

ROUGH EDITED COPY

NILG
WEBINAR SERIES
JULY 23, 2020

TRANSCRIPT PROVIDED BY:
ACCESS INTERPRETING, INC.
www.ainterpreting.com

* * * * *

This is being provided in a rough-draft format. Communication Access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings

* * * * *

>> Hello, everyone, and welcome to today's webinar, compliance on campus and guidelines for college and university recruitment and selection. I do have a few housekeeping things before getting started.

The session will be recorded and a transcript will be made available on the NILG website sometime after the presentation. There is a copy of the presentation attached to the webinar which you can download. It is under handout. And you have received an e-mail from Tony Kaylin this morning with some instructions and in those instructions there is a link to closes captioning if you need it.

Questions will be taken at specific points during the presentation. And please use the chat functionality to ask questions I will provide the questions to the speaker or Danny will be able to read off some of the questions as they come in.

Before I introduce you to Danny, I want you to take a moment to thank our sponsors. Next slide, please.

And the sponsor you should see on the screen for supporting the NLG and the webinar series and we have many sponsors so thank you.

So let me introduce you to the speaker for today's webinar, compliance on campus.

Danny Petrella is a vice president and assistant general counsel for the center for workplace. He advises employers and with emphasis on OFCCP requirements.

Welcome, Danny, and thank you for presenting today.

>> All right. Thank you very much. Well, good afternoon, everyone, and good morning to our friends on the west coast. My name is Danny Petrella, and this slide this front of you basically says I've been doing this for a little while. But before we introduce the topic, a little more about myself. I do want to say while I'm an attorney, I'm not your attorney so I can't give you legal advice here today. I do encourage questions. I know this has been a popular topic over the years. And there's been a few twists and turns

along the way, particularly as it relates to the current pandemic. But I think, I'm pretty sure, that I can answer most of your questions without giving you legal advice here today.

I've been doing this, I've been practicing in this space for about 15 years now. I'm an attorney based out of Washington, D.C. and today I'm here on behalf of the center for workplace compliance. I know a lot of you are very familiar with CWC, but for those of you who aren't, let me just a quick bio. CWC is the nation's leading employer association dedicated to helping our members understand and manage their workplace compliance requirements. So we started all the way back in 1976, back then we were known as the equal employment advisory council, or EEAC. And we help our members through memos, through phone calls, through trainings, and certainly helping and partnering with the NILG in presentations such as this. So looking forward to the next 60 or 90 minutes or so, I do have some extra time to stay on if we do get a lot of questions here today.

But our objectives today, which we'll see here on the next slide, is to talk about compliance on campus. And it has been, you know, as I think about your compliance obligations as federal contractors, I have done many, many presentations over the years on what I would call atypical recruitment or atypical selection practices.

And sometimes we will have discussions on, you know, evergreen recs or pipeline recs, or in this case, campus recruiting and the various challenges that go along with that. And I think anymore of any time we talk about atypical recruitment or atypical selection practices, there tends to be a growing interest in the industry, okay, do we really have to follow all of these compliance requirements, do we really have to follow the law in this case. Because things are different, right? We know things are different when it comes to campus recruitment.

And the answer is no. Unfortunately, there are not -- while we do have atypical recruitment and atypical selection practices, unfortunately the compliance requirements stay the same, over the 60 minutes or 90 minutes or so, I'm going to try to identify for you and examine the key employment laws and regulation that is will specifically impact campus recruiting programs.

We will identify, right, how some of those programs and practices can inadvertently run afoul of fundamental EEO compliance and recordkeeping compliance in particular and I'll try to offer some practical guidance along the way that will help you minimize your risks associated with these programs and, again, please do encourage questions along the way. And without further ado, why don't we get, just dive in and get started here.

Next slide. All right. So key compliance considerations. Contractors need to evaluate whether and how campus recruiting practices implicate legal challenges under a variety of laws. We probably won't be able to cover each and every one of them here today. In fact, I think we could probably spend a whole day or two talking about developing and implementing a compliance campus recruiting program. But I do want to highlight a few of them here today. And one is certainly the age discrimination and employment act. Certainly engaging and continuing to implement good faith efforts and outreach under executive order 101246, section 503 in VEVRAA. Can't forget, of course, VEVRAA and, I'm going to talk about the history and helping employees understand what the expectations around that requirement and why it has been a little bit challenged over the years.

And then of course, last but certainly not least, identifying internet applicants and soliciting their race, ethnicity, sex, status disability and protected veterans status of applicants.

So why don't we start by talking about the ADEA. So next slide we'll do some brief overview here, right. I think you probably all know this, but if you don't, let's just do a quick reminder, right. The age discrimination and employment act or ADEA, under this law, employers may not discriminate against individual in any aspect of employment because that individual is 40 years old or older. This applies not just to employees, it applies to applicants as well. And you cannot advertise for jobs in such a way that will indicate a preference for or bias against particular job candidates based on their age. I want to -- we're going to lay the groundwork first and then we'll talk about the implementation a bit later. But that's a key law that has come up several times over the last couple of years as more and more employers have been challenged on their campus recruitment advertising practices and recruitment practices.

Next slide. Outreach and good faith efforts. I think probably the vast majority, if not 100% of the folks on the phone today are either federal contractors or perhaps some of our friends from the OFCCP on the line as well and are responsible for enforcing the requirements. That federal contractors have to engage in outreach and good faith efforts for women, minorities, veterans, and individuals with disabilities.

Now, these requirements are not suspended, right, they're not suspended simply because we're on campus. They're not suspended simply because we are maybe engaging in what I would refer to as an atypical recruitment or atypical selection practice. But the requirements are slightly different. And I think this often gets lost. It gets lost certainly amongst the employer community and sometimes it gets lost even amongst a newer compliance officers as well. Right? And I want to highlight for a moment the fact that under executive order 11246, right, your percentage placement goal is the thing that triggers outreach requirements. It's the thing that triggers action oriented programs, right?

