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New EEO-1 Rules

By George E. Chaffey, James Y. Wu, Alissa A. Horvitz, and Joshua S. Roffman

Employers with 100 or more employees (and covered government contractors/subcontractors with 50 or more employees) must annually file an EEO-1 Report with the EEOC. However, the EEO-1 form due by September 30, 2007, will differ from the old form in two respects: (1) the "Officials and Managers" category will be split into two separate categories; and (2) the existing five racial classifications have been expanded to seven.

For non-government contractors, these changes to the EEO-1 form are easily addressed. However, government contractors are faced with possible issues that could make it more difficult to know what to do.

The Two Changes to the EEO-1 Form

"Officials & Managers" Are Divided Into Two Categories. First, the previous category of "Officials and Managers" is now divided into two levels, based on responsibility and influence within the organization. The two new levels are:

1. **Executive/Senior-Level Officials and Managers:** Those who plan, direct and formulate policy, set strategy and provide overall direction.
2. **First/Mid-Level Officials and Managers:** All other managers.

Race/Ethnic Category Changes. Second, the new EEO-1 Report Form expands the race/ethnic categories, as follows:

1. The existing category of "Asian or Pacific Islander" is divided into two separate categories: (1) "Asian" and (2) "Native Hawaiian or other Pacific Islander." Thus, Native Hawaiians or Other Pacific

Islanders will be reported in their own category, separately from other Asians.

2. A new category titled "Two or More Races" has been added. Thus, non-Hispanics who identify with more than one race (White, Black, Asian, Native Hawaiian/ Other Pacific Islander, American Indian/Alaska Native) can choose to be classified as "Two or More Races" rather than as one of the two or more particular races with which they may identify.

As a result, the new EEO-1 Report Form contains seven, instead of five, race/ethnic categories:

- Hispanic/Latino,
- White,
- Black /African American,
- American Indian/Alaska Native,
- Asian,
- Native Hawaiian or Other Pacific Islander, [new]
- Two or More Races (Not Hispanic/Latino). [new]

Employees must be reported in one, and *only* one, of the foregoing seven categories on the new EEO-1 form (see "Implementing the New Race/Ethnic Categories" section below for specifics).

Implementing the Change to Two Manager Levels

Employers *must* provide the information using the new two levels of Officials & Managers now, for the 2007 report. This

should not be difficult, and there is no need to communicate with employees regarding this change. Employers should simply divide officials and managers into the two categories in any logical manner that is consistent with their operations. As a guideline, the EEOC recommends that large companies place the CEO and the next two reporting levels in category 1.1, and all other Officials and Managers in category 1.2. For smaller employers, only the very top levels of management will be in EEO Category 1.1.

Implementing the New Race/Ethnic Categories

Although employers must use the new EEO-1 form in 2007, there is no requirement that employers report employees under these new categories in 2007. In fact, the EEOC never affirmatively states a requirement that employers switch to the categories in 2007. Thus, employers may choose to utilize the new seven categories now or wait to begin using them at some future point.

Employers Who Are NOT Government Contractors

Employers who do not have contracts with the federal government, and are not affected by OFCCP requirements, can implement the new race/ethnic categories fairly easily.

Existing Workforce. Although the EEOC encourages employers to resurvey the existing workforce (contact all employees to update their race/ethnicity), there is *no* obligation to resurvey the existing workforce, this year or at all. However, there are practical reasons to provide employees with the opportunity to choose one of the new categories. Instead of resurveying employees, employers may simply notify all employees that those who wish to change to one of the two new categories (“Native Hawaiians/Other Pacific Islanders” or “Two or More Races”) should let the employer know, and that employees will otherwise just stay in their present category. Thus, the burden is on the employees to inform the employer if they wish to change category, and the employer only deals with that small percentage of employees wishing to do so.

New Hires. Although the EEOC has encouraged employers to begin using the new race/ethnic categories for new hires as soon as pos-

sible, there is no mandatory start date. Thus, if employers have not yet begun using the new seven categories for new hires, they may wish to begin doing so, for consistency, at the same time they begin collecting such data for existing employees.

How to Ask Employees to Self Identify: Two Question vs. One Question Approach. The self-identification form can use a two-question approach or a one-question approach. Both approaches contemplate that the employee will select only one race/ethnic category.

Two-Question Approach. The EEOC recommends using a two-question approach. First, ask if the employee is Hispanic. If the answer is “yes”, the individual cannot choose a race. If the answer is “no,” the individual is asked to choose a race, including the new option to self identify as being “Two or More Races.” This format has the advantage of being what EEOC suggests. It also ensures that Hispanic employees will not self identify as “Two or More Races.” However, it may create some awkwardness by singling out Hispanic employees and by not allowing them to identify as Two or More Races, as is allowed for all other groups.

One-Question Approach. Most non-government contractors should consider using a one-question approach, which lists “Hispanic or Latino” as one of the seven categories from which employees choose one. The one-question approach has the advantage of being easy for employees to understand and easy for employers to administer. It also fully allows employees to choose exactly in which of the seven categories they wish to be reported.

