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**SENT VIA FACSIMILE TO (202) 663-4114 – (6 Pages)**

May 3, 2004

Frances M. Hart, Executive Officer  
Executive Secretariat  
Equal Employment Opportunity Commission  
10<sup>th</sup> Floor  
1802 L Street, NW  
Washington, DC 20507

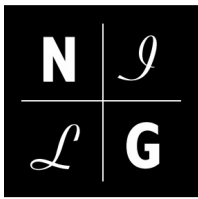
**RE: National Industry Liaison Group's Comment Regarding Agency Information Collection Activities: Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (UGESP) as They Relate to the Internet and Related Technologies**

Dear Ms. Hart:

The National Industry Liaison Group (NILG) welcomes the opportunity to comment on the proposed Interagency Guidance on the definition of "applicant" pursuant to UGESP.

As background, the Industry Liaison Group (ILG) concept started over 20 years with a partnership between the Office of Federal Contract Compliance Programs (OFCCP) and federal contractors as a forum for working together towards equality in the workplace. ILGs formed voluntarily to create a unique partnership of public and private sector cooperation to deal proactively with advancing workplace equal opportunity. Over the years, ILGs have reached out to other agencies, such as the Equal Employment Opportunity Commission ("EEOC"), with mutual goals of fostering a non-discriminatory workplace. The NILG is comprised of members of the local ILGs from across the United States, and links ILGs on a national basis by disseminating information, holding meetings with ILGs, and discussing equal employment opportunity and affirmative action initiatives.

The NILG acknowledges the efforts of the Interagency Taskforce ("Taskforce") to clarify the definition of "applicant." We also acknowledge the effort made by the federal EEO enforcement agencies to provide a common approach to interpreting these guidelines in the context of the Internet and related technologies.



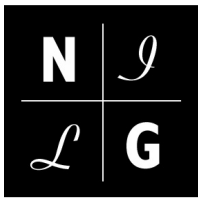
We have described below our specific comments regarding the proposed changes.

**EMPLOYERS NEED CLARIFICATION AND A UNIFORM APPROACH BY FEDERAL EEO ENFORCEMENT AGENCIES IN INTERPRETING UGESP RELATING TO THE DEFINITION OF “APPLICANT”**

While the proposed regulation is helpful in attempting to clarify how the definition of an applicant might be applied in the Internet environment, the absence of a common interpretation of UGESP between the EEOC and the OFCCP is cause for some concern. The “conforming regulations” published by the OFCCP on March 29, 2004 provide federal contractors with different guidance regarding the definition of “applicant.”

The impact of having to comply with two separate and distinct approaches in defining an Internet applicant will most likely lead employers to collect and retain data and records in accordance with the broadest definition, which is the one contained in the instant proposed guidance. That definition of applicant will undoubtedly take precedence for those employers who are federal contractors, since a contractor will not know which federal agency may seek to obtain applicant data and related records at some later point in time. Therefore, we request that the Taskforce clarify the interplay between the broad definition offered by the Taskforce and the OFCCP’s differing definition of applicant. It is unclear from these two proposed sets of guidance whether the federal EEO enforcement agencies are in agreement with respect to providing guidance concerning the applicant definition and are in alignment regarding an approach to interpreting UGESP. Employers want and need clear, uniform guidance.

Without knowing if the federal government will seek a uniform approach between the EEOC and OFCCP in defining “applicant”, it is difficult to fully assess the potential impact and burden on employers for implementing these regulations. Since we understand that the original intent of the Taskforce was to provide a “common” interpretation of UGESP, we respectfully request that the Taskforce reconsider the approach of permitting a different definition of an applicant, depending on which federal agency is seeking the data from employers. This proposed guidance and the OFCCP’s proposed companion regulations should not be implemented until that coordination is achieved.



## **THE TASKFORCE SHOULD CLARIFY THE USE OF QUALIFICATIONS IN DETERMINING WHO IS AN “APPLICANT”**

The proposed guidance alludes to an employer’s ability to consider minimum qualifications in defining “applicant” but it is left unclear. The two examples in the proposed guidance (each of which identify when an individual applying for a position is not considered an applicant) seem to imply that minimum qualifications can be considered. We recommend that the guidance is revised to clearly address the appropriate use minimum qualifications in defining applicant.

One of the examples in the guidance presents a scenario regarding the hiring of park rangers, where job seekers complete a detailed questionnaire that solicits their “experience” in wildlife management, forest fire prevention, firearm safety and first aid. Another example presents a scenario concerning hiring for a printing plant. In this example, one of the questions contained in the personal profile on the company’s web page considers total years of printing “experience.” Although implied that minimum qualifications can be considered, these two examples, do not clearly indicate when “minimum qualifications” or “skills” can be used by employers in determining who is an applicant.

NILG certainly is encouraged to see consideration of minimum qualifications clearly addressed in the OFCCP’s recently-published proposed “companion” regulations. That proposal indicates that the “advertised, basic qualifications” of a position can be considered in defining applicant. We welcome this inclusion of “minimum qualifications” as a necessary enhancement to the definition of “applicant.” We recommend that the instant proposal clearly indicate that consideration of minimum qualifications is permitted in identifying applicants. Consistency with the language in the OFCCP proposal will provide clarity and, as a consequence, should increase employer compliance.