So it's not all jobs at all times in all places. Right? The idea is that you will evaluate your workforce and in those areas of the workforce what you have then what's available, you're going to try to break down those barriers, if any exist, and try to engage in a additional outreach, engage in additional efforts.

Slightly different tactic when we think about veterans, outreach for veterans under the Vietnam veterans era adjustment and existence act.

Slightly different for individuals with disabilities under section 503 of the Rehabilitation Act. There, your outreach, your good faith efforts, your action oriented programs, even though term is not explicitly used, I don't think in, 503 are not triggered to goals, not triggered to benchmarks or numbers. They're ongoing. You have a ongoing permanent obligation under section 503 and VEVRAA to engage in that outreach, engage in those good faith efforts to try to attract, recruit, and retain protected veterans and individuals with disabilities.

And don't forget, right, each year you have to assess, right, have you to assess whether or not those efforts are working and that assessment piece over the last, and I'm sure a lot of you have experienced this in your own compliance evaluations over the last measure three to six months, there have has been increased OFCCP initiative, right, to focus in on that assessment, right?

It has been on the books for many years. To date, has not been enforced all that much. But right now, OFCCP is very much intrigued in to these assessments of outreach efforts. And so on campus recruiting, really any kind of recruiting, it is really important that you're kind of taking stock of how the events are going and making sure that you know, whether it is six months from now or 12 months from now, you have the ability to kind of look back and report on how these efforts either did or didn't work and how these efforts impacted your affirmative action plans under 503 and VEVRAA.

Next slide, please. All right. Well, we'll tee this up now. We'll come back to it a bit later. Your mandatory job listing requirements. Contractors have an obligation to list all open positions with the appropriate employment service delivery system. I've always found that term fascinating. Appropriate employment service delivery system. What does that mean? It often means your state job bank but it is not the only way, right? It could be the say the job bank, it could be your local's veterans representative.

I know in modern time, this obligation is satisfied through one more of the job scraping systems which are great but those job scraping services may not be the best solution, right for all of your scenarios and we'll talk a little bit about today about what maybe some of the alternatives might be to satisfying that requirement but also engaging in that good faith efforts and outreach.

And I should note, this is a requirement that stems from VEVRAA, right. This is a job listing requirement not arising under executive 11246, not arising under section 503, but it arises under VEVRAA and we'll explore that just a little bit later.

Now, there are three exceptions. You do not need to list executive and senior management positions. You do not need to list positions that will be filled from within your own organization. And you do not need to list positions lasting three days or less. There is no exception that says when a company goes on campus, you do not need to list these positions. So we'll kind of explore some of the challenges there in just a little bit.

But do not want to leave without talking a little bit about the internet applicant rule which I believe is going to be the very next slide. So I think just about everyone on the call today is probably familiar with the internet applicant rule.

I think if we're being intellectually honest, I think when the internet applicant rule was first implemented, I think OFCCP was trying to get ahead of the internet a little bit, trying to future proof it's egg regulations a little bit and I think no one knew, right, in 2006, in 2007, just how quickly, right, the internet would change. The government didn't know, I don't think most of us in -- in the private sector knew, except for maybe a handful of tech companies who were working on things that would really change the way that we do business and change the way that we recruit for years and years to come.

But just as a refresher, OFCCP requires that federal contractors solicit, right, and hopefully report on, but the obligation comes in that you solicit the race, ethnicity, and section, importantly, which has now been extended to cover veterans status and disability status as well. For every internet applicant, right? And internet applicants has to meet all four of the following criteria. Or I should say the requisitions that you're using have to make all four of the following criteria, right? And there has to be an expression of interest in employment through the internet or related technologies and that doesn't mean each and every one of your expressions of interest have to be submitted through

the internet, right? Even if only part of your process is to the internet or related technology, all of the expressions of interest that you receive associated with that requisition will indeed trigger the internet applicant rule.

So that first prong tends to be a focus not necessarily only on the individual expression of interest but rather on the process as a whole. So you have to have an expression of interest. The contractor has to consider that expression of interest for one or more positions. And I think right there, right there, tends to be where a lot of folks get confused and get lost with respect to how this rule is supposed to be applied.

The internet applicant rule does not state that an applicant have to apply for a job that you consider, right? The internet applicant rules states that the individual has to express interest in employment, in general, right, and that the employer, the federal contractor, will then go ahead and consider that expression of interest for one or perhaps more than one position. And that's certainly a key factor in terms of how we evaluate campus recruiting compliance.

The expression of interest has to meet the basic qualifications for the position and often, right, when it comes to campus recruiting, whether it is intern programs or entry level graduate, there are often very few basic qualifications for these jobs.

And last but not least, prior to an offer being made, the job seeker does not remove him or herself from further consideration or otherwise indicate a disinterest in the position in question. In other words, they don't withdraw, right? So they have to not apply, right, they have to express interest. They have to be considered. They have to be qualified. And they have to be interested. And campus recruiting in particular can impose some challenges along the way which we'll explore here in just a little bit.

But before we leave that I have one more slide on this. I think the next slide is going to talk about a key requirement that often gets overlooked, right? Under the internet applicant rule you have to retain any and all expressions of interest which are consider for a particular position regardless of whether the individual ends up being an internet applicant, right?

Oftentimes, under the internet applicant rule, you're not going to know until much, much later in the process whether or not someone qualifies as a internet applicant. And so as a record keeping environment, OFCCP says have you to retain, any and all expressions of interest that you considered, even if the people ended up not being internet applicants.

And then, of course, you have to record the searches of both internal and external of résumé databases.

I got some comment here that we're having trouble hearing me a little bit. I'm talking directly in the phone. Let me try one other alternative here. Let me know, is that any better, Tony?

I'll try to keep going here and let me know if that works out a little bit better. I was in a speakerphone but now I'm speaking directly into the handset.

>> Sounds better.

>> Okay. Great. We'll finish this way, then, time for me to get a new -- time for me to get a new phone.

All right. Let's go ahead and switch to the next slide. Okay. And please feel free to ask any questions along the way, happy to pause and address them. I don't see that any have come in yet. But I am ready and waiting.

