June 25, 2021

Rachel See, Acting Executive Officer,
Executive Secretariat,
Equal Employment Opportunity Commission,
131 M Street NE,
Washington, DC 20507

Dear Ms. See:

This is in response to the request from the Equal Employment Opportunity Commission (EEOC) for approval for information collection under the Paperwork Reduction Act. Specifically, the EEOC seeks approval to continue the recordkeeping purportedly required under the Uniform Guidelines for Employee Selection Procedures (UGESP), published in the Federal Register of April 28, 2021 (Volume 86, Number 78, Pages 22048-22050).

I have been employed since December, 2020, as a Senior Compliance Advisor with OutSolve, LLC, a consulting firm specializing in preparation of affirmative action plans, audit preparation, and compliance support. Prior to that, I was employed for 24 years with Gaucher Associates, and with the Office of Federal Contract Compliance Programs (OFCCP) for seventeen years, as a field compliance officer, and as the Director of Regional Operations for the New England Region.

It has been some time (1999) since I last wrote to the EEOC expressing some of my concerns regarding the UGESP, particularly as interpreted by the OFCCP. The EEOC concurred with the OFCCP's interpretation, as consistent with its own. The result of the interchange with the EEOC, the OFCCP, and the Office of Management and Budget was the development and issuance of the OFCCP's "Internet Applicant" definition.

However, I also questioned whether the recordkeeping as described in the UGESP is in fact required of any employer at all. No one can doubt that since Griggs v. Duke Power, it is possible to demonstrate discrimination as a consequence of using facially neutral selection criteria which have an adverse impact on the employment of women and minorities, but which have no manifest relationship to safety or job performance. But is every employer in the United States covered by Title VII required to collect, maintain, and analyze close to 2 billion employment applications, including information on race/ethnicity and gender, when all they want to do is find and hire qualified employees?

I raised this question because throughout the UGESP, the word "should" is used, rather than "must", "will", or even "shall". In 1999 the EEOC's response was that the definition of "should" was incorporated into the UGESP. But that does not mean that any specific action, beginning with the collection and maintenance of records, is <u>required</u>. The word "should" does not state a requirement, only a recommendation. So, I have to wonder if there even <u>are</u> any recordkeeping requirements under the UGESP that would require OMB approval under the Paperwork Reduction Act.

But, assuming for the sake of argument that "should" is to be read as "shall", what should (there's that word again) I make of the agency's burden statement, which says that "[t]here are no reporting requirements associated with UGESP. The burden being estimated is the cost of collecting and storing a job applicant's gender, race, and ethnicity data. The only paperwork burden derives from this recordkeeping.

The problem I'm having is that the UGESP Section 4, states as follows:

"Sec. 4. Information on impact.—A. Records concerning impact. Each user **should** [emphasis added] maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group…"

If we are to accept the EEOC's contention that "should" conveys the same meaning as "must", that is, that it states a requirement, then what are we to make of Section 15. Documentation of impact and validity evidence, which also requires that employers (1) determine whether or not the total selection process has an adverse impact, and (2) if it does, evaluate the individual components of the selection process for adverse impact:

"(2) Information on impact—(a) Collection of information on impact Users of selection procedures other than those complying with section 15A(1) above **should** [emphasis added] maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations **should** [emphasis added] be made at least annually…[and] [w]here a total selection process for a job has an adverse impact, the user **should** [emphasis added] maintain and have available records or other information showing which components have an adverse impact."

If "should" means what the EEOC says it means, then shouldn't it also be evaluating the burden, under the Paperwork Reduction Act, of analyzing employment decisions by job, determining if there is overall adverse impact, then analyzing the steps in that employment process for adverse impact, and then determining the validity of selection criteria that continue to show an adverse impact?

As always, I appreciate the opportunity to comment on these matters.

Sincerely,

Stan Koper
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