

# FINAL TRANSCRIPT

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**\*\*ACC - What the OFCCP'S New Internet Applicant Rule Will Mean For Your Company**

Event Date/Time: Nov. 30. 2005 / 1:00PM ET

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## PRESENTATION

**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Good afternoon or morning depending upon your region. As you can tell my voice I am not Keith Rummer of Fifth Third Bank, unfortunately, Keith had a family emergency and had to be unavailable. I would like to welcome you to the Association of Corporate Counsel Employment and Labor Committee webcast on "Understanding the OFCCP's New Definition of Internet Applicant". The committee would like to thank Jackson and Lewis our sponsor for their assistance and preparation of this webcast. Our moderator for today will be Eric Felsberg of Jackson and Lewis, Eric?

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**Eric John Felsberg** - *Jackson and Lewis - Associate General Counsel*

Thank you, Eileen. Our two panelists today will be Eileen Groves and Matthew Halpern. Eileen is an Associate General Counsel to the United Space Alliance in Houston, Texas. The United States Alliance serves as the prime contractor for NASA. Eileen also serves as the Vice Chair of the ACC's National Employment and Legal Law Committee Executive Board, chairing the membership subcommittee as well as a member of the board of directors of the Houston ACC Chapter.

Eileen was recently awarded the 2005 ACC Jonathan Silber Committee Member of the Year Award at the annual national conference in Washington D.C. Matthew Halpern is a Senior Partner at Jackson Lewis LLP, the national management side labor and employment law firm. At Jackson Lewis, Matt serves as the head of the firm's national affirmative action and diversity practice.

The firm's national affirmative action practice prepares approximately 1,500 affirmative action plans per year and has defended over 200 OFCCP audits since 2003. The panelists today have agreed to take questions that anyone has. If anyone does have a question, please feel free to email it to me Eric Felsberg at the following email address, felsbere@jacksonlewis.com. And we will repeat that email address later in the program.

And without further ado, I present Eileen and Matt.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Thank you, Eric. For those of you who want to know the secret to the address it is felsberg, drop the "G" and add an "E" for Eric at jacksonlewis.com. That was felsbere@jacksonlewis.com.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Thank you, Matt.

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**Matt Halpern** - Jackson and Lewis, LLP - Senior Partner

You're welcome.

**Eileen Groves** - United Space Alliance LLC - Associate General Counsel

Ladies and gentlemen, I would like to welcome you to what is basically the first webcast for the employment and labor committee for this New Year, post national meeting. During the national meeting, I cornered Matt at the Jackson Lewis display and said, Matt I would like to get an Internet Applicant webcast on as soon as possible. And he said it was doable and I think him for responding so quickly.

**Matt Halpern** - Jackson and Lewis, LLP - Senior Partner

You're welcome.

**Eileen Groves** - United Space Alliance LLC - Associate General Counsel

Why are we so interested in this? As obviously, USA is a government contractor and I think many in the country are government contractors and are subject to the requirements of executive order #11246. Happily, that in 2004, I think it was or 2005 rather, the EEOC issued proposed regulations defining Internet Applicant in early March of 2004. And about two or three weeks later the OFCCP issued their proposed regulations regarding Internet Applicant. And there was a dichotomy between these two proposed regulations.

And low and behold the OFCCP came out with their final regulations before the EEOC has come out and we will all be as contractors responsible to respond to this requirement by February 6, 2006. The proposed regulations were issued on October 7, 2005 in the Federal Register. The Federal Register starting at page 58946 through -- I'm flipping through the back page -- 58963. So, the full report or final regulations are available as of October 7, 2005 in the Federal Register.

These will become operational in 120 days since they were issued. So, February 6, 2006 we must be responding to this. And the proposed regulations issued in March of 2004 have been repealed. For years, there has been a controversy between the OFCCP that is the Office of Federal Contract Compliance and the contractor community regarding the definition of applicant. This is significant, because contractors have an obligation to analyze adverse impasse in their hiring practices. This obligation requires us to solicit both race and sex information from applicants and to monitor the selection and rejection of the applicant pool. The OFCCP, which is a subgroup within the Department of Labor is --

**Matt Halpern** - Jackson and Lewis, LLP - Senior Partner

Page 4, we are on.

**Eileen Groves** - United Space Alliance LLC - Associate General Counsel

-- signature to the EEOC's 1998 uniform guidelines and employment selection processes. And the Q and A is issued in 1979. One of the difficulties for the contractor community since 1979 is the question and answer to question #15, which they basically describe the concept of an applicant is a person who has indicated interest in being considered for hiring, promotion or other employment opportunities.

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This may be expressed in an application or orally, depending upon what the employer does. Well, that could be anybody who walks in the door and says, I want a job. Is that person an applicant? If you are known, as I am, in a company that does rocket science and this person doesn't even have a high school diploma. Is that person an applicant? Well, on those Q and A's it is possible this person was an applicant. Well, this is important because the determination of adverse impact relies on the size of the pool and also when and where the contractor identifies the person as being an applicant.