So all of the things that we've discussed, right, whether it is executive order 11246, 503, VEVRAA, internet applicant rule, the ADEA, they all pose, I think, different challenges at different stages. Process and I'm going to go through some of those key stages here today.

Now, there's lots of different companies here on the phone today. I know each much you probably have your unique wrinkles to the process in terms of how you recruit candidates for intern programs or entry level positions but I think most of the time, right, the process goes a little bit like this, we are going to be posting or advertising vacancies, hopefully, hopefully in advance of the job fair but maybe not always in advance.

There's going to be some combination of sourcing job seekers, maybe screening job seekers to determine whether or not they are indeed internet applicants. And we're going to do interviewing. Right, sometimes that's taking place on campus. Perhaps less this summer than in previous years. But whether or not you're doing those in person, we also have a combination of virtual interviews which, and we'll talk about kind of the pros and the cons of some of the video interviewing solutions that are out there, and this is not something that came about solely because of the pandemic. But it is certainly something that has accelerated through the pandemic, I know there's a lot of you being bombarded day in and day out with the latest and greatest technologies on artificial intelligence and video interviews and chat bots and all sorts of other things that are going to help, and I do want to -- I do have a slide or two on that as well. And then, of course, at the end of the process, you're going to have an offer.

And there's an increasing I would say interest over the last couple of years, particularly as companies are being -- really starting to compete for candidates on extending those same day offers. And we can talk a little bit about some of the solutions I think that we've seen, some of the risks associated with all of these -- with all of these activities.

So, again, I don't know that we'll get through all of it here today, we could probably spend days talking about a lot of these things, but I do want to offer my insight on some of the key challenges that have arisen and some of the key possible solution that is need to be out there.

All right. So let's dive in. And I do see a question on posting jobs that, can I post jobs that focus directly on new graduates. That is a great question and that's a great segue, whoever asked that, thank you. I think we're going to talk about that a little bit or maybe a lot a bit in the next couple of slides.

So let's go on and talk about posting job vacancies. Okay. So what are the rules? What are the rules for where and how we advertise either internship opportunities or entry level opportunities that we intend to fill, perhaps not exclusively, but maybe primarily on campus?

So first and foremost, let's get through probably one of the most -- one of the most difficult ones, right.

Under VEVRAA we have a mandatory job listing requirement and is there an exception if I'm going to a career fair to hire interns or if I'm going to a career fair to hire entry level new college grads for entry level positions, done we have some exception that says I don't have to list these jobs. But no, the answer is no. There is no formal exception

under this policy or under this law that says I get an out, I get a free pass, right, for not listing these jobs under VEVRAA.

Now, I do want to emphasize for a moment the purpose of this requirement. And the difference between posting a job, which is I would argue maybe 99.9% of what you do, right?

The difference between posting a job and listing a job. The purpose of the job listing requirement under VEVRAA was to give state and local employment offices an opportunity to refer to federal contractors what we called priority veteran referrals, right? The idea is, and this predates what the internet has to come, the idea was, right, that you could notify the state, you could notify your local employment -- local veteran employment representative and say, hey, we're hiring and we want your veterans. If you have veterans to send us, we want them to apply. Here is how they do so. And you send them information on how to do so.

I think what that has become, what that quickly became, right, is all of these service that is are out there and many of them tremendous, right, which allow you, scrape your website, every day, they scrape your career site each morning and they list your opportunities not just with the state but often with lots of other great diversity organizations and partnerships and that absolutely, right, satisfies your job listing requirements and more, frankly, a lot of things. But you don't have to actually do that, right? And there may be opportunities that more local targeted outreach would be beneficial. Right? And so one thing that you could -- one thing that you could consider, right, is in these unique maybe atypical selection programs or atypical recruitment practices, is this a time, right, to not necessarily go the job scraping route but actually engage in that local outreach, contact the local veterans representative, document it along the way, of course, right, so that if there are veterans in the local workforce, if there are veterans attending the schools, which there are, right you know, how do we connect with them, how do we get the veterans to the career fair, right?

There is no formal OFCCP or any other federal requirement, right, at least in this space, to post jobs for competition.

Now, it is in your interest to do so, and arguably I would say under the next bullet it is required, but you're not going to find it anywhere in the regulations it says have you to post jobs for competition. You do have to list your openings. You have to list your vacancies with the appropriate employment service delivery system and often time that's the state but it doesn't always have to be just the state. So I do think you have options there are there as you consider solutions.

The other thing that to keep in mind is you nothing about campus recruiting suspends, right, your outreach and good faith effort considerations, especially if you're hiring for these, you know, if you're hiring new grads for these entry level roles, those jobs are going in to job groups that may absolutely have placement goals, right, under section -- under executive order 11246. And those jobs are also subject to your outreach requirements under 503 and VEVRAA.

And so absolutely, you cannot forget those outreach requirements, you cannot forget those good faith effort requirements in trying to find a way to make sure that your campus recruiting activities play a role, play an important role in your affirmative action programs.

ADEA. Right. This has been a big topic, especially over the past 12 months or so. So you need to really be careful with your social media advertising. Not only just with buzz words. And I think a lot of folks now are becoming more comfortable with the fact that we really shouldn't be putting for in a job posting looking for young, energetic college grads, right, those are buzz words that absolutely I can't say they're explicitly unlawful but they absolutely expose candidates -- I mean, employers to risk under the ADEA.

But it is not just how you draft. And again, I do want you to be careful how you're drafting. You know, these announcements and these advertisements. But it is also where, right. It is also where you -- where you recruit, where you advertise. And there have been lawsuits recently suggesting that, you know, if you're using on-line, you know, kind of automated algorithms, rights, that only direct your advertisements to certain age groups, that could expose the company at risk.

If you're only recruiting for your entry level positions on school, at campus, not having additional avenues to apply pour those jobs, that can expose you to risk. So it is a very much a developing area of law. There's very little that has been settled here. But as you, I would encourage all of you as you think about your campus recruiting efforts, you know, to make sure that you have a good strategy in place to make sure that we're not simply limiting these positions or these opportunities to, you know, certain schools or only certain age groups, even if it is not explicit, you may be unintentionally, right doing so.

