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JULY 2008

Employers should be planning now for the September 30, 2008 filing deadlines for various government forms, including the Form EEO-1, which applies to all employers with 100 or more employees and to government contractors with 50 or more employees and a single contract of \$50,000 or more.

Important EEO Data Filing Deadlines Are Fast Approaching

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

Employers should be focusing their attention now on three government-imposed data filing deadlines that fall on September 30 each year. The forms with upcoming deadlines, and the employers to which they apply, are:

- **Annual EEO-1 Form:** applies to **all employers with 100 or more employees** and to government contractors with 50 or more employees and a single contract of \$50,000 or more.
- **Biennial EEO-5 Form:** applies to elementary and secondary public school districts with 100 or more employees.
- **VETS-100 Form:** applies to government contractors only; monetary thresholds described below.

The following practical advice and tips are intended to help employers evaluate whether they are required to fill out these forms and assist employers in preparing the necessary data in advance of the filing deadlines.

EEO-1 Forms

All employers subject to Title VII are required to file EEO-1 Forms by September 30, 2008 if: (1) they have 100 or more employees; or (2) they are a federal government contractor with 50 or more employees and a single contract or subcontract of at least \$50,000. EEO-1 forms must be filed online. Employers may use any payroll period from July through September for their filing.

Previous EEO-1 Filers

Companies that filed EEO-1 forms last year should be careful to use the same UserID and Password this year as was used last year.

Practice Tip: The EEOC is doing a more thorough job of trying to track down UserIDs that are not accompanied by completed reports in an effort to ensure that those companies required to file are actually doing so. Last year, Littler attorneys saw a higher than typical volume of “Show Cause Letters” being generated from the EEOC because, in most cases, the person who filed the 2007 report used a different UserID than was used to file the company’s EEO-1 forms in previous years. In some cases, the person filing the 2007 report did not know that reports had been filed under a different UserID; in other cases, an acquiring company failed to “close out” the reports that were separately filed in previous years by the acquired company. For assistance in locating a UserID and password from last year, employers may contact the EEOC directly at e1.techassistance@eoc.gov or 1-866-286-6440.

Penalty: The EEOC’s only remedy for failing to file the forms is to require the company to file them. There are no fines or penalties associated with the non-filing or late-filing of the forms. However, employers should try to avoid drawing a Show Cause Letter as it can be a time-consuming and potentially costly process to resolve.

First-Time EEO-1 Filers

For companies that have not previously filed an EEO-1 report, or individuals who are new to the process, the EEOC website provides information and resources about the reporting obligations and the race and ethnicity categories. <http://www.eeoc.gov/eo1survey/index.html>

The link for first-time filers to register is: <https://apps.eeoc.gov/eo1/register.jsp>. The EEOC also provides an instruction booklet that will assist first-time filers in understanding the types of data on which they will need to report. http://www.eeoc.gov/eo1survey/instructions_form.pdf.

Gender, Race and Ethnicity Issues

Companies are required to have gender, race, and ethnicity data for every full-time and part-time employee. It is not acceptable to have active employees with “unknown” gender, race, or ethnicity in the company’s HRIS or payroll databases. If an employer previously has not self-identified its workforce for gender, race, or ethnicity, we suggest the employer contact experienced employment counsel to develop an appropriate form.

According to the EEOC instruction booklet, “self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 report.” If an employee declines to self-identify, employment records or visual observation may be used. Where race/gender records are maintained, they should be kept separately from the employee’s personnel file.

EEO-5 FORMS

Public elementary and secondary school districts should receive their EEO-5 forms in the mail. There is no electronic filing option for the EEO-5 forms.

VETS-100 FORMS

Federal government contractors have traditionally been required to file a VETS-100 form. The link to the electronic filing website is: <https://vets100.vets.dol.gov/vets100login.htm>. First-time filers will need an Employer Identification Number in order to register as a New User. The dollar threshold to file these forms

changed from \$25,000 to \$100,000, but this dollar threshold is tied to the date when the contract was entered into, as described in more detail below.

Pre-December 1, 2003 Contracts (“Old” Contracts)

Employers with a federal government contract or subcontract of \$25,000 or more that was entered into before December 1, 2003, and has not been modified since that date, are required to file the traditional VETS-100 form. For clarity, these are sometimes referred to as “old” contracts. There is no minimum employee threshold; only a dollar threshold (\$25,000).

Post-December 1, 2003 Contracts (“New” Contracts)

Employers are covered by the new requirements if they have a federal contract or subcontract of at least \$100,000 where the contract is either entered into, or modified or extended in any way, on or after December 1, 2003. For clarity, these are sometimes referred to as “new” contracts. Since contracts are typically modified in some way over the years, it is generally expected that most federal contracts now in effect would be “new” contracts, regardless of when they were originally executed. Although there was some speculation early in 2008 as to whether employers with “new” contracts would be expected to use the new VETS-100A form for this year’s filing, when the government issued its final rules earlier this year, the Veterans Employment Training Service indicated that reporting under the new requirements will not begin until 2009. Indeed, the new VETS-100A form is not even available to employers on the VETS-100 website.

Therefore, it appears that employers with “new” contracts will use the traditional VETS-100 form this year, just as they have in the past. Employers with only “new” contracts below the \$100,000 threshold and no “old” contracts no longer need to file a VETS-100 form.

However, beginning in 2009, all employers with a “new” contract (for at least

\$100,000) will file the new VETS-100A form. Employers with any “old” contracts (for at least \$25,000) will still file the traditional VETS-100 form, and employers with both “old” and “new” contracts will file both the traditional VETS-100 and the new VETS-100A forms. The question that each such contractor will need to resolve before September 2009 is whether there will still be any need for that contractor to file the old VETS-100 form.

For more information about the VETS-100 and VETS-100A forms, see Littler’s August 2007 ASAP, *OFCCP Issues Final Veterans Regulations for Government Contractors*.

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