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**Matt Halpern** - Jackson and Lewis, LLP - Senior Partner

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**Eileen Groves** - United Space Alliance LLC - Associate General Counsel

Now, going to page 6, the earlier a person becomes an applicant, means that your pool of applicants is much larger, which means potentially, you have a greater liability. But if you can identify a person who is an applicant later on down the line. And you have eliminated the people who don't have college degrees, or don't have a certain type of degree and you decrease it to a smaller group and then you make your analysis the potential for impact may and probably will be less.

Many contractors have insisted that we don't count applicants who we actually start interviewing. We have gone through the process and said, okay, this is our group of people who we think are qualified and we are interviewing them. And it is at that point that we start gathering the race and sex information. Because we have determined at that point that they have met minimum qualifications.

For years, the OFCCP has said, that is too late in the process, because the OFCCP wants to have as large a number and persons in the process, in the group. Because their fearing that you are screening out adversely persons who may qualify for the job. Plus the fact that the larger the pool, the larger the make hole remedy, which means the greater back pay, the greater job offers. So, this is where the contract community and the OFCCP have come to a dispute. And the contractors have repeatedly been asking for some form of a uniform definition of applicant, because even within the various offices or regions of the OFCCP, there was an inconsistency in the definition.

Well, in 2000 -- on page 8, as pointed out -- in 2000, the government came out and asked and created an inter agency task force to examine this issue. And finally in March of 2004, as I indicated the EEOC issued their proposed guidance for applicant and subsequently the OFCCP published theirs. I should note as a side note, I was in an ABA conference in which they were representatives of the EEOC and OFCCP. And that was the hot issue that in-house counsel was attacking the EEOC on saying why couldn't your definition be like the OFCCP. But that is here nor there, but it was an interesting conference, because it was right then and there. The key thing to the OFCCP's definition versus the EEO is that the OFCCP proposed definition included an element, minimum qualification. That is a key element and Matt will continue on with this, to show you how this characteristic and the other proposed changes in the regulation will be affecting us in the future, Matt?

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**Matt Halpern** - Jackson and Lewis, LLP - Senior Partner

Okay, Eileen, thank you. The way I have always looked at the applicant definition issue is like dropping a pebble in a pond. The point where the pebble strikes is the hire and then there are successive rings that emanate from the center. The first ring would be declined offers or offers. And then the next ring out would be those who are interviewed. And the next ring out after that would be something earlier than the interview process maybe that is where minimal qualifications occur.

And if you look at the application process as a series of rings, concentric circles emanating out from the pebble being dropped, that gives you a sense of the different stages of the applicant process. So based on the prior definition that ring or the emanation could go all the way to the end of the pond and everybody in the pond could be applicants. The new regulations still do not

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change one factor, which is the OFCCP still will not accept a definition of applicant that is equal to only those who you interview. Because at that stage you will have already screened people out, even using something like basic qualifications. So, I view this as having narrowed the pond a little bit in terms of the information that has to be kept.

Now, the definition applies to Internet applicants and applicants through other related electronic data technology. And there are four parts to the definition. The definitions -- the new definitions are very similar to the proposed definition from March of 2004, with some deviation. And what I'm first going to do is highlight what the four parts of the definition are and identify the major differences between the proposed and the new rule. And actually throughout this what we are going to do is we are going to highlight what we think are the primary issues, regarding each of these four definitional standards.

So, the four standards are and I'm referring to page 11 now; "the individuals who submits an expression of interest in employment through the Internet or related electronic data technologies". And that is essentially the same as what was proposed in March of 2004. So, the first one is expresses interest through the Internet. Number two is, "contractor considers the individual for employment in a particular position". And that is virtually the same as proposed but removes the word "open".

The rationale being that you might consider somebody for a position that doesn't happen to be open right now, maybe closed, you may keep their application for further consideration. So, they have removed the word open, but in many respects this definition has remained the same. So, the first two are expresses interest and then the contractor considers for a particular position. Number three, "the individuals expression of interest indicates that the individual posses the basic qualifications for the position.

The chief difference between the proposed and the current rule is that the word "advertised" was removed before basic qualifications for the position. And I will describe why that is later on in the presentation. So, the third is basically, the basic qualifications standard. And then the fourth criteria is, "the individual at no point in the contract or selection process, prior to receiving an offer of employment from the contractor, removes him or herself from further consideration or otherwise indicates that he or she is no longer interested in the position".