And that is a bit of a segue here in to my next bullet. And I think probably responsive to some of the questions that have been coming in. Well, hey, wait a minute, can I limit applicants to a particular school? Can I say we're only recruiting at this school? Or we're not going to consider anybody who comes from other schools? And that's a tough topic and one I won't be able to answer fully for you here today. But I would say is that while there's nothing in the regulations that says you can't do that, nothing says that you can't limit applicants to a particular school, I would -- I would put a big caution sign around that last bullet, right, and make sure that you carefully weigh the potential implications under not just ADEA, right, but now, you know, also demographic concerns and steering concerns under executive order 11246, and Title 7 as well, I didn't list explicitly Title 7 on one of those earlier slides but absolutely that comes in to play with all of this.

So let me just pause for a moment. I see that there was a bunch of questions that have come in, not surprisingly, on the topic of job postings or job listings. Let me kind of scroll up here. All right. So most of our applicants list unknown or preferred not to answer for self ID. This is a general challenge. General challenge assessment for adverse impact but it also challenges outreach efforts. Or outreach assessments. What do you have to increase applicant disclosure. Okay. So I think if I interpret that question correctly, the concern is that have you a relatively low self ID rate and we're trying to improve the response rates, try to improve that.

And I think, first and foremost, what I have found over the years, is that companies that have unusually what I call unusually low self ID rates, and we'll maybe start with race and gender, are often tied to the text nothing the, right, so if the technology is not being presented in a way that it's easy for the applicants to navigate, that has tended to be kind of one of the primary reasons I have found that applicants are not self identifying. You're always probably going to have a little bit of a higher self ID rate once you get to

the employee level. Applicant level, certainly one of the challenges is going to be technology based and I think each and every time if I have seen, you know, low self ID rates for race and gender to the point where, you know, only, you know, only 50 or 60% of my applicants are providing that information, that's probably too low, right?

I can tell you just from my own experience, doing this for 15 years that's probably too low. Although you're going to have a variance certainly by industry and area of the country. You know, if you are experiencing those low self ID rates, focus on the process, focus on the technology, making sure that each and every applicant who applies is presented those forms, presented those self ID forms very early in the process.

All right. Are extra help or temp service positions considered open positions and do they need to be advertised is if usually these positions are considered vacancies but temp positions needed for additional assistance, is it mandatory to list them.

This comes up all the time, and what I would say is what I would say, if you're advertising for your temporary workers, in other words, people that will come your W-2 employees, if the position is going to last only three days or less, then no, you do not have to list under VEVRAA. If it is a temporary position that lasts longer than that time period, yes, if they're going to become your W-2 employee, then you would have to -- you would have to list those jobs.

There are no-no rules with respect to whether or not your temp agencies, right, list their jobs, unless they, themselves, are a federal contractor.

Now, there's lots of solutions out there that I've seen, very good solutions, right, where you'll engage in kind of a partnership with those agencies to try to collect certain data but that's a very different discussion and I would encourage you to talk to your lawyers about that.

But the VEVRAA requirements apply to you as a federal contractor and your employees, your apps, not a temp agency's employees, unless that temp agency is, itself, subject to its own regulations and requirements.

Can you elaborate on how the candidate considers one or more positions but there's not a requirement that the candidate applies. How does this affect candidates who begin but not complete an application? Yeah, absolutely. If you have candidates, right, who have considered because they have expressed interest out there, out there on the internet, maybe they have expressed on Monster or Indeed or Ladders or a job site, right, where you are actively screening, actively searching and considering and screening candidates, for one or more positions, they could become internet applicants. Now, if those job seekers that are out there on the internet do not follow through with your instructions on where and how and when to apply, they will never fulfill their journey of becoming an internet applicant and I think we have some bullets and some slides coming up later on, and one of the things that I've always encouraged employers to do is if they are caught in this gray area, right, where people have not applied but they have expressed interest in employment, one of the single best things that employers can do is make everyone apply. If you make everyone apply through the same process and the job seekers do not follow your process, right, they have withdrawn, they will not become internet applicants.

Let's see. Lots more questions coming in. Why don't wouldn't limiting applicants to a particular school go against the uniform guidelines, that's a great question. We'll talk about that in a little bit when we talk about uniform guidelines.

Question, my employer is trying to increase diversity, right, so we're trying to solicit schools that are predominantly populated by minorities. Do you see any risk there? You know, I would say, as a federal contractor, typically the things that you do to attract women and minorities and veterans and individuals with disabilities typically and of themselves do not create risk. However, if you start screening based on those same characteristics, you can absolutely expose yourself to risk. And certainly as you think about your diversity strategies, your recruitment strategies, your on campus schools and which schools you're going to attend and you're going to advertise those jobs, I do think it makes sense to probably involve your attorneys in those discussions.

All right. How do we monitor and document good faith efforts is it mandatory to keep records of your good faith efforts for OFCCP.

That's a great question. Look, there's a few different ways to think about OFCCP's regulations. Actually there's a lot of different ways to think about them but we'll try to focus on, I'll try to keep it simple here today. The vast majority of OFCCP's regulations do not require you to create records but if you create them, which I know you are, if you create them, you got to keep them. And it is absolutely in your interest as a federal contractor to create good sound documented records on your outreach and good faith efforts. And assess them along the way.

I think one of the popular options that I think has made its way around the employment employer circles is as you're engaging outreach, not just in campus recruitment, but in general, as you're engaging in these activities, that you're keeping some type of log, hopefully, or record of what those activities were, right? When you attended them, what the target audience were, the target candidates, and hey, whether or not it worked.

And the critical piece of affirmative action, the critical piece of the OFCCP's regulations is if you do something and it doesn't work, that's okay, right? You tried. But next you have to do something a little different, right?

So that kind of self critical evaluation of what is working, what is not, what we're going to do different, I think that's a key part of affirmative action compliance, a key part of your recordkeeping obligations as well. So you should be documenting those outreach plans or efforts not ohm in your assessment but also in your AAP narratives arising under 11246 and then, of course, 503 and VEVRAA as well.