## **THE FINAL GUIDANCE SHOULD SET FORTH A DEFINITION OF “APPLICANT” THAT IS THE SAME FOR BOTH “INTERNET” APPLICANTS AND APPLICANTS APPLYING OR BEING CONSIDERED THROUGH “TRADITIONAL”, NON-INTERNET-RELATED MEANS**

The definition of “applicant” is an issue that has been discussed and often debated for many years, even prior to the introduction of Internet recruiting. We now have an opportunity to address this issue in its entirety. However, while the proposed regulation attempts to clarify for employers how to define

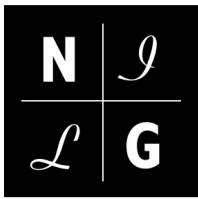


an applicant utilizing Internet technologies, it does not provide any guidance on defining non-internet applicants and therefore potentially encourages employers to utilize two different applicant definitions in the employment process. Since many employers do not have comprehensive and integrated on-line staffing and employment systems, with the proposed guidance, applicants can be defined, e.g., along with the associated tracking, record keeping and analyses, via two distinct processes: one for individuals seeking jobs via the Internet, and another for those seeking jobs utilizing a paper process. Many employers are currently using a combination of on-line and paper processes. As a result, the lack of clarity regarding how to define “applicant” in a combined process will most likely result in inconsistent interpretation of the regulation. Instead, employers should be able to develop a single, consistent definition of applicant that applies to both the Internet and non-Internet environment. An individual should be considered an applicant regardless how he/she entered or was later “considered” in the selection process.

### **THE PROPOSED GUIDANCE SHOULD CLARIFY THE OBLIGATION TO COLLECT THE RACE, ETHNICITY AND GENDER OF APPLICANTS**

The collection of race, ethnicity and gender, and at what point in an employment process these data should be sought, has been a subject of much discussion and debate over the last several years. The introduction to the proposed guidance indicates that “the UGESP Agencies” are providing guidance about when and how employers should identify race, gender and ethnicity of their applicant pool when using the Internet and related technologies. However, the proposal does not provide any specific guidance on when employers need to collect these data on applicants. The conforming regulations proposed by the OFCCP state that the current 60-1.12 (c) (ii) requires employers to obtain information, where possible, on the gender, race and ethnicity of applicants. Employers should be permitted to maintain one, consistent approach to the collection of applicant gender, race and ethnicity data. Not knowing when it is considered acceptable under the proposed guidance to collect such data may lead to an inconsistent interpretation of the regulations by employers and the federal agencies enforcing the regulation.

The NILG requests clarification concerning this issue to provide employers with guidance on when the collection of race, ethnicity and gender should be sought in the recruitment process, and the permissible ways for collecting such data, e.g., applicant self-identification and employer visual observation of individuals who choose not to self-identify.

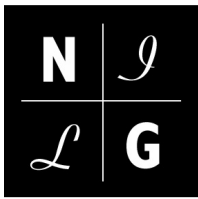


## **OUR ESTIMATE OF BURDEN OF THE PROPOSED CHANGE**

As previously indicated, it is difficult to estimate the anticipated cost in time and resources to implement the proposed guidance. However, a review of software currently available anticipates that costs to different employers may range from tens of thousands to potentially millions of dollars. The proposal will require employers to review various on-line employment systems to determine if their current processes comply with the proposed regulations. Employers may also be required to modify their on-line employment systems to collect, track, and analyze applicant data on a broader pool of individuals. Other factors that employers will need to consider are the additional requirements that will need to be incorporated into their systems to comply with the OFCCP's conforming regulations which are different from the Joint Agency proposal.

Furthermore, employers also are awaiting guidance from the EEOC on race and ethnicity reporting associated with the EEO-1 filing requirement. These anticipated changes will impact employer costs to re-survey employees, and to purchase, reprogram or upgrade systems to comply with these regulations. Not having final regulatory guidance on these issues, nor any timeframe in which to expect the final regulation to be implemented, it is difficult to assess the potential cost in time and resources to implement the proposed changes. Many employers may need to either change their systems or make system enhancements to their current on-line systems to conform to the final regulations pertaining to guidance around the definition of an applicant for the Internet and related technologies. Additional system modifications may be required if the regulations on data collection regarding race and ethnicity are implemented at another date. Without having the benefit of both the final regulations on race and ethnicity, including the estimated timeframe needed to implement the proposals and re-survey employees, and the final regulations on the applicant definition, we cannot properly assess the impact. Therefore, NILG recommends that the changes associated with the revisions to the EEO-1 form and the instant proposed guidance is implemented simultaneously.

In sum, the NILG believes the UGESP agencies may have substantially underestimated the burden that the collection of information associated with the proposed changes entails.



## **RECOMMENDED TIMEFRAME FOR IMPLEMENTATION**

The proposed guidance -- in combination with the OFCCP's proposed conforming regulations and the EEOC's anticipated changes to employee race and ethnicity record-keeping and reporting -- undoubtedly will have a profound impact on employers' compliance obligations. Companies will need substantial time to make changes to their technology and computer systems. For 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.

The NILG believes that employers will need substantial time to accommodate these significant anticipated changes. Therefore, we suggest the following two alternative timeframes for implementation:

1. if the federal EEO enforcement agencies publish final regulations regarding the definition of applicant and employer race and ethnicity recording-keeping and reporting obligations by the end of 2004, NILG recommends that the instant proposed guidance be implemented in 2006; and,
2. if either or both the revised applicant definition regulations or the employer race and ethnicity recording-keeping and reporting obligations are not finalized until 2005, the Taskforce's proposed guidance should not be implemented until 2007

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Once again, NILG sincerely appreciates the opportunity to participate in this important process. We hope our comments will provide an opportunity for the Taskforce to further clarify the issues and questions addressed herein before issuing the guidance in final form. Please do not hesitate to contact us if you have any questions. You may contact NILG's Legal Counsel, Mickey Silberman at (631) 247-0404 or e-mail address [silbermm@jacksonlewis.com](mailto:silbermm@jacksonlewis.com).

Respectfully submitted,

The National Industry Liaison Group