This is similar to the proposed rule, but probably differs most as compared to the other three from the proposed rule. It modifies the proposed rule, which was phrased in the double negative, which made it confusing and it also adds for concept of removing oneself from consideration. So, the four definitional standards are you expressed interest through the Internet or related technology; the contractor considers you for employment of a particular position; you can tell what the basic qualifications are based on the expression of interest; and the individual had not removed themselves from the process or otherwise indicating that they are not interested in the position.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, does this only apply to just somebody who just gets on the internet? Or can he just come in or mail in we scan it in or anything?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Eileen, an excellent question, which takes us to slide 13, which is expression of interest was dissolving the dual definition dichotomy. What Eileen is asking is, are we supposed to have now two definitions of applicant, because the definition of paper applicant hasn't changed. We are still kind of tied to that notion of what is an applicant as defined by question and answer #15 in the Q&A's accompanying the uniformed guidelines and employee selection procedures.

This is -- it depends on the employer's definition, if somebody expresses an interest in employment, who is considered, orally or written interest. So, for paper applications the standard hasn't changed, which is that we know for certain it has to be earlier

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than the interview stage, but aside from that we don't know much else. Including whether minimum qualifications is appropriate, although based on what we see with these rules, one could concur that some consideration of basic qualifications is allowable.

But what this rule did was, deal with the issue with what happens if you have two different systems and what situation can you integrate them. The OFCCP specifically solicited comments on this dichotomy during the comment period, because it got a lot of push back from the contractor community about the problems of having two separate definitions of applicant.

And so, the OFCCP in response to the published comments has said that on page 14 - - that the new definition includes all expressions of interest, regardless of the means in which they were made, if the contractor expressions of interest made electronically in the recruitment or selection for the particular position. In other words, if you accept applicants electronically as well as hard copy or walk in, then they are all considered to be electronic applicants. If you only accept hard copy applications for a position then the old definition still applies.

So, if you have a dual, many different pathways to applying for the same position and one of those pathways happens to be electronic, then they all can fall in the definition of an Internet applicant.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, I have a question?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Yes.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

We take - - or you can access via the Internet to fill out an application on line. Now, if somebody comes into our offices, we don't give them a paper. We say go fill out the application on the computer out there in the lobby, are we required to take a paper application?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

No, you are not required to take a paper application. Your processes are still yours. You can still decide what the application and procedure will be. As long as, and this is the caveat, as long as your procedure itself doesn't have an adverse impact or it is not evident of some design to treat people differently, because of a protected category. But that still is an employee's purview to decide what system works best for itself. What we recommend is, if you want to have a uniformed system, just make sure that all positions can be applied for electronically, even if the majority of them get applied for in hard copy.

Now, contractors do not have to consider all expressions of interest, because one of the advantages of the Internet is also one of its greatest disadvantages, which is it is easy to apply and therefore - -. And that's great because it is easy for people to find you. But the part that is not so great is that a lot of people who find you and then that is a lot of data to deal with. And so what the OFCCP has told us in the new rules is that companies can use protocol to control the number of people who "apply" and I'm turning to page 16.

The second prong is considering individuals for employment in a particular position. And an employer is not required to consider expressions of interest that are not submitted in accordance with its standard procedures for applying for a job, or not submitted with respect to a particular position. So, for example, if you don't consider - - you don't accept unsolicited resumes, you are under no obligation to start doing so following issuance of this rule.

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The rule also allows employers to draw the line in too many applicants. If there are a large number of expressions of interest the employer has not "considered" the individual for employment at a particular position. If it uses data management techniques that do not depend on an assessment of qualifications such as random sampling or absolute numerical lenex (ph) to reduce the number of expressions of interest.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

You mean like if I only take 100 or random 100 out of 1,000.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Right, or the first 10%. Because you know you are not going to have the resources to go through all of them. But the caveat there is that the pool that you poll has to be appropriate, it has to reflect the total pool of those submitting expressions of interest. So, in other words, you couldn't have a system that said, we are only going to look at males. That is our data management technique, because that would not be reflective of the pool, it would be openly discriminatory.

The OFCCP by the way, considered to mean that you are viewing the qualifications to see if the person has the basic qualifications. If they don't, then they will get bounced out on the fact that they don't have the basic qualifications. But the fact that you considered them is fulfilling the consideration prong. So, if you have looked at it, they have the basic qualifications and they have expressed an interest through the Internet, if they haven't removed themselves from the process as we will talk about in prong four. Then that person is an applicant, even if they may not strike you as the best applicant.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

My recollection of this is that the EEOC proposed regulations did not include this qualifier of meeting basic qualifications.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

It does not, you are right, and that was one of the chief criticisms of the EEOC's definition of an applicant. So, employers are free to apply data management techniques to limit the number of expressions of interest that must be considered. They have to be facially neutral and they can't have a disparate impact based on race, gender or ethnicity in the expressions of interest to be considered.

That kind of begs the question of should we be recording to some extent the impact of our systems on the resulting applicant pool. And we will talk more about this near the end, but the answer is, yes. Because the OFCCP will do, so and it specifically says that it will do so. So, if you are going to apply data management technique, one thing not keep in mind is you should get a sense of what impact it is having on the pool. And then maybe not immediately, but after trying it for a couple of six months, decide if it needs to be tweaked or changed.

