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September 30, 2011

Stephen Llewellyn
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Docket ID# EEOC-2011-0017

Dear Mr. Llewellyn:

I am writing to comment on the Equal Employment Opportunity Commission's (EEOC's) request for extension of clearance under the Paperwork Reduction Act (PRA) from the Office of Management and Budget (OMB) for the Uniform Guidelines on Employee Selection Procedures (UGESP).

Our firm, Gaucher Associates, last commented on the EEOC's request for OMB approval of the UGESP under the Paperwork Reduction Act in 1999. At that time, we raised two issues. One of them involved the burden imposed on employers, particularly those covered by Executive Order 11246, as amended, by their sister agency, the U.S. Department of Labor's Office of Federal Contract Compliance, regarding solicitation of race and gender information for persons posting resumes on employment databases via the internet.

Our second issue, which was dismissed out of hand by the EEOC, was that the procedures outlined in the UGESP, while perhaps a "good idea", are not and should not be treated as required of any employer covered by Title VII or Executive Order 11246, as amended. Over ten years later, we continue to hold that view.

To refresh the agency's memory, we made the essential point that these regulations do not impose a requirement on employers but are merely advisory. We pointed out at the time that the definition of "should" as contained in the UGESP is no different from the dictionary definition of "should".

The EEOC"s response had been to simply quote that definition, as if somehow that made it mandatory. We wish to be clear: unless the regulations say that employers "must", "shall", or "will" comply with the UGESP, there is no compulsion to do so. The Department of Labor's Office of Federal Contract Compliance Programs recognized this in 1996, in connection with changes to its veteran and disabled regulations when it stated that "…OFCCP uses the term

'shall' when material is mandatory and 'should' when the material is encouraged but not required" (FR Vol. 61, No. 85, Wednesday May 1, 1996, p. 19345).

That is exactly our point with respect to the UGESP. Treating it otherwise is in itself a burden on employers that is not, and cannot, be justified simply by quoting a dictionary definition that does not possess the power of compulsion.

In 2004 the EEOC proposed, and has subsequently withdrawn, additions to the 1979 Questions and Answers on the UGESP, intended to address the issue that had arisen regarding application of UGESP "Guidelines" to internet applicants. Even here, the agency stated that "…employers still must ensure that they are complying with the requirements of the UGESP." Unfortunately, the very name, "Uniform Guidelines should make it amply clear that there are no "requirements" with which employers must comply. In addition, we would like to point out that the EEOC itself does not enforce the provisions of the UGESP.

The Office of Federal Contract Compliance Programs in the U.S. Department of Labor includes the UGESP in its regulations at 41 Code of Federal Regulations, Chapter 60, Part 60-3. However, when the OFCCP's regulations are up for renewal under the PRA, it identifies that part as being exempt from consideration, since the regulations have already received clearance under the EEOC's imprimatur.

The EEOC has mentioned the so-called Internet Applicant Recordkeeping Requirements" published by the Office of Federal Contract Compliance Programs, referencing its "unique" use of applicant data. In fact, of course, the OFCCP's regulations do not address the UGESP. The UGESP describes procedures to be used to determine whether or not selection procedures, apparently neutral on their face, have the "inadvertent" effect of producing a disparate impact on selection based on gender, race, or ethnicity. The OFCCP's regulations are instead a description of procedures for the simple purpose of recordkeeping. Moreover, a careful reading of their regulations finds reference to recordkeeping in connection with positions, not jobs. In response to a request, the OFCCP has stated that because of this, applicant records must be maintained, even when there is no selection (and thus no chance of adverse impact). Even the UGESP doesn't impose that sort of burden.

Here is what the Federal Plain Language Guidelines, March 2011, Rev 1, May 2011, Page 27, have to say about the use of appropriate wording in Federal regulations:

> **iv. Use "must" to indicate requirements**
> The word "must" is the clearest way to convey to your audience that they have to do something. "Shall" is one of those officious and obsolete words that has encumbered legal style writing for many years. The message that "shall" sends to the audience is, "this is deadly material." "Shall" is also obsolete. When was the last time you heard it used in everyday speech?
> Besides being outdated, "shall" is imprecise. It can indicate either an obligation or a prediction. Dropping "shall" is a major step in making your document more user-friendly. Don't be intimidated by the argument that using "must" will lead to a lawsuit. Many agencies already use the word "must" to convey obligations. The US Courts are eliminating "shall" in favor of "must" in their Rules of Procedure. One example of these rules is cited below.
>
> > Instead of using "shall", use:
> > "must" for an obligation,
> > "must not" for a prohibition,

> "may" for a discretionary action, and
> "should" for a recommendation.

Do I need to say more?

Finally, we would like to add a word about burden hours. The EEOC has noted in the past that:

> Title VII of the Civil Rights Act of 1964, as amended, covers employers with fifteen or more employees. However, UGESP has reduced recordkeeping requirements for employers who employ 100 or fewer employees, and these small employers are not required to keep applicant data on a job-by-job basis or to make adverse impact determinations. See 29 C.F.R. § 1607.15(A)(1).

That's not exactly what the regulation says. It says this about "users" who employ 100 or fewer people"

> users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:
> (a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;
> (b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and
> (c) The selection procedures utilized (either standardized or not standardized).
> These records should be maintained for each race or national origin group (see section 4 of this part) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section 4 of this part) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

So in fact "users" employing 100 or fewer people must establish a procedure through which they can collect applicant data by race and gender, and must, develop and maintain evidence of validity for any selection procedure if they "…have reason to believe that a selection procedure has an adverse impact…" There isn't an "adverse impact fairy" to tap them on the shoulder and tell them that they have a "problem". The only way to be sure would be to actually calculate selection rates.

Also, although the UGESP provides what might be a lower threshold of activity for "employers" with 100 or fewer employees, what about employers who employ, say, between 125 and 250 employees, but in more than one "establishment", so that no particular establishment employs, in a given market area, more than 100 employees. According to the EEOC, they would then be required to calculate selection rates by job for all transactions (not just applicants and hires, of course, but also selections for promotion and termination), for each location.

The EEOC also asserts with respect to the burden that the UGESP imposes that"

> There 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 difficulty I have with this claim is that the UGESP was adopted by four agencies. One of these agencies, the OFCCP, does in fact include as part of its request for data during compliance evaluations, reporting on applicant flow, hires, promotions, and terminations. However, when it is the OFCCP's turn to go before the Office of Management and Budget and defend the cost of complying with their demands, they leave their version of the UGESP out, claiming that it is the responsibility of the EEOC.

In the words of Homer, "it is a wise child that knows its own father. Obviously, neither the OFCCP nor the EEOC wishes to claim paternity with respect to the obligations that they believe are imposed by the UGESP.

The procedures described in the Uniform Guidelines on Employee Selection Procedures may well be a "good idea", that employers ought to follow to ensure that their selection procedures do not result in inadvertently excluding a significant number of persons of one race/ethnicity or another, or one gender or the other, from selection, but the EEOC should acknowledge that they are only recommended, not required.

Sincerely,

s/Stan Koper
Senior Vice President
Gaucher Associates

cc: Robert Anzalone
Richard Gaucher