

April 29, 2004

Frances M. Hart  
Executive Officer, Executive Secretariat  
Equal Employment Opportunity Commission  
10<sup>th</sup> Floor  
1801 L Street, NW.  
Washington, DC 20507

**RE: 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 Fed. Reg. 10152 et seq.**

Dear Frances Hart:

This letter responds to the request for written comments on the Equal Employment Opportunity Commission's (EEOC) proposed Additional Questions and Answers to the Uniform Guidelines on Employee Selection Procedures (UGESP).

### **Background - Maly & Associates LLC**

Maly & Associates is a management consulting firm located in San Rafael, California. We specialize in the analysis and reporting of human resource data, affirmative action compliance, and Office of Federal Contract Compliance Programs (OFCCP) audits. The majority of our clients are federal government contractors and range in scope from large, multi-national corporations to smaller organizations of 100+ employees nationwide. We assist clients in understanding and complying with the federal regulations for affirmative action, including Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973. Our firm has analyzed data for and developed thousands of Affirmative Action Programs (AAPs) over the almost 18 years that we have been in business. We have assisted many clients with compiling their data for EEO-1 reports, VETS-100 reports, EO Surveys and preparations for OFCCP audits. We are keenly aware of the high costs and organizational burdens imposed on our clients by unclear guidelines and regulations, and inconsistent and overlapping government definitions.

### **Focus of Our Comments**

The EEOC's notice described five specific questions and corresponding answers for the UGESP to which it is interested in receiving comments. Our letter will number and address each of these five Questions and Answers (Q&A) below. In

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summary, we recommend that the EEOC create a clearer and uniform definition of an applicant by rewriting the UGESP rather than issuing additional Q&A. It is our view that equal employment opportunity can best be achieved by making the goals and requirements of the EEOC as transparent as possible, and by reducing the burdens of interpretation and implementation on covered employers.

### **General Comments**

Before addressing each of the proposed additional Q&A we would like to address specific statements made in the Introduction and Overview of Collection sections of the EEOC's proposal.

First, the EEOC states that "this document does not solicit comments on the Uniform Guidelines." Although we will respect this request, it is our view that interpretation of the Uniform Guidelines in the form of Q&A requires a concurrent assessment of the Uniform Guidelines themselves. The additional Q&A proposals are patches on guidelines issued in 1978. The fact that there is a need to address Internet selections indicates the outdated nature of the original guidelines.

Second, the EEOC states that in the proposed Q&A that the "UGESP agencies are providing guidance about when employers should identify the race, gender, and ethnicity of their applicant pool when they use the Internet and related technologies." There is, in fact, no indication of when and how the identification of race/ethnicity and gender should occur. Does the EEOC intend for employers to actually solicit applicants for identifying data and what should be done if applicants choose not to provide this information? Do employers have an obligation to guess race/ethnicity and gender by way of visual identification or some other means? Furthermore, the EEOC should be very clear in its use of the terms race, gender, and ethnicity considering the proposed changes to the Standard Form 100 (EEO-1 Report) that would distinguish race from ethnicity. Is it the intent of the EEOC that employers collect both race and ethnicity data on each applicant even though they may only be required to report one category on the EEO-1 Report?

Third, and most fundamentally, is there a need for a definition of Internet applicant distinct from a traditional applicant and how is the traditional applicant different? On what basis did the agencies conclude "that they must update the Questions and Answers accompanying the UGESP" to address new technology? Are we to infer that the three criteria proposed in Q&A 96 do not apply to traditional applicants? The proposed Q&As do more harm than good if they ignore the questions surrounding the definition of a traditional applicant and simply raise additional questions about the distinction between applicants.

Finally, from the Burden Statement in the Overview of Collection, the EEOC states that the "the Additional Questions and Answers would not involve an increase in paperwork burdens associated with attempts to apply existing guidelines to the context of the Internet and related technologies." We would suggest that having one system for traditional applicants and an additional

system for Internet applicants would create additional burdens. Additionally, the EEOC should consider the unequal burden placed on small organizations that will require the same systems as those used by larger organizations. That is, the Internet and related technologies may have made data record keeping more efficient but the enormous increase in applicant flow requires implementing and maintaining a system at a much higher relative cost to small employers. Should small organizations be required to hire additional personnel to deal with the additional burdens?

### **Q&A Specific Comments**

The following commentary specifically addresses the five Q&A.