I guess one way to look at it is if you are trying to come up with data management techniques, especially if you are using an outside service or even an internal resume -- you know you have a resume bank. The extent that the bank pulls up individuals and assigns a percentage rating to how closely the individual who gets pulled up gets your criteria, you certainly, could do a limitation or restriction that ties into that percentage.

For example, we are only going to look at everybody who meets our criteria by a 75% or better match. So, there may be ways to use data management techniques that are lawful and acceptable under the regulation that are camping out to looking at individuals and saying this is a better qualifying person with basic qualifications and this a worse qualified person with basic qualifications.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Are you saying then, if I could put in a criterion of I want a college graduate, with two years of programming experience and I only want people who have 75% of these qualifications?

**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

You were okay up to the, we want people with 75% of these qualifications. Because I think at that point -- and it is a great segue way into basic qualifications. Basic qualifications can not be comparative. And so you would not be using the 75% as a basic qualification, rather you would be using it as a data management technique. But that is an excellent question; now let's talk about basic qualifications.

Under the OFCCP's old definition since there was no definition of minimally qualified or no component of minimally qualified, and I'm on page 19 now. In the definition of an applicant, the OFCCP could insist that anyone who expressed an interest was an applicant regardless of whether they were minimally qualified or not. That caused a lot of push back from the contractor community. And the OFCCP's response to that is okay, we understand that not everybody expresses an interest in employment is an applicant.

We understand that you are using your example, Eileen, someone applies for a job to be a rocket scientist, but they don't have a degree in rocket science. Under the old definition, one might view them as an applicant, just the very data, if they followed your procedures. Under the new definition, it is one of the basic qualifications was must have a degree in rocket science and it maybe five years of experience. Then the person without the degree with out the experience would not longer be a bad applicant, they would simply not be an applicant at all.

Under the OFCCP's new definition referring to page 20. An applicant must meet all of the positions basic qualifications in order to be an Internet applicant. Now, that is a little misleading because it doesn't mean that a contractor has to consider basic qualifications, all the basic qualifications in each instance. The OFCCP specifically says that the contractor may choose not to use all of its basic qualifications, because the pool will get too small.

It's like when we all used to do Lexis (ph) searches and if you made your query too specific, no cases would pop up. So, we all learned after a fashion that you better start with the board and start adding in more and more relevant elements until you got a manageable query. The OFCCP position is an applicant is somebody who meets all your basic qualifications, but you are not prevented from sacrificing some of those qualifications if you want a larger pool. However, you will have to keep records on that larger pool. So, they are saying if you set the basic qualifications, use them and that is how you can shrink your applicants to pool. If you are not using all of them, it is going to make your pool larger and you have to do the data collection on a larger pool.

One interesting set of comments in the regulations was why don't you just use the word minimum qualifications? Why did you come up with a new term basic qualifications? And the OFCCP's response to that was because minimum qualifications are understood by everybody and it is very common in the case law and in the binocular of the EEO world. And we think it is going to cause more problems to borrow a term from common usage to which everybody attributes different meanings and to come up with our own term and give it a very specific narrow meaning.

And the specific narrow meaning that the term is given is that the qualifications must be non-comparative, objective and relevant. And I will get to that in greater detail in a minute. The other thing I wanted to add before we talk about that is that in the beginning I mentioned the old OFCCP removed the word "advertise" from basic qualifications. And in the definition of basic qualifications itself and I refer to page 21.



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It says that a basic qualification refers to a qualification that the contractor advertises the potential applicants as they must possess in order to be considered for the position. Or, the qualifications for lack of a better description, exists otherwise. There are preset queries or criteria that the contractor uses for such a position, although they may or may not be advertised in a given instance.

For example, if you were pulling resumes off of an external database, you might have a set of criteria that never got posted in the newspaper or on the net, but you are legitimately using those criteria to poll individuals down off of the resume data base. So, the word "advertise" was specifically removed from the general definition although it is still there as part of the explanation, but you are not limited to just those advertised qualifications.

So, let's talk about the three - - turning to page 22, criteria that all basic qualifications must meet.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, before you begin, continue just to remind people if you do have a question, you can email it to Eric, that felsbere@jacksonlewis.com. Sorry, Matt.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Yes, if you have questions, send them to Eric. So, first of all qualifications must be non-comparative, non-comparative of the job seeker. A two year experience requirement is non-comparative. Saying, I want the top five individuals with the best experience would be comparative. In addition, the qualification must be objective, in that they don't depend on the contractor's subjective judgment.

