



AFFIRMATIVE ACTION UPDATE: DECEMBER 2006

This bulletin provides an update for Affirmative Action subscribers. Please contact us if you have any questions about these issues or about their effects on your business.

Why the New EEO-1 is More Than Just a New Form

You probably have heard a great deal about the new EEO-1 form (as well as its new racial classifications) that will go into effect in September 2007. Several questions have emerged about this change:

- (1) How do I obtain the information about the new racial classifications from my current employees?
- (2) When will I need to resurvey my workforce?
- (3) How do I resolve the need to use one set of racial classifications for the EEO-1 and another set of racial classifications for my Adverse Impact Analysis?

What Has Changed?

In June 2003, the EEOC published a notice of proposed revisions to the EEO-1 Report in the Federal Register, received and considered public comments, and held a public hearing on the topic in October 2003. The EEOC has now finalized those changes.¹

¹ The new EEO-1 also increased the number of job categories from nine to ten. However, because job category information is within the knowledge of the employer, the transition to the new categories should be completely within the employer's control and does not present the same timing issues as the transition to the new racial categories.

The current five Race and Ethnic categories will increase to seven:

| Current EEO-1 – (Answer for both male and female) | REVISED EEO-1 – (Answer for both male and female) |
|--|---|
| Hispanic | Hispanic or Latino – (This category includes all employees who answer – YES – to the question – are you Hispanic or Latino? Report in the appropriate categories below all employees who answer – NO – to the question – are you Hispanic or Latino? ----- |
| White – (Not of Hispanic origin) Black – (Not of Hispanic origin) Asian or Pacific Islander American Indian or Alaskan Native | White – (Not Hispanic or Latino). Black or African American – (Not Hispanic or Latino). Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino). Asian – (Not Hispanic or Latino). American Indian or Alaska Native – (Not Hispanic or Latino). Two or More Races – (Not Hispanic or Latino). |

Thus, the revised EEO-1 takes on a “flow chart” approach:

- First, the EEO-1 asks whether the employee is “Hispanic or Latino;” “Hispanic or Latino” is defined as “A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish **culture** or **origin**, **regardless of race.**”
- If the employee answers, “No,” then he or she responds to one of the following six choices:
 - **White (Not Hispanic or Latino):** A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.
 - **Black or African American (Not Hispanic or Latino):** A person having origins in any of the Black racial groups of Africa.
 - **Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino):** A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

- **Asian (Not Hispanic or Latino):** A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- **American Indian or Alaska Native (Not Hispanic or Latino):** A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.
- **Two or More Races (Not Hispanic or Latino):** All persons who identify with more than one of the above five races; the employee is neither required nor invited to identify which two or more races are implicated.

Time-Table for Implementation

The implementing regulations specify that covered employers must use the new reporting **format** of the EEO-1 beginning with the report due in September 2007. With regard to the new job categories, of course, the employer has all the information it needs (since classifying employees into job categories is left to the employer) so job category information must be supplied on the EEO-1 beginning with the September 2007 report.

With regard to race and ethnicity, however, you will have to resurvey current employees about race/ethnicity information (because you currently only know how they would self-identify with five choices and without a “two or more races” option). Fortunately, reporting employers do not need to survey their existing workforce until **after** October 1, 2007; in the Preamble to its November 2005 Final Comment Request on the new EEO-1, the EEOC stated:

*In an effort to minimize burden for employers during this transitional period, the Commission **will not mandate that employers resurvey their workforce before submitting the first EEO-1 form in the new format.** Employers should keep in mind, however, that opportunities to further resurvey without additional burden should be utilized as much and as soon as possible, for example, using routine updates of employees’ personal information to obtain updated EEO-1 data. **Employers also should seek self-identification of new employees under the new ethnic and racial categories as soon as possible.***

So, how do you bridge the gap and get your information updated – both with regard to current employees and new hires – in time to use