effective alternative.³⁸ Similarly, any search criteria used by an employer to select potential hires out of a group of job seekers will also be subject to the disparate impact analysis.³⁹

<15> In addition, employers using online pre-employment personality or psychological tests should be aware of a recent decision in the 7th Circuit. In *Karraker v. Rent-A-Center, Inc.*, the 7th Circuit held that a psychological test used by Rent-A-Center prior to awarding management promotions was a medical examination that violated the Americans with Disabilities Act (ADA).⁴⁰ The test, the Minnesota Multi-Phasic Personality Inventory (MMPI), measures personal traits such as honesty, preferences and habits, but the Court found that it could also reveal mental disorders or impairments such as depression. Because the ADA prohibits the use of pre-employment medical examinations, Rent-A-Center's use of the test to screen out job applicants violated the Act and found that the test was not consistent with business necessity because it was irrelevant to decisions about promotions.⁴¹

AVOID VIOLATING FEDERAL GUIDELINES BY ADOPTING APPROPRIATE POLICIES

<16> Employers currently engaged in online hiring or considering increasing their online hiring presence should adopt policies to ensure that their practices are in compliance with the new EEOC Internet job applicant guidelines. These policies can help protect a company against unnecessary litigation and help ensure that its hiring practices are attracting the most diverse applicant pool possible. Employers engaged in online hiring should:

<17> Develop clear, consistent job application procedures. Explain to jobseekers that they will not be considered for the position unless they comply with the application process instructions. For example, a company may want applicants to fill out a specific form to apply for a position. Certainly, companies will want to require that applicants state which job they are applying for at the company. A clearly stated application procedure will ensure that only those job seekers who are serious about applying will be considered applicants by the

<18> Develop and update job descriptions. Regularly updated job descriptions are a good idea for many reasons, but for a company that pre-screens or sorts applicants' résumés, they are a must. This is because the pre-screening questions, tests, or sorting criteria should be based on the objective skill requirements of the job that are written in the job descriptions. The qualifications should not involve comparing the qualifications of one person to another. The minimum basic qualifications reflected in the job description should be stated in the job announcement.

<19> Carefully craft pre-screening questions. While pre-screening questions are attractive to overwhelmed managers looking at hundreds of electronic résumés, be sure that the questions used to pre-screen applicants request objective information that is related to the job description.⁴² Do not ask applicants to rate or interpret their own skill level, such as whether they are a beginner or advanced user of Microsoft Excel. Instead, ask how many years that have used Excel, if they are certified, and a description of projects where they used Excel.

<20> Keep sorting and screening power in the hands of trained administrators, not the person with the authority to hire. Individual managers who want to electronically sort or pre-screen their applicants should have their proposals for questions and sorting criteria approved by a human resources professional familiar with employment discrimination laws to avoid a disparate impact charge. A manager facing 250 electronic résumés will be tempted to sort them to save time. The manager may find that by eliminating those without a Bachelor's degree, a minimal qualification for the job, only gets the number of résumés down to 150. That is still too many, so the manager may sort out all applicants without a Master's in Engineering, getting the number down to a manageable list of eight résumés. But, if a Master's in Engineering is not a requirement of the job, there is no business necessity for eliminating the other candidates and this manager's act may give rise to a disparate impact charge if women or people of color are disproportionately excluded from the opportunity to be considered for the job.

<21> Allow applicants to submit paper applications. Many companies may be so attracted to the paperless world of Internet hiring and recruiting that they want to abandon accepting paper applications altogether. This invites a "digital divide" -- the gap between the individuals who have access to the computer technology and those who do not -- which means that a company may receive fewer applications from some

groups of color, older people, or people with disabilities. This is because fewer members of these protected groups access the Internet than Americans as a whole. For example, people with disabilities go online at a rate of 38% compared to 58% of all Americans.⁴³ Only 29% of African-Americans and 23% of Latinos use the Internet.⁴⁴ Older Americans are also much less likely to use the Internet as well: 58% of Americans age 50-64 go online compared with 75% of 30-49 year-olds and 77% of 18-29 year-olds.⁴⁵ While this issue has not been tested in court and the new guidelines do not address it, an online-only hiring process may invite a disparate impact challenge and it will certainly encourage applicants from a smaller universe than a policy that allows for paper applications as well.

CONCLUSION

<22> The new Internet job applicant guidelines help clarify the anti-discrimination expectations for companies who accept job applications and résumés electronically. These guidelines should prompt those employers to revisit their hiring practices to ensure that online applicants are not being treated in a discriminatory manner. Employers who use online tests or pre-screening tools should pay particular attention to the information gathered from these methods to ensure that there is no disparate impact on protected classes of applicants, including women and people of color. If there is a disparate impact on a protected group, the employer should be prepared to justify it as a business necessity. All employers should adopt clear application procedures for Internet job seekers to limit the number who will be considered job applicants, regularly update their job descriptions and use the descriptions to form an objective basis for all sorting criteria, and assign responsibility to a human resources professional to ensure that the sorting or screening criteria used is job-related and consistent with a business necessity. Finally, employers attracted to a paperless online hiring process should consider the problem of the digital divide and recognize that many protected groups will be left out of their hiring process.

PRACTICE POINTERS

- Understand the new EEOC definition of an Internet job applicant and use hiring policies that appropriately narrow the universe of job seekers who will be considered job applicants under the new definition.

- Use clearly defined job descriptions.
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- Base any Internet pre-screening questions or sorting criteria on the objective standards described in the job descriptions to avoid unintended prohibited discrimination.
- Consider the possible narrowing impact on your job applicant universe of adopting an Internet-only application process.

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Footnotes

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