When I do training I spend a fair amount of time with managers teaching them as there is no such thing as subjective. That subjective is really is when you take a whole bunch of objective things and lace them all together and you take a short cut by taking the term that you think is subjective, but really everything is based on objectives. And so, it is a matter of making sure that articulate our factors objectively. A college degree in accounting is objective. Saying somebody has to have a degree from a good school would not be. You could specify which schools you want to hire from, because they have specific programs, keeping in mind of course that you want to make sure ultimately that your definition doesn't have an adverse impact. But the term "a good school" in and of itself sounds subjective and non-objective.

Finally, the qualifications must be relevant. The basic qualifications must be relevant to the performance to the particular position and enable the contractor to accomplish its business related goals. In other words, requirement of an accounting degree may not be acceptable for a human resources position, as you look at page 24. It is the old dilemma of the man who is saying I want the employee to have master degrees and nobody in the department has master degrees except for one person and he's not doing well.

And so, the question of is a master's degree job related and consistent with business necessity, certainly sounds job related. I'm not sure it would be consistent with business necessity and with the master degree we are having an adverse impact. Then we would have problems defending it, based on our defense that it is job related and consistent with business necessity. So, the qualifications should be relevant but then that is HR101, that is what we always struggle to obtain.

A job seeker - - turn to page 25 - - must meet all of the companies basic qualifications to be an Internet applicant, as I stated however, the employer is free to open up the definition to an earlier stage. If it does so, however, it will have to keep records of the earlier stage at which it started. What you are really doing is you are actually changing your definition of basic qualifications and saying, basic qualifications when we added three of these opposed to the five that we usually do.

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That means that there is going to be a lot more emphasis on record keeping and keeping track of what we do. The OFCCP also stresses the fact that employment tests are used as employee selection procedures are not considered basic qualifications under the rule. If you are using that test to decide who your applicants are. If you decide who your applicants are and then give them the test to see who succeeds then it would be considered a basic qualification at that point, but not prior.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, at this point, I think I would like to stress to my colleagues this, when we go through all of these issues and points, we are raising them for you to go and ask your hiring department or your HR department whoever is doing it. And also to your IM department who may have all of this information in a server someplace to find out how you can track it. And also possibly to find out who does the screening.

I use the example that in my company, if a manager has a position that he wants to fill. He can get on line and type in what he determines is the basic qualifications. And this is an issue, staffing is going to have to work with managers to train them as to what are the types of qualifications that he regards as basic. And he may add, I want someone, a programmer who has experience in C++ or Oracle programming or whatever. We need to go back and talk to staffing and IM and talk to HR to establish a procedure and forms if necessary for the people who are actually doing the queries, so that we have a record. And we stay within those basic tenets.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Yes, and that is absolutely right, because a lot of this is going to come down to record keeping, because we are going to talk about that in a moment and what the definition gives us or gives the OFCCP is the opportunity to go back and recreate what the employer did. Just finishing up on the notion of basic qualifications, I just mentioned employment tests and with employment tests if you had 100 people take that employment test.

But out of the 100 regardless of how they did you picked the 50, you only considered the test results were 50 who met the basic qualifications of the job. And the information on those individuals would only have to be or kept and race and sex data would only have to be solicited for the 50 job seekers screened by test results, because the test was used as a selection procedure only for those individuals.

By contrast, if the contractor uses the test results from the 100 test takers to narrow the pool to 50 job seekers, then you have to keep the results of all of 100. It really comes down to how you are using the test and what this all boils down to is who do you have to solicit sex and race data from. Because it is those you seek with the race and sex data from which will go into your adverse impact now.

So, just finishing up basic qualifications, factors such as individuals salary requirements, willingness to travel, willingness to work certain shifts are not considered basic qualifications. But, we do have a way of using them in the fourth criteria which is individuals who remove themselves from consideration. And the new definition allows contractors to discount as applicants any individual to prior to receiving an offer of employment from the contract removes himself or herself from the consideration or otherwise indicates that he or she is no longer interested in the position.

And turning to page 27, in the past, you would use somebody's failure to show up for a job interview or having disqualifying information on their application form to remove them from the applicant pool. Not to change whether they were truly an applicant or not. They already were an applicant, we just after initial adverse impact we would argue that these individuals have to come out because they are not qualified. So, what you are really arguing is you having a job related reason that is consistent with business necessity to take somebody who has a criminal conviction, for example, out of the adverse impact pool. Even though they might be an applicant.

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The new definition clarifies that such conduct means that the individual doesn't even have to be counted as an applicant in the first place. And that is significant because that means they never have to even go into the adverse impact and be pulled out later on. Probably even more significant is that an employer can review applications in what ever form they may be, data, Internet or electronic and make a decision based on what information is in the applicant's resume or application about salary or about shift availability, that they can consider to be that person either removing themselves or being no longer interested in the position.

