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Application of EEO Record-Keeping and Affirmative Action Requirements to Temporary Employees

This issue paper sets forth the position of the American Staffing Association regarding the obligation of staffing firms to comply with federal record-keeping requirements administered by the U.S. Equal Employment Opportunity Commission and the record-keeping and affirmative action regulations of the Office of Federal Contract Compliance Programs (an agency of the U.S. Department of Labor). EEOC has general responsibility for enforcing the nation's equal employment opportunity laws, and OFCCP enforces equal opportunity mandates prohibiting federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, or veteran status—and requiring those contractors and subcontractors to take affirmative action to ensure nondiscrimination.

The paper covers three issues:

- Whether temporary employees of staffing firms are subject to the EEOC and OFCCP record-keeping and affirmative action requirements, including the OFCCP's Internet applicant rule[1]
- To what extent the EEOC and OFCCP exemption for "recruitment practices" applies to staffing firms' activities
- How staffing firms should comply with client requests for employee gender, race, and ethnicity data

Application of EEOC and OFCCP Rules to Staffing Firm Temporary Employees

For more than 40 years, ASA has taken the position that EEOC's record-keeping and OFCCP's record-keeping and affirmative action regulations do not apply to temporary employees on the payroll of staffing firms. This position is based on the express exclusion of temporary employees from the definition of "employee" in the guidelines for completing EEO-1 reports, thus relieving employers of any obligation to include temporary employees in their reports.[2] ASA argued for the exclusion after the EEO-1 report was first proposed in 1965, asserting that visually determining the race or ethnicity of thousands of employees who work for clients at remote locations would be impossible. Moreover, the association was concerned that race and ethnic data obtained from job applicants could be used in making assignments, thereby subjecting staffing firms to discrimination claims.

ASA subsequently took the position that because the OFCCP affirmative action regulations expressly refer to the EEO-1 report as a required report for prime contractors and subcontractors,[3] because OFCCP guidance and practice generally expects contractors to align their affirmative action programs (AAPs) to be consistent with their EEO-1 report, and because the EEO-1 report is the primary basis and information upon which OFCCP selects contractors for audit of their AAPs,[4] staffing firms are not required to include temporary employees in

their AAPs. ASA asserted that applying the published affirmative action criteria to employees whose tenure is temporary would be impossible and that even if the rules could practically be applied, they would confer no meaningful benefit on such workers.

ASA continues to take the position that the exclusion of temporary employees for EEO-1 reporting purposes provides a basis for asserting that the laws and regulations enforced by OFCCP, including its Internet applicant rules, do not apply to temporary employees.

To the association's knowledge, this position has never been litigated in court or specifically addressed in the OFCCP regulations. Thus, the issue of whether temporary employees must be included in AAPs has never been definitively resolved. However, based on its historical inclination to expand its coverage whenever possible, and other guidance it has issued, it is likely that OFCCP would take the position that temporary employees of staffing firms *should* be included in the firms' AAPs. Indeed, some OFCCP field auditors have taken such a position in the past.

In this regard, OFCCP regulations at 41 CFR §60-2.1(d) provide, "Each employee in the contractor's work force must be included in an affirmative action program." In the preamble to OFCCP's 2000 amendments to its regulations regarding how AAPs must be developed and who must be included in an AAP, OFCCP stated its belief that "The term 'employees' is broad enough to include part-time, temporary, and full-time employees."[5] In OFCCP's proposed itemized listing of information required to be provided by federal contractors during a compliance evaluation or audit, proposed item 12 (current item 11) provides that the request for employee-level compensation data encompasses all employees "including, but not limited to, full-time, part-time, contract, per diem or day labor, temporary."

Importantly, however, neither the 2000 preamble nor the proposed modification to the itemized listing rises to the level of law or regulation. Accordingly, ASA believes that they are not binding and that 41 CFR§ 60-2.1(d) must be interpreted to be consistent with the scope of EEO-1 reporting as discussed previously.

If a staffing firm with an AAP that excludes its temporary employees is audited by OFCCP, and the agency notices the exclusion of the temporary employees, the agency may allege a violation of its regulations. Should the staffing company decline to begin reporting these employees, OFCCP may proceed to litigation.