All right. Why don't we keep going with the presentation. We'll come back to questions here in a little bit. Thank you. These are all great questions.

So we have hopefully listed other jobs with the state or local employment service and now we're ready to start sourcing and screening candidates. And I think as you think about these activities, you have to first answer, ask and answer, hopefully, two key questions, right? First of all, are you sourcing or are you screening?

I have here on the slide, the rules are different. There are some pretty intense rules about screening candidates. In fact, I would say that's a big part of the internet applicant rule is all about, right? Screening candidates, keeping records along the way, also making sure that you can replicate, right, the steps of the process under the

uniform guidelines. In contrast, there are very few rules about sourcing. There are very, very few rules.

And so as you think about your on campus activities, I think you need to ask ourselves, are we sourcing or are we posting it one more opportunities that we intend to fill. Because a lot of on campus events are information sessions. Just information sessions. You may not have any vacancies. You may not have vacancies for many, many months to come, right? But have you these information sessions on campus to meet people, right? And if you're on campus meeting people and you're not there to fill jobs, you know, there are no explicit requirements around those being a tiffs. Now, again, with the notable exception of that if that's part of your outreach program, if that's part of your recruitment strategy, whatever records you create along the way, you have to keep those for at least two years. And I will say oftentimes, the line become blurred. Because what is sourcing today. I'm on campus today but I don't have opening today, I have openings next Monday, well, at some point, the nexus is so close that you should be in the practice of assuming that you're screening and filling open rules so that you keep good sound records along the way.

Now, if you're screening, right, do you have an expression of interest? And this is a particular challenging thing, right. And the first element of the internet applicant rule almost always gets overlooked because if we take it as a whatever it is, whatever we're doing in our applicant tracking system or whatever it is we're doing on Monster or Indeed or other databases that those things maintain and involve expressions of interest.

And on campus that may not always be the candidate, right? If you simply get a list of names from a school without any additional information about the candidate, right, something that would fall well short of an expression of interest, then it is possible that you have not yet reached the point in the process where the internet applicant rule is going to apply.

So as you think about those early stages of sourcing and recruitment, I think you need to be asking yourself and talk to your compliance folks, talk to your lawyers about kind of when, where, and how the internet applicant rule first kicks in. Because sometimes you may not even have expressions of interest. In those early, early stages.

All right. So next slide, please.

All right. So the key risk when it comes to campus recruiting so leaving behind internet applicants, right, arched these are people who have expressed an interest and they've been considered, right, because they were either considered through some sort of prescreening criteria that you've done, you've been considered because you're meeting them on campus or meeting them and screening their résumé on campus but the key risk is you go through those activities, people express interest and they're considered and you look at them and you talk to them and you meet them but then you don't invite them to apply. You don't invite them to attach themselves to a requisition, you don't solicit, right, their race, ethnicity, section and other demographics, right?

And so the key risk is that you are leaving behind these people who yeah, maybe they weren't the best candidate but they were qualified and you talked to them and they were interested, so that is the key risk we've of seen in most campus recruiting programs is that there tends to be a risk that we're leaving behind a lot of people that we otherwise may have an obligation to not just to keep these records but if they do kind of follow

through on your instructions, you have an obligation to solicit their data as well and then also report on that through OFPCC during a evaluation.

And I've seen a pretty creative solutions over the years and I think as technology, I think as technology improves, and advances, the solutions are getting maybe a little bit easier.

So have a few on the screen here. I think each with their -- each with pros and cons. First and foremost, I hinted this earlier, one is making all students apply through the applicant track, right?

And I know it's challenging, right, but if you don't do that, have you to consider how else are you going to obtain or solicit demographic data.

Now for the technical requirement, I do want to go over the technical requirements, you only need to elicit race, ethnicity and section of internet applicants and because of an individual's status as a internet applicant is often not known until much later in the process. I have seen some practitioners and lawyers try to get fancy over the years and say, oh, well you can do this much later.

Well, technically you can. But I can tell you I have never seen a system that's worked and so it is really good to get that data upfront and make sure that everyone and every person that you speak to on campus gets the same instructions. I've seen some companies have flyers or business cards and to make sure everyone gets the same message.

I've seen also preregistration even in advance of the event or at the event, right, where you collect some basic information at the booth, right, burr then each night you go and you, you know, you'll do an e-mail blast to the entire population to make sure that they know how to continue the process and how to officially apply. And if they don't, right, if they don't follow your instructions they can never become internet applicants.

Don't forget, it's a really, really good idea, one might even say a requirement, to have a policy or practice in place to make sure that you understand how you're going to handle paper resumes, right, and we don't -- some companies have a pretty strict requirements that they don't accept them. Or if they do accept them, they destroy them right away because that's not the way to apply. We understand that did can be a difficult candidate experience sometimes and so not always something that recruiters want to do to a candidate right there on-site.

So can you have, you know, first, can you have a policy, right, where you refuse to accept paper résumés. Absolutely.

Can you have a policy where you at least initially or nominally accept the paper résumé for candidate experience purposes? But you're not actually considering it, using it, right? It is a little trickier because I think what happens there is you start taking notes on it, you pass it to the hiring manager who is doing interviews, right? And the moment that starts taking place and we got note taking, we got all sorts of things coming on, those become records that have to be kept, right? So I think it is very important you have a clear understanding going in of what the process is going to be for paper.

But making all students apply through the ATS and making sure that you and your talent acquisition team are giving all of these candidates the same instructions, right, so that you're not leaving behind people who would otherwise count as internet applicants, that's the key.

We have also seen kind of the evolution of what we call sourcing or a pipeline rec to manage this massive applicant flow which is sometimes the product of what happens, right? When you make all of these people apply through the -- through the ATS. And there's challenges there too, right?

So if you're on campus and you're not just hiring for engineers, you're hiring for engineers and accountants and HR professionals and information technology professionals and you put all of these people in the same bucket, that becomes a real challenge, how are you going to get them out of that bucket and what are the criteria that you're going to use along the way, right? If you start collecting that, that becomes what is called a internal résumé database effectively. So you're going to have some solutions out there. And we've seen some companies set up different rec okay is, right, recs for your accountants and recs for engineers and recs for information technology professionals and making sure they don't cross.