Employers Who ARE Government Contractors

Implementing the new EEO-1 categories is more complicated for government contractors because they must meet the requirements of both the EEOC and OFCCP. Government contractors *must* ultimately follow the EEOC’s requirement of gathering and reporting data by the seven categories, but there is no assurance that the OFCCP’s requirements will follow suit. To date, the OFCCP has not issued new regulations indicating whether it will either:

- adopt the seven categories now required by the EEOC;
- maintain the five race categories in its current regulations (i.e. requiring Pacific Islanders to continue being included with other Asians and requiring those who choose “Two or More Races” to, nevertheless, be placed in a *specific* race category for OFCCP affirmative action purposes); or
- require something different (e.g., requiring that multi-racial individuals choosing “Two or More Races” for EEO-1 reporting be identified by each specific *combination* of two, three, or four races for affirmative action reporting, which could expand the race/ethnic categories from five to almost 30 or more).

Temporary Solution. The OFCCP has provided interim guidance that, pending issuance of its regulations, it will accept information presented in either format (the OFCCP’s existing five categories, or the EEOC’s new seven categories). Thus, contractors still using the OFCCP’s five categories as well as those who have already started using the EEOC’s seven categories are all considered compliant by the OFCCP for affirmative action purposes until it issues guidance to the contrary.

Alternatives for Government Contractors. Because of the uncertainty about what the OFCCP might do when it finally issues regulations, government contractors have several different available options on how to proceed at this time, each with advantages and disadvantages. The following are three of the more considered ones:

Do Nothing for Now (Keep Five Categories) ... Wait until September 2008 or until the OFCCP Issues Final Regulations. Some government contractors are concerned that the OFCCP, which is still using the traditional five categories, might not follow the EEOC approach. Thus, such contractors are reluctant to adopt a specific system to capture data for the new EEO-1 categories until they learn exactly what categories the OFCCP will require them to use for affirmative action purposes.

By “doing nothing” now, contractors need not guess what the OFCCP may ultimately do. This reduces the possibility of having to resurvey employees if the OFCCP ultimately requires recordkeeping that is inconsistent with the EEOC requirements. There is hope that the OFCCP’s initial proposal will be revealed with the next month or so, and that may be a strong reason for employers who have not yet initiated a new system to wait a little longer to see what requirements the OFCCP may propose.

Use a Single-Question with All Seven Choices and Ask Individuals to “Check Only One”. In this format, employers simply list the seven race/ethnic categories and ask individuals to “Check Only One.”

The advantages of this “Check Only One” approach include: (1) it complies with the EEOC requirements; (2) it is easy for employers to implement (just add two new race fields in the HRIS system); (3) it is easy for employers to administer and maintain data (employees are counted just once, in one of the seven categories, and the employer need not guess or manipulate data to determine the proper category); (4) it is easy for employees to understand (“pick one of the following”); and (5) it allows employees to choose the exact category in which they wish to be reported.

The disadvantages include: (1) if the OFCCP refuses to allow reporting of “Two or More Races” and requires a *specific race* for each employee, then employers would have to resurvey those employees selecting “Two or More Races” to determine a specific preferred race for OFCCP affirmative action reporting and add such a question to the self-identification form; and (2) if the OFCCP requires that individuals selecting “Two or More Races” be categorized by specific race *combinations*, then employers would have to resurvey those employees to determine the various races they identify with and add such a question to the self-identification form.

Use a Single-Question with the Six Race/Ethnic Choices and Ask Individuals to “Check All That Apply.” In this format, employers list the six specific race/ethnic categories (but not the “Two or More Races” alternative), and ask individuals to “Check All That Apply.” The employer would then categorize the responses pursuant to the following rules: (1) if the individual selects Hispanic plus any other category, the employer *must* report the individual as Hispanic on the EEO-1 form; (2) if the individual selects more than one race, none of which is Hispanic, the employer *must* report the individual as “Two or More Races” on the EEO-1 form.

The advantages of this approach include: (1) it complies with the EEOC requirements; and (2) if the OFCCP requires that individuals identifying as multi-racial be categorized by specific race *combinations*, this approach would provide that information.

The disadvantages include: (1) it is potentially burdensome to implement and maintain; (2) employees may be reported in race/ethnic categories they have not chosen or might not prefer (e.g., someone selecting both “Black” and “Hispanic” will be defaulted to “Hispanic,” even if they would have preferred to be categorized as “Black”, and someone selecting “Black” and “Asian” will be defaulted to “Two or More Races” even if they would have preferred to be categorized under one of the specific races); and (3) if the OFCCP refuses to allow reporting of “Two or More Races” and requires a *specific race* for each employee, employers would have to resurvey those employees selecting multiple races to determine a specific preferred race for the OFCCP affirmative action reporting, and add such a question to the self-identification form.

Employers are urged to keep these issues in mind as they elect the best option going forward.

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