If staffing firms elect to include temporary employees in their AAPs, OFCCP will expect the firms to have collected, maintained, and self-audited applicant flow data by race, ethnicity, and gender for such workers—a requirement that may be very difficult to meet, since firms must administer a self-identification form to *all* applicants for temporary positions, not only those who are interviewed.[6] Staffing firms also must conduct annual analyses to determine if their hiring, promotion, or

termination of temporary employees results in statistically significant adverse impact by race, ethnicity, or gender.

Importantly, as discussed in further detail later, particular clients that are federal contractors may require their staffing firms to maintain and track this type of information regardless of whether the staffing firm is a federal subcontractor or otherwise specifically required by OFCCP to do so. Frequently, federal contractor clients demand that this information be collected as a condition of maintaining the account. This is often the case because OFCCP has, on occasion, taken the position that when a temporary-to-hire conversion occurs, temporary employees who worked in the same position as the converted employee during the period the pool was evaluated for possible hire should be reported as the client's applicant flow in its AAP.

The Exemption for 'Recruitment Practices' Under EEOC and DOL Rules

In 1978, EEOC and DOL adopted the "Uniform Guidelines on Employee Selection Procedures."[7] The guidelines specify what records employers should maintain to determine whether their employment selection procedures have a disparate impact on minorities and other protected groups, and prescribe methods for validating those procedures that are found to have a disparate impact.[8]

In 2004, the UGESP agencies published questions and answers to clarify the application of the guidelines to Internet recruitment practices.[9] Question 95 asks, "Is Internet recruitment, like traditional recruitment, exempt from UGESP requirements?" The answer given is

> Yes. As a business practice, recruitment involves identifying and attracting potential recruits to apply for jobs. Under UGESP, "recruitment practices are not considered...to be selection procedures,"[10] and the UGESP requirements geared to monitoring selection procedures do not apply.

Based on these guidelines, ASA believes that staffing firms that identify and attract recruits for direct hire by clients are engaged in "recruitment practices" as defined previously and should be exempt from requirements to maintain applicant flow data under both the UGESP guidelines as well as the OFCCP regulations pertaining to Internet applicants. Moreover, ASA believes that the exemption for recruitment practices applies not only to direct placements but also to those made through temporary-to-hire arrangements.

This position has not been tested in the courts. If a staffing firm has participated in pre-employment screening of candidates—including rejecting candidates from further consideration based on their qualifications or other criteria through résumé review, interview, background checking, or employer references—OFCCP would likely disagree. In that case, OFCCP would likely consider this pre-employment screening to be part of the client's "selection process" and allege that staffing firms that screen a client's candidates for employment are acting as agents of the client for this purpose. This issue is not likely to arise in an OFCCP audit of a staffing firm, however. It would most likely arise in an audit of the client, when the client's recruiting practices

and applicant flow are examined. As such, it would be the client and not the staffing agency that would receive a notice of violation from OFCCP should its practices be alleged as noncompliant.

Client Requests for Gender, Race, and Ethnicity Data

For the reasons previously noted, federal contractors that use staffing firms to recruit employees for employment, either through direct placements or through temporary-to-hire arrangements, may consider themselves required to collect applicant flow data regarding staffing firms' temporary employees. They might therefore request that staffing firms maintain gender, race, and ethnicity applicant information and might contractually require staffing firms to track and maintain employee and applicant information, including applicant flow data. Some staffing firms are being contractually required to use the client's applicant tracking system for data entry of applicant flow information. ASA encourages staffing firms to be cognizant of such possible contractual requirements.

ASA notes the challenges in collecting and providing such data and the importance of reaching a mutual agreement with the client as to whom should be counted as an applicant. With regard to the temporary-to-hire activity, as noted previously, many staffing firms have successfully limited client applicant tracking to only those temporary employees who were actually placed in the job for which the temporary-to-hire conversion(s) subsequently occurred. This is a much more practical approach than tracking everyone whom the staffing firm reviewed for possible placement with the client. It also is an approach that has been generally acceptable to OFCCP for temporary-to-hire applicant tracking.

With regard to recruiting employees for hire, ASA notes that some federal contractors undergoing corporate management compliance evaluations, commonly known as "glass ceiling audits," have received OFCCP requests to interview recruiting firms used to fill senior leadership positions. In these interviews, OFCCP typically inquires whether the firm was notified that the client is a federal contractor with equal employment opportunity and affirmative action obligations; was notified of any special efforts it should use to recruit minorities, women, veterans, or people with disabilities; and whether it maintained applicant flow for its client. OFCCP has noted that the federal contractor itself is responsible for ensuring that it is maintaining applicant flow, either through its own efforts or the efforts of the recruiter.