And that is actually a pretty big give me to the contractor community. Because even though you may have considered them, because they expressed an interest using your procedures through the Internet and they have the basic qualifications. They still may not be an applicant because there is information also on their resume that would also suggest that they are not interested or that they should otherwise be removed. You can do that under three conditions and these are "or" conditions. Obviously, if the person makes an expressed statement that they are no longer interested.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

In the position, such as never mind, then they don't have to be considered an applicant, if it is prior to an offer. Or there is a passive disinterest that is shown through repeated non-responsive inquiries from you about the position in question. For example, somebody fails to return telephone calls, they don't return emails, they don't show up for an interview, they don't show up for a phone interview, they don't get back to you with information that you need. Then that can be considered a passive demonstration of disinterest.

And finally, and this is the part that I think is very helpful for contractors is that you can conclude a lack of interest based on the individual's initial expression of interest and the information that is in there. For example, if somebody puts salary requirements in or they say they can only work certain shifts or they have geographic restrictions. Provided you have been consistent and not considering similar situated individuals that person comes out of the applicant definition. They know they are not an applicant for purposes of this rule, which means we don't have to solicit race and sex information from them.

I would advise however, that if you are going to do that, that you have very good records regarding applicants withdrawal from the application process, such as time of call, because you want to be able to -- or appointments missed, or the expressed salary requirement that they said they needed to have. Because you are going need to be able to establish that to the OFCCP and that is what will allow you to remove the individuals before you ever do the adverse impact analysis.

Okay, why don't we talk about record keeping and I'm going to respond to a couple of emails in just a moment that we have received. I just want to get through the record keeping part. The record keeping obligations are what you have to maintain and what you don't. What you have to maintain is any, all, expressions -- and this is in general. Any and all expressions of interest submitted through the Internet or related electronic data technology, which the contractor considers -- for which the contractors considers the individual for a particular position. Including on-line resumes and internal databases.

So, some one has expressed interest in a particular position and followed the employers rules. You have to keep a record of that person. You also have to keep a record of who you contacted among that group. Because you may have their record, but you may not have contacted them. And that is a constant theme that runs through the OFCCP's preamble which is that they want to be able to go back and look at your decision making process. And so, you have to keep a record of who you contacted so that they can go back and recreate the results of your selection process.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Excuse me, Matt. I think this gets back to my earlier point, which we have to get with our staffing department and our IM department to see how we can keep this track. If they can put in a system or tracking all of this or else we are going to be sitting there writing down on pencil and paper again.

**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Right, the OFCCP has done is, the easy one is okay, so I'm going to express interest right. They follow our rules, they express interest, and we actually look at them for a particular position. Remember considering the individual position means we review their resume for basic qualifications. So, if you have applied for data management techniques and you never get to consider them for that basic qualification. You don't have to keep the records of those who you didn't consider. You have for the ones you did consider, you have to keep those records and then those who -- and then you have to keep records of who you contact so they can go back and recreate what you did.

**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, how long do we have to keep those records?

**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

You have to keep them for two years. That was specifically added into the regulations, although there was reference to it before in various spots and now it is specific to your record keeping. For internal resume databases and there was a lot of comments about the internal and external databases producing huge numbers of records. The OFCCP said you have got to keep really four pieces of information for an internal resume database. A record of each resume that is added and the date that it was added, number one.

The position that you did a search for and the criteria used for that search, number two and number three. And the date the search was made. What that will allow the OFCCP to do is come back in and can recreate your searches if they have to. And so then they can evaluate who you contacted and who you didn't contact. Because you are going to have to keep a record of who you contacted. And so, they can back into your decision making process if they have those records, plus a record of who you contacted and that you contacted them.

**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, we have been talking about this a couple of days ago and I had mentioned to you that several years ago on a prior position. I had a plant manager who just took applications and through them in the bottom drawer of a file cabinet and low and behold he ended up with four years of applications. If we are talking about Internet or electronic applicants, should we put in some system whereby, two years it is purged.

**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Yes, keeping in mind document spoliation issues that might relate to litigation. It is probably a good idea to have a document purging policy in place. And two years might be fine, but sometimes you may want to have a longer like third year, because sometimes you get adverse impact and it is anomalous and you want to be able to argue that look, it didn't happen the year before, it didn't happen the year after.

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So, we would like to take note of that at OFCCP. So, have some kind of document purging process, but think about how you want it to apply. For external databases, the criteria is even a little more narrow. You need the position search for the search criteria used. The search date and the resumes of any who meet the basic qualifications and were considered. That again will allow the OFCCP to go back and recreate your search.

Turning to page 36, just remember you may be in the position of having to keep resumes for individuals who do not possess the basic qualifications even if those individuals are not included on the applicant flow report and resulting adverse impact analysis. So, you want to make sure that you get with your IT people and your HR people and your recruiting people and help them to understand that the definition of applicant is closer to the hire than the record keeping obligation is.

You have to solicit the race and gender of your "applicants" and you can make at any stage you want. You want to just make sure that you get the information. You could still do it by visual observation, although the preferred method is self identification. If they are coming in electronically then the information should be easy to solicit. So, you can just put up a popup solicitation on the form.