But if you're not doing that, if you have the big pipeline rec, there are certain requirements in play when you start to go to search and screen those candidates and I think on the next slide just as a reminder, I think a lot of have you probably seen this before, but just as a refresher under the applicant, you do have an obligation to record your searches, right? You have an obligation, if you're searching your internal résumé database, typically, not always, but typically your applicant tracking system, have you to keep a record of the position you were searching for the, search criteria, the date of the search, and any résumés that were added and the date they were added.

If you're doing searches of external résumé databases have you to keep a record of the position searched for, the search criteria, the date, and now, importantly, the résumés or profiles returned from the search that meet the basic qualifications and are considered, right?

So that's -- I think that's the key challenge, right, as you start to do some of these searches, as you start to screen candidates on campus, a lot of times you're doing so before they apply. You're doing without the benefit of all of their additional information and that's great maybe from a candidate experience standpoint but it can be really, really tricky from a risk management standpoint and we've seen time and time again, right, the OFCCP in these compliance evaluations if I are not able to present them, right, with a good sound applicant flow, we've seen them create it for you, right, using data from the local employment office and other services. So really, really important you that take that seriously.

All right. Let me just pause for a moment. I know we got a bunch of other questions cupping in. We've got a handful of slides left on talking about interviewing and same day offers but let's see if I can scroll up here and take a look. All right.

Hi, sorry if I missed it, what is the difference between listing a job and posting a job.

Yeah, so posting a job, I use that term when we refer to external or internal postings that are opening up and allowing for competition. Here's how I apply, right here, go to this rec, post your job for competition.

Listing a job, I'm referring to your requirement under VEVRAA that you notify the state of employment openings, right? If you have vacancies that are available and they're not subject to one of those three exceptions have you to notify either the state job as much as or your local veteran employment representative to make sure that they can get the word out that those are available and that the veterans can apply and they can send

you priority veteran referrals. Oftentimes posting and listing are one and the same. And I would say 99.9% of the time they are one and the same. But I point that out simply because they don't have to be, right? They don't have to be.

All right. Are you talking about student workers? I don't think I was talking about student work eggs at all, but if there's a more specific question that you can post there, I'm happy to entertain it.

Can you talk about evergreen postings, pros and cons. Oh, wow. We could talk for hours about the pros and cons of ever green postings. I will tell you that the cons tend to outweigh the pros. Just from a compliant standpoint. And different terms -- different companies use these terms I think differently, right. And so I guess when I think of an ever green posting, I'm thinking of a requisition that is being open for a long period of time and will be used to hire lots and lots of workers, right? And there have been some pretty tough evergreen requisition processes that I have even over the years. Maybe they're open for one, worst case scenario, they never lose, they never close, this he have a giant applicant pool that you continue hiring from which makes it impossible to ever do a true self critical analysis which is required under OFCCP's regulations and the uniform guidelines.

You know, the pros of a evergreen rec could simply be it is administratively easy, and perhaps well suited to certain types of hiring situations.

I think about class situations, right, where you're trying to hire new classes of maybe customer service reps and they're all going to be hired and trained at the same time, right?

I mean, it can be very administratively convenient to have those evergreen reps. The primary con is that you are producing data that is very, very much opens you up to what I would call a increased risk of allegation of unlawful discrimination from the OFCCP, right, and the reason I say that is because typically when you do a evergreen rec, not always, but in my experience, typically, what you're doing is trying to hire lots of people and they tend to be your entry level high volume, high turn over jobs and it's these requisitions are ripe for producing the two biggest risks, right, and for hiring discrimination. One is you have lots of hires, right? The more times you do it, the more likely it is, even small differences in the selection rates of men and women or whites and minorities will produce statistical significance. As the number of time you do something increases, the likelihood that you're going to find statistical significance increases with just very, very small, very, very small differences selection rates, right?

And the other thing that evergreen recs produce is large applicant pools and the likelihood that recruiters and talent coordinators and hiring managers can kind of go through and accurately manage that pool and accurately he did position everyone, that sends to decrease the longer the rec is open.

So I think what companies have done to try to find that suite spot is to try to put a time limit on ever green to three months, I would prefer one month, but I never get my wish there, but have strong data techniques, and how you manage that applicant flow. So that's a short answer to what is a longer discussion. We could be here for hours talking about ever green reqs.

Okay. Let's go to the next section and talk a little bit about interviews and the current pandemic, right. Things have changed. I suspect that the events over the last few months have caused you to either suspend or fundamentally change your campus

recruiting activities in that you're probably not on campus or if you are, you're not on campus the way that you would have been at this time last year, right, and so if you think about your interview processes in particular, a lot of employers are switching to virtual interviews. And this term, this term, you know, video interview, it's kind of a blanket term that gets thrown around, used to describe a lot of different things, right, first and foremost, a video interview, whether it is done over Teams or, you know, Zoom or something, some other technology like that the requirements, frankly, aren't any different than a regular in-person interview. If it is just you and the candidate talking to one another, it is no different, frankly, or almost no different than just a in-person interview and the same rules and the same requirements apply, right, got to keep a record of the fact that the interview happened and if you create notes along the way or you're using some sort of structured interview guide, you got to keep them. You got to keep that information, right?

So and to the extent you're using a live interview, probably a whole lot -- probably not a whole lot different I could think there are some important distinctions about how that live interview might be recorded or stored, and I'll talk about that on the next slide.

But if you're using -- if you're not going down the path of a live interview and you are using one of these new technologies, right, where you are it will be an automated computer driven interview where the candidate is being interviewed, recorded or both, there are implications there and a lot of these technologies, I know in particular, are trying to rely on artificial intelligence and we could have a whole another session on artificial intelligence. But there's a few key considerations there.