ASA believes that the EEOC and OFCCP record-keeping and affirmative action rules, including the Internet applicant rules, are not applicable to temporary employees, and that staffing firms engaged in recruitment practices may be exempt from the legal requirement to maintain applicant flow data. At the same time, ASA and its members remain firmly committed to ensuring that temporary employees are recruited, assigned, and employed on a nondiscriminatory basis, and that staffing firms comply with their contractual obligations while assisting clients in meeting their EEO obligations.

The information in this paper is provided to ASA members for informational purposes only and should not be relied on as legal advice. Because these issues have not been definitively resolved by the relevant federal agencies or the courts, ASA strongly encourages members to consult with their own counsel regarding the application of the EEOC and OFCCP record-keeping and affirmative action rules to their businesses, including the application of any state EEO laws that may differ from the federal rules and that may apply to temporary employees. ASA also encourages members to promptly advise the ASA legal department of any complaint or legal action involving the issues discussed in the paper.

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1. Federal contractors or subcontractors subject to OFCCP jurisdiction are required to preserve "Any personnel or employment record made or kept by the contractor" for a period "of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." See 41 CFR §60-1.12. The OFCCP's "Internet applicant rule" further prescribes the records that federal contractors and subcontractors must maintain related to hiring conducted through use of the Internet or related electronic data technologies and provides guidance about which job seekers are considered to be applicants. See 41 CFR §60-1.3. For its part, EEOC has not adopted any requirement that employers make or keep personnel or employment records—only that such records that are made must be preserved for one year from the date of the making of the record or taking the personnel action involved, whichever occurs later. See 29 CFR §1602.14 ("Any personnel or employment record made or kept by an employer [including but not necessarily limited to requests for reasonable accommodation; application forms submitted by applicants; and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship] shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.")

2. The EEO-1 reporting guidelines were issued jointly by EEOC and OFCCP. EEO-1 reports must be filed by all private employers with 100 or more employees that are subject to Title VII of the Civil Rights Act of 1964, and by all federal contractors or subcontractors with 50 or more employees that have contracts, subcontracts, or purchase orders of $50,000 or more. Covered employers must provide sex, race, and ethnicity data on all full-time and part-time employees, excluding temporary employees. The EEO-1 guidelines can be found on the EEOC website at *eeoc.gov/employers/eeo1survey/2007instructions.cfm* ("The term employee **shall not** include persons who are hired on a casual basis for a specified time, or for the duration of a specified job [for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employees' work at the site]; persons temporarily employed in any industry other than construction, such as temporary office workers, mariners, stevedores, lumber yard workers, etc., who are hired through a hiring hall or other referral arrangement, through an employee contractor or agent, or by some individual hiring arrangement; *or persons [**except** leased employees] on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employers direction and control.*") [emphasis added].

3. 41 CFR §60-1.7(a)

4. See, for example, 43 FR 49249, Oct. 20, 1978; OFCCP transmittal 283, dated Aug. 14, 2008; OFCCP's sample AAP available at *dol.gov/ofccp/regs/compliance/pdf/sampleaap.pdf*; and EEO-1 Frequently Asked Questions and Answers, available at *eeoc.gov/employers/eeo1survey/faq.cfm* ("OFCCP uses EEO-1 data to determine which company establishments to select for compliance reviews. OFCCP's system uses statistical assessment of EEO-1 data to select facilities where the likelihood of systematic discrimination is the greatest.").

5. Government Contractors, Affirmative Action Requirements; Final Rule, 165 FR 68021 (Nov. 13, 2000) (amending 41 CFR Parts 60-1 and 60-2), at 68024.

6. 41 CFR §60-1.3; 41 CFR §60-1.12; 41 CFR §60-2.17(b).

7. 29 CFR §1607.1.

8. The UGESP can be found at 29 CFR part 1607 (EEOC) and 41 CFR part 60-3 (DOL). The courts have held that the guidelines are not legally binding—see *AMAE v. the State of California*, 231 F. 3d 572 (9th Cir. 2000), en banc ("Although the guidelines are not legally binding, they are 'entitled to great deference.'").

9. 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 as They Relate to the Internet and Related Technologies, 69 FR 10152 (March 4, 2004) at 10155.

10. 41 CFR §60-3.2(c) ("*Selection procedures*. These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures.")