One of the questions we got by the way is, the information we need to collect the same as we need on the old forms? As this is optional, what if the applicant's don't return or don't complete? The application on EEO forms, I assume you mean EEO-1 forms is for current employees and those are incumbents and that is different. You generally most employers are too big to use visual observation so instead they will have self ID forms and there is not room for a un-identifying on an EEO-1 form so you are in the position of either having to get them to tell you or making a visual observation for those who don't comply for our current workforce.

For applicants there is an absolute obligation to solicit the race and sex of applicants. I would imagine the OFCCP's position is because we have narrowed the definition of applicant significantly, you really should have very little excuse for not obtaining race and sex data. And as they have been doing in the recent past, I have to imagine in the future, they are going to look very seriously at your methods for soliciting race and sex from your applicants. And if you have too big a proportion that is unknown you are likely going to get a citation for having an ineffective solicitation system for obtaining race and gender information.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

So, what do you do? You've gone through, you have looked at basic qualifications, you have now come down to let's say 25 electronic resumes. And you only want to bring in maybe 10 for an interview. Do you still send out an email to those 25 and say, hey, what is your race and sex?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Yes, and assuming that you have gone through a process where you windowed it down to 25 and then you take the 15 or 10 that you contacted, there was significant discussion in the preamble about some civil rights agencies saying that this definition is going to allow employers to pick and choose and they may not always be so noble and they are picking and choosing methods. And it wasn't quite clear, either in the writer's itself or the preamble what the answer is.

I think the answer is, if they have expressed an interest through the Internet, if you have considered their basic qualifications, and for a particular position they meet the basic qualifications. And they haven't otherwise removed themselves from the application process, they are an applicant. And so you have to solicit their race and sex. Whether you have to contact them or not is the bigger issue. I think the answer is you would not have to contact all 25 because, why would you have the general rule and we want a record of who you contacted.

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That implies that there will be some you don't contact. So, in the situation you described where you eliminated everybody where you can. Then those remaining 25 are your applicants, even though you aren't calling them all in or contacting all of them. You would have to solicit their race and sex.

Somebody asked, you didn't see it anywhere in slides 33 and 34 any requirement of keeping a record of who was contacted, where is that from? Since I can't quickly look it up in the regulations, I can direct you back to the slide 32 which at the bottom says all records identifying job seekers contacted regarding their interest in a particular position.

Then there was a question about, exemptions. Is there a blanket exemption if you have less than a certain number of employees or percentage of your workforce working on government contracts? And the answer is in for a penny, in for a dollar. If you are a covered contractor, meaning that your company is covered because your "company" has a government contract than this - - and the contract is at least \$50,000 annually. And you have at least 50 employees, then the organization is covered, not just those who work on the contract. Unlike the drug free work place act; which would apply to those employees who work directly on a government contract. If you are a covered contractor, then the rule would apply to everybody in your "company".

That individual also asked is there any way to apply for an individual exemption based on your company's relationship and services. That could be a webcast in and of itself. There is a separate facility exemption that can apply for that if the government contract work is only performed by a specific facility and no other processes, persons, procedures, resources in the organization in any way support that facility fulfillment of the government contract. You could apply for a separate facility waiver. Also waivers are given in for national security reasons and for the national interests although later two, I have really not heard much - - many exemptions being granted. Separate facility waivers though, we have had a little more success.

I just want to jump back to the slides for just a moment to point out that the OFCCP borrowing a page from the EEOC proposed guidelines and also in specific reference to a supreme court case law and its preamble says that - - . And this was to assuage the concerns of the civil rights community who worry that contractors will toy with the definition of applicant to the disadvantage of minority groups and other protected categories.

Is that look as a civil rights enforcement agency we always have a right to go look at and see if the applicant definition is having adverse impact. And we can determine that by comparing hiring applicant activity at the company with who is in the labor force. Look at labor market data and do adverse impact based on labor market data. You know what, company, you system is creating a situation where your representation of women in your applicant flow is only 10%. But the representation of women in relevant positions in labor force is about 40%, so your definition itself is having an adverse impact. And that adverse impact is at least two standard deviation of significance. And so the OFCCP makes clear that in its regulations it is still going to use the two standard deviation rule for determining statistical significance.

I had one more question, which I am going to save for the end, because although it is OFCCP related, it is not quite applicant definition related. So, I just wanted to finish off, what you should be doing now is reevaluating your definition of applicant and procedures for applicant data, in light of the new rule. Consider what the impact of having two definitions will be, paper copy versus electronic copy. And then decide what you are going to do. Are you going to make so that everybody can apply electronically, which will turn all your paper resumes into "electronic or Internet" resumes. And if you do, you need to have in place a system for recording the information.