**1. Question and Answer #94: *Do federal employment nondiscrimination laws apply to employers and other UGESP-covered entities when they use the Internet and related electronic data processing technologies for recruitment and selection?***

Q&A 94 takes a simple coverage issue regarding Title VII and Executive Order 11246 and confuses this issue with UGESP applicability. That is, this is not really a question about UGESP but about nondiscrimination laws in general. It appears that the general intent of the Q&A was to establish nondiscrimination law coverage over the Internet and related electronic data processing technologies and specifically to make clear that, although recruitment is exempt from UGESP, it is covered by nondiscrimination laws.

We would suggest two options for avoiding this confusion. We recommend that the words "for recruitment and selection" be replaced in the question and answer with "employment practices." The nondiscrimination laws apply to employment practices including recruitment while the UGESP apply to selection procedures that specifically exempt recruitment. If the EEOC still wants to make clear that recruitment is not exempt from nondiscrimination laws, a statement could be made in the answer that employment practices include selection procedures and recruitment or, as stated in the Introduction to the proposal, that employment nondiscrimination laws "continue to apply to all aspects of employment including recruitment."

An alternative solution would be to rewrite the question to specifically address the difference between the UGESP and nondiscrimination laws as follows: Do federal employment nondiscrimination laws apply to employers when they use the Internet and related electronic data processing technologies for employment practices including UGESP-exempt recruitment and UGESP-covered selection procedures?

**2. Question and Answer #95: *Is Internet recruitment, like traditional recruitment, exempt from UGESP requirements?***

Although we generally find Q&A 95 to be succinct and clear, elaboration on the distinction between recruiting and selection would be helpful.

**3. Question and Answer #96: For recordkeeping purposes, what is meant by the term “applicant” in the context of the Internet and related electronic data processing technologies?**

We will address our comments to each “prong” of the test proposed in this Q&A.

- 1) The first part of the test asks whether the employer “has acted to fill” a particular position. The issue with this prong is that employers may act to fill a position but decide against filling the position at all. Even if we assume that the second and third prongs have been satisfied, the third prong of the test may be fulfilled without the employer making a selection decision. Perhaps it is simply a matter of defining what an act to fill means or maybe a fourth prong could be added to allow for the retraction of applicant status if no selection decisions are made and the position is not filled.
- 2) On the second prong, is it the intent of the EEOC that the “standard procedures” include both the medium and method of application? Also, does this prong indicate that an incomplete application would fail this prong? A clarification of these two questions will help the general clarity of the second part of the test.
- 3) The issue we have identified in the third prong of the test is similar to the issue identified above with the first prong. That is, what if an individual voluntarily removes himself from consideration before a selection procedure has been used? An addition to the fourth prong suggested earlier that would retract applicant status if the individual indicates that he or she is no longer interested in a particular position might resolve this issue.

**4. Question and Answer #97: Are all the search criteria that employers use subject to disparate impact analysis?**

What this question really calls for is a revision of the UGESP but, in light of the request to address only the Additional Q&A, we will simply comment that the statement that disparate impact analysis “can be based on Census or workforce data” requires extensive elaboration. How would such an analysis be performed? What area should be used to establish the correct census data to use?

Additionally, we would suggest that the use of the phrase “on a protected group” in the last sentence of this Q&A is inappropriate and should be replaced by “in a protected category.” We submit that race, color, religion, sex, and national origin are categories and all groups within those categories are protected by nondiscrimination laws. Furthermore, considering the increase in discrimination complaints based on national origin and religion and the scope of Title VII, would the EEOC eventually add the need for collection and analysis of data on the national origin and religion of applicants?

**5. Question and Answer #98: *Are employment tests, including those administered online, subject to UGESP?***

Experience has shown us that there is a need to clarify what constitutes a test and what qualifies as merely an investigatory question.

**Summary and Conclusion**

The real problem is not the creation of Additional Questions & Answers but the failure to address the fundamental issues regarding the definition of a traditional applicant. We appreciate the difficulty of reaching a consensus among agencies that may have different data collection needs and missions. However, it is important to keep in mind that the best method of achieving employer compliance is by making it easy for them to understand what is expected from them. Conflicting and confusing guidance increases the procedural burdens on employers and takes resources away from substantive compliance efforts. We find that when employers are out of compliance it is not because they are indifferent or intent on breaking the law but because it is difficult to extract practical guidance from political legalese. We thank you for the opportunity to submit these comments and we look forward to the EEOC's commentary.

Sincerely,

Edward Correro  
Consultant

ETC/AMM/SA/GS