One is challenge your vendors on what type of technology they're offering you. Is there going to be a white box technology where they and you can kind of work together to design the algorithms and the results and impact the results or is it a black box technology where the algorithms can learn and change themselves over time as more and more data are fed into them, right?

Key, key question, because I think if you using these interviews as a cut off to advance individuals through the process, yeah, I think you're also going to have some implications there under the uniform guidelines, right, how do we validate this technology. And if you have ever heard one of my many sessions on this topic, I always tell you, don't believe the sticker on the box, right, technology has not been validated for your company until it has been validated for your company and how you're going to be using it.

And yeah, that's a step in the selection process and just a refresher under the uniform guidelines you're going to have an obligation to, if these are occurring in job groups where you're going to have adverse impact, you're going to have an obligation to re-create the steps of the process.

So some key considerations there if you are going down that video interview path or using any kind of artificial intelligence to kind of screen all of these -- all of these applicants and I think on the next slide we'll talk a little bit about Title 7 as well as. Obviously there are going to be Title 7 implications. Next slide there. And I didn't explicitly mention Title 7 earlier. But I think it should go without saying. But yeah, if you're -- any time you're using that video interviewing technologies, there's the risk of disparate treatment, right, and, of course, disparate impact concerns as well.

We don't have time to fully define and flesh out those terms and those legal theories but it is really, really important that you start at least asking and hopefully answering some. Questions on the slides. Who has access to the videos, where are they being stored. And this new sub bullet, this is something that's happened really recently over the past 12 months or so, can they be retrieved or destroyed upon request. Can you actually retrieve and destroy those records. There are new laws popping up that I'll call it the broad umbrella of right to be forgotten, right, they mandate you, as an employer, to be able to purge those video interviews and there's probably some inherent conflicts there, right, between state and local laws and federal laws that require you to keep them in the first place. So I don't have an answer for you today on that but I do want to flag it as a potential issue. And I think Illinois was first to the gate on that one.

And then, of course, there's always the impact. So recruiters and hiring managers have told us over the year that they worry. That there's a concern that videos can impact their decision or maybe even prerecorded audio can impact their decision.

So keep in mind the background, we've folk used obviously a lot on OFCCP for good reason on the inter in the am police can't rule but the broad reason behind all of this is Title 7 of the civil rights act and you have an obligation as federal contractors to make sure your processes are not discriminating or acting as barriers to the advancement of one or more groups.

Next slide. Campus interviewing presents I think its own challenges and this is with or without the pandemic, and I think a lot of this will go back to what we've talked about before. But, you know, on campus interviews, you know, often risk putting the cart before the horse and sometimes you're actually switching, now you're switching the steps of the application process, right? There's a big challenge for employers.

I think when we started today's session, I went through, okay, you list, you post your jobs, you screen your candidates, you interview them, you do an offer. Well, now, sometimes the interview is happening in advance. How do you reproduce that in a data format? How are you making sure that you're not leaving behind people who would otherwise count as internet applicants and you would need to have their right, ethnicity and other demographic data.

So here I think we've touch on this, right, making sure that you have a way, perhaps, even right there on-site, have a way for them to apply, right, you could have tablets set up or laptops set up where they have to complete at least some initial like prescreening registration before they can go and sit down for the interview. I know a lot of folks on the phone today have done that approach.

You could register either in advance of the event or directly on-site and then maybe there's a formal link that's sent out to everybody after the event saying here is how you complete the application, here is how you continue, right, with the application. Of process.

The other key risk, right with campus recruiting and interviews this particular, right, is not retaining interview notes and guides or the résumés where you're jotting down notes, right? I said this earlier, I'll say it again. It is really, really important you that have a clear policy on note taking and record retention, including the acceptance, or not, of résumés. And you get to make that decision but it is really important that you follow, it right?

Because these records, right, the primary way employers get in to trouble with OFCCP during these compliance evaluations is that there is a one or more indicators of statistical significance, right, as I noted earlier, often become easier to produce with events like campus recruiting, right, where you're talking to hundreds of students and you're doing interviews and your intention, right, to make lots and lots of hires, perhaps, from these events. And if you have that combination of statistical significance, right, and you back it up, you can't disprove the stat, right, you don't have the records to demonstrate, right you selected one individual over another or really many individuals over many other individuals, that is the rows pee, right, that gets employers in trouble. You get bad statistics, you combine that with bad recordkeeping, and it usually equates to liability. That is the receipts pee for how this usually goes during compliance evaluations. So it is really important.

And this is important certainly at all stages and all types of recruitment processes but certainly critical in campus settings or other settings where it is going to be administratively difficult to check all of the boxes that you need to check along the way. And I think we have maybe one more slide and then, again, happy to stay on for questions here towards the end.

Same day offers. So we get this question at every conference, right. Can I extend same day offers. Yes, you can. It is difficult. It's administratively difficult from a compliant stand point. But yes, you can absolutely do that. But, again, the risks here are the same as the risks elsewhere, right, you're going to risk not receiving data on internet applicants, including those, this is where it gets harder, including those who received offers and may have even declined the offer, right?

And it's one thing if they drop out preoffer. If they drop out preoffer, are they're not internet applicants, there's not an expectation that you produce their race, ethnicity an section. If they drop out post you've, they decline the offer, that's a internet applicant and you need that data.

So again, the same solutions we've talked about earlier with regards to forcing them to at least apply or register on-site through a tablet or a kiosk, I think that applies equal here as well.

And then also what some companies have done is they've considered conditioning the formal offer on the completion of a formal application within a set time period following the event, right. So either extending a verbal offer on-site or a conditional paper offer on-site that is conditional on them successfully following through on the following steps. And often timings within a very limited time period to encourage them to apply.

All right. So I think I have maybe one wrap up slide. Next slide. Yep. Just key takeaways. I don't think any of this will surprise you, right. Campus recruiting does not suspend your compliance expectations. So be mindful of how and where your positions are advertised. And making sure that your job listing requirements are indeed being fulfilled. That age is not one of the factors you're using, even unintentionally, in advertising and recruitment and of course, making sure your good faith efforts continue. And be prepared when OFCCP comes knocking, right, that any and all expressions of interest that were considered by the company, right, were indeed environment to have a application and maintained, so that extension of making sure they have the process by actually applying, that is the key step to trying to cure a lot of the other vulnerabilities in this process.