Make sure your HR, IS systems can do this. Because a lot of people are all excited that they can consider basic qualifications now, but what does that mean. Because if you can do this electronically and you say okay at this stage you become an applicant, you have to trust a lot in your basic qualifications. The problem is there is usually a lot of different basic qualifications for a lot of different jobs at a company. So, I'm not sure how much work this saves us. It certainly is positive, but I still don't think that you can totally automate this. Because basic qualifications differ from job to job.

So, unless you had a bank of basic qualifications for all your jobs that you were very comfortable with there is still going to be the human element. So somebody is going to have to go through and see if the electronic cut-offs that they are trying to query

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is really producing those with basic qualifications for not and go through them. Finally, you probably want to review your system after a while to see if you are detecting any kind of adverse impact.

Is your system itself creating an adverse impact? Is your definition of applicants closing the situation where your demographics look artificially restricted compared to the labor market. And I guess stating the obvious, you want to make sure you train your human resources and recruitment and staffing and MIS folks on this so that they understand and they understand and when they don't understand something so they can come to you.

The final question that we received is regarding requesting OFCCP for an extension. And I actually, now that I read it I'm not sure if it is a request for an extension on the definition of the application of -- the definition of applicant being put into place, or getting an extension for an audit. I will tell you that on audits the OFCCP generally is pretty reasonable except for a certain typical offices around the company and you can always rat them out to the regional director. But I have heard nothing about the -- or any request for extensions made to the OFCCP and as a member of several industry groups, both personally and as part of the Jackson Lewis Affirmative Action Practice Group.

I haven't heard yet the stories and complaints that I think will probably occur, because I think that everybody is still digesting and figuring out how much trouble they really are in. And once we realize and get the sense that there is a lot here that we don't quite understand, that is not completely clear. You might see requests for extensions start to occur. Those generally will happen through organizations like ACC (ph), it happens through the various ILGs (ph), which are inter-dispersed (ph) liaison groups, which are industry groups which are composed of contractors, who have affirmative action allegations and they meet regularly with the OFCCP to share common concerns and complaints in the employer position.

And those are very active in expressing opinions as is Sherm (ph), National (ph) and the local Sherm (ph) chapters. But as of yet I have not heard that there was a grounds swell of reaction to the implementation date. But I think that is more, as I said before, a reaction to the fact that everybody is still going through intellectual concept shock. They are trying to figure out what the regulators mean and again, how much trouble we really are in, or are we really in trouble at all.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

And or that they are starting to talk to their IM department or they haven't started talking to their IM or their staffing and find out that we are going to have to revisit the whole process.

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Exactly.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Matt, have we heard any word on the EEOC proposed regs?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

No, they have been oddly quiet about it. But again, it is not surprising because the EEOC using the definition of applicant generally to determine if they are going to take an individual charge. It has a much different meaning for the EEOC. I asked one of the heads of EEOC at some point, are you going to now do what the OFCCP does or are you going to use this for making for luncheon commissioners, charges and looking at the definition of applicant on a group basis.



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And the response was, no, that might happen, but right now we use the definition of applicant for when somebody walks in and says I was discriminated against because I wasn't hired. And then we look at it from that individual charge basis. And so that has a much different import to the EEOC, at least in the track implication than it does for the OFCCP.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

All right. Any other questions, Eric?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

Eric, any other questions? No, I think we have covered all of our questions and let me briefly go through them.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Well, why Matt is looking through them I would note that at the conclusion of this webcast, that an hour or so later it will be available off of the ACC website and will be available for approximately a year for replay. We will also prepare answers to the questions that have been posed or that you may pose following this webcast. And they too will also be posted on the ACC website. I review again, if you want to send a question post this webcast to [felsbere@jacksonlewis.com](mailto:felsbere@jacksonlewis.com), [felsebere@jacksonlewis.com](mailto:felsebere@jacksonlewis.com). Is there anything else Matt?

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

No, I think that is it.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Okay, thank you very much and I thank Jackson Lewis and Eric for all of your help and work on this effort. And I invite our listeners to send for the questions if they have them to you. And I pass it over to Jaclyn (ph).

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**Matt Halpern** - *Jackson and Lewis, LLP - Senior Partner*

And I will just to repeat the contact information is [felsbere@jacksonlewis.com](mailto:felsbere@jacksonlewis.com), felsberg, drop the "G" add an "E" at [jacksonlewis.com](http://jacksonlewis.com). Thank you.

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**Jaclyn Ley** - *Association for Corporate Counsel - Staff Attorney Committee Manager*

This is Jaclyn Ley (ph) that Staff Attorney Committee's Manager with the Association for Corporate Counsel and in addition to replays of the webcast, within a week we should have a transcript of the webcast which will be available in our virtual library and if you have any questions concerning any of this, you can contact me at [windley@acc.com](mailto:windley@acc.com). We thank you for your attendance.

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**Eileen Groves** - *United Space Alliance LLC - Associate General Counsel*

Thank you.



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