



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Office of  
Legal Counsel

October 27, 2005

[REDACTED]

Dear [REDACTED]

This responds to your recent letter about Internet hiring, referred to the Office of Legal Counsel (Office or OLC) by Robert Johnson, Regional Attorney, St. Louis District Office, Equal Employment Opportunity Commission (EEOC). Your letter commented on the possible discriminatory impact of Internet hiring practices and then focused on the types of information employers require online, how that information may be used, and whether it is kept confidential. You questioned employer practices such as preventing job seekers from completing applications until they have self-identified by gender and race on online EEO questionnaires.

As you know, the EEOC enforces the federal laws that prohibit employment discrimination on the bases of race, color, religion, sex, national origin, age, and disability. The laws enforced by the EEOC include Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq.*, Title I of the Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. § 12101 *et seq.*, and the Age Discrimination in Employment Act, as amended (ADEA), of 1967, 29 U.S.C. § 621 *et seq.*

Internet Recruitment and Hiring and Basic Non-Discrimination Principles

Your letter comments that employers who only permit job seekers to apply for employment online may be relying exclusively on hiring practices that unfairly impact seniors and economically disadvantaged individuals who lack regular Internet access or sufficient computer skills. The federal employment nondiscrimination laws do not prohibit particular hiring practices. These laws, however, require that covered employers conduct their recruitment and hiring, and other employment practices, in an entirely nondiscriminatory way with respect to race, national origin, gender, age, disability and other protected bases. The employment nondiscrimination laws prohibit not only intentional discrimination but also unintentional discrimination, i.e., using neutral selection criteria that have the effect of disproportionately excluding people based on their protected status without sufficient justification under Title VII, the ADEA or the ADA. Additionally, the ADA prohibits using neutral selection criteria that exclude even a single individual on the basis of disability, absent a sufficient justification, without regard to the effects of the criteria on an entire group of individuals with disabilities. We note that the courts have not yet ruled on EEO challenges to Internet recruitment with respect to any of these theories.

It would also be possible, of course, for employers to use recruiting and screening software to intentionally discriminate on an unlawful basis. For example, an employer that used its software to screen out all Internet applicants over age 40 would be violating the ADEA, which prohibits employment discrimination against people aged 40 or above. An employer that used its software to screen out individuals with home addresses in certain zip codes, which are known to be ethnic, racial or religious enclaves, would be violating Title VII. Again, the courts have not yet ruled on such cases.

Under the ADA, an issue arises as to the extent to which an employer must ensure that its on-line recruiting and application process is compatible with assistive technology used by some people with disabilities, such as screen-reading software used by people who are blind or visually impaired. The Commission has not taken a legal position on this issue. It could be argued, however, that webpage access might be an issue of reasonable accommodation in the application process to enable individuals who are blind or visually impaired to apply for jobs.<sup>1</sup> Alternatively it could be argued that a covered employer that uses an inaccessible website format may violate Sections 102(b)(1) and (3) of the ADA. Section 102(b)(1) prohibits covered entities from "limiting, segregating, or classifying" individuals with disabilities in a manner that adversely affects their employment opportunities, and Section 102(b)(3) prohibits employers from using "standards, criteria, or methods of administration" that have the effect of discriminating on the basis of disability. There is no case law interpreting these ADA provisions in this manner, but these legal theories may be viable.

### Online Questions to Job Seekers and Background Checks

Your letter expresses the opinion that there is an unfair exchange of information in the Internet hiring process because employers ask for sensitive information from individuals but do not provide detailed information about employment opportunities.<sup>2</sup> You note that employers may ask for racial self-identification, health information, and criminal history.

#### *EEO Questionnaire*

In your letter, you comment on application procedures that bar a job seeker from proceeding with an online application until he or she completes a "Voluntary EEOC Questionnaire." Such questionnaires typically ask job seekers to identify by race, national origin, and gender. Compelling a response to such a questionnaire, regardless of its title, is unlawful; however, requesting a response in a truly voluntary manner is lawful. Federal employment nondiscrimination rules and regulations require employers to keep anonymous data about the race, national origin, and gender of their applicants and employees.<sup>3</sup> The key for data

<sup>1</sup> See generally EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship (as revised October 17, 2002) available at [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html).

<sup>2</sup> Many job seekers have expressed similar views in recent journal studies on Internet hiring. It has been suggested that employers provide another level of review if applicants feel that the hiring process was unfair or discriminatory. See Dr. John Sullivan, *An Applicant's Bill of Rights, Part 2*, available at [www.erechange.com/articles](http://www.erechange.com/articles).

<sup>3</sup> See 29 C.F.R. Part 1607; 41 C.F.R. Part 60-1.

collection is whether the employer's request is administered in a way that is truly voluntary. Clearly, employers should advise job seekers that the request is voluntary; that the data will not be available to hiring officials; that it will be confidential;<sup>4</sup> and that it is collected solely to comply with recordkeeping requirements of the nondiscrimination laws and rules.

#### *Questions About Health Status*

The ADA prohibits employers from asking any questions that are likely to elicit information about a disability prior to a job offer. *See* 29 C.F.R. § 1630.13. For example, an online questionnaire would not comply with the ADA if it asked about workers' compensation history or about medical conditions that might negatively affect attendance, because these questions are likely to elicit information about disabilities. Additionally, the ADA would prohibit pre-offer use of psychological or personality tests that provide information that is used to identify a mental disorder or impairment. *See* EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/95). (This document is available on our website at <http://www.eeoc.gov/policy/docs/preemp.html>.)

#### *Questions About Arrest or Conviction*

Title VII allows background checks, including checks of conviction or arrest records, but they must be conducted in a non-discriminatory manner. Under Title VII, if an employer's use of conviction or arrest records were to have a disparate impact – for example, if they disproportionately excluded applicants on the basis of race, national origin, or gender – then reliance on the records would be lawful only if they contained information that was related to the job in question and consistent with business necessity. Employers must consider the time that passed since the conviction and/or completion of the sentence, the nature and gravity of the offense, and the nature of the job held or sought. With respect to using arrest records in hiring, employers must evaluate whether the applicant or employee actually engaged in the misconduct. Employers should examine the surrounding circumstances, offer the applicant or employee the opportunity to explain, and, if he or she denies the conduct, make follow-up inquiries to assess his or her credibility. *See* EEOC Policy Guidance: Consideration of Arrest Records in Employment Decision under Title VII of the Civil Rights Act of 1964 (9/7/90).

#### *Questions About Age*

Finally, hiring procedures that request a job seeker's date of birth will be closely scrutinized to assure that the request is for a permissible purpose and not one that is proscribed by the ADEA. *See* 29 C.F.R. § 1625.5.

We hope this discussion is helpful. This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the EEOC. If you have further questions,

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<sup>4</sup> Race, national origin, and gender information gathered from applicants to comply with the Uniform Guidelines on Employee Selection Procedures and from employees for purposes of completing the EEO-1 reporting form, as well as lawfully gathered medical information, must all be kept confidential. *See* 29 C.F.R. § 1607.4B; 29 C.F.R. § 1602.13; 29 C.F.R. § 1630.14(d).

you may contact Carol R. Miaskoff, Assistant Legal Counsel, or Mary Kay Mauren, Senior Attorney Advisor, at (202) 663-4689.

Sincerely,

*Peggy R. Mastroianni*

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