And make sure, right, that records of job seekers who have been considered cannot be left behind, simply because they were not the before he qualified candidates.

All right. I think that concludes my formal remarks. I think on the next slide you'll see a big I with my name and e-mail address. If you'd like to get in touch with me off-line. Let me see if we have any other questions comment. Oh, yes, we have.

All right. I'm happy to stay on with you all and answer some of these questions.

How do you handle or what is the risk of creating a specific internship in conjunction with a specific college?

And so that's a great question. I have seen it come up from time to time over the years where, yeah, you have those partnerships with universities, right, where you do have internships that are setup maybe solely because of that partnership, with a specific university. And I can tell you and you won't find, right, you're not going to find a law or regulation that says you can or cannot have a partnership with a university to supply you with candidates and some might argue that's a good idea, particularly if those are universities designed to provide the company with good qualified women, minority, veterans, people with disabilities, right, that could be a critical part of your outreach efforts.

I guess the one thing I would caution is just as you start to evaluate those programs settle are those the only programs? That are available?

Are you limiting your internships to just those partnerships, and could that activity, right, could that limitation expose the company maybe not to any explicit violation of federal law but could it expose to you risk on the basis of one or more protected characteristics. And so I encourage you as you think about how you fill your internship rolls, I encourage you to and how you also fill your entry level roles that are filled, often but hopefully not exclusively, with recent college grads, making sure that there are avenues available for other applicants to apply, either applicants affiliated with not your preferred universities or others as well. So that's something I know companies have taken seriously over the last couple of years as we've seen more and more particularly of these lawsuits under the ADEA.

All right. What comes next here. Regarding the searching and recordkeeping, would you suggest sending an invitation to for all to apply to an open req. I think you have some options there. You don't necessarily have to send everyone a link to the specific req. I do think whatever you send to people should be the same.

Look, you're going to come back from the career fair with your preferences because you've met great candidates and maybe you've interviewed, and maybe you've even offered them as well. And that's okay. Nothing says you can't do your job as recruiters, right, and go find and hire the best candidates. But it is important that the best candidates that they receive the same direction as other candidates as well. I think that would be the best practice there. And if that's an individual req, great. If is just a link to your career page, say, hey, here's the event landing page, right, where you go to apply for these royals, I think it is just important that everyone get the same instructions.

With respect to extern ram searches, do you also have to add them to the ATS? Okay. So nothing explicitly in the internet applicant rule says you have to add them to your ATS. I think oftentimes that's what you do in practice. But no, you do have to retain either the résumé or the profile or whatever the expression of interest is, you have to

retain those that come back from the search that are qualified and considered and that's an important step, right? It is not just qualified but qualified and considered.

And just as a refresher on the internet applicant rule or perhaps maybe for those of you who are new to this, right, considered under the internet applicant rule does not just mean that you or a human pair of eyes actively considers them. It could be because you're doing an advanced search for preferred qualifications or other things that are being used to compare candidates and it is absolutely possible for a system or a technology to do the consideration for you, right? So always keep that in the back of your mind as you're engaging in the searches, as you're engaging in a lot of these great technologies that are out there.

What specific search criteria is obligated, does this include summary narratives, interview questions, its, could you detail some examples?

So by search criteria I'm referring to you're trying to, you know, you're posting for, engineer position and you're going to go out to a résumé data base. It might be your applicant tracking system. It might be your CRM. It might be an external database. And you're going to store, you're going to stop information about the search, right, the job you're searching for, the date, and whatever criteria you type in Todd certainly engine to produce the results. Have you to keep a record of the criteria you're using to produce the results.

So whether that's degree or location or both, location and degree or type of position, right, these are the times of examples that you might include examples that you might include in your search.

All right. If the ATS allows you to perform searches on a candidate pool and the search result with candidate profile snippets, the high level info only and you click only on certain candidates, are those candidates the ones I considered or if I looked at all of the snippets, does that count as considered?

That's a great question. I think there's probably a -- a important term there which is snippet. And if the snippet is allowing to you assess the expression of interest, right, and it has basic information such as their degree and experience and, right, if it is allowing you to evaluate the expression of interest and you're looking at all of them, there's probably a pretty good argument that you're considering all of them. However, if what you're looking at in the snippet does not provide enough information for you to evaluate, for example, whose the people have met the basic qualifications, then you would be considering just the ones that you open but there's a lot of very important distinctions there in terms of what that snippet provides and also the search criteria that you're using to produce that result. If you're just searching using criteria designed to assess interest and/or basic qualifications, the search in and of itself does not consider anyone. If you are using the search to do more and consider and screen people beyond basic qualifications, beyond interest, that search indeed be deemed consideration.

All right. Let's see. Can you talk for a moment about selection process.

Not entirely sure what that question is directed towards. But I would just say selection process in general if we're talking about kind of a on campus setting or even a virtual setting it's just important you that have one consistent process and whatever records that you're creating along the way that you keep. So whatever the criteria are you're

going to be using to advance people through the process, you're going to want that document so you can reproduce the process later on.

All right. So what happens if you see them as a fair, provide them a link but they never apply. Then if you apply them a link and they never apply, they cannot become internet applicants, they get left behind, as long as everyone gets the same message.

>> Thank you, Danny, for all of the questions that you've addressed. I think we only have a few more that I'm sure we'll provide to you and you will be providing us the answers so we can provide -- so we can put them on the website.

I do want to thank everybody for hanging in and thank you, Danny, for continuing to address the questions of the audience and really appreciate that. We do want to thank the sponsors again and we also want to make sure that you don't forget about next year, Nashville, August 1st through the 4th at the ohm any Nashville hotel in Nashville, Tennessee. Check often the NationallLG.org we shall site or look out for an e-mail for recommendation.

The numbers are visual on the presentation slides. So everyone, thank you so much, again, Danny, and all, and take care and stay safe.

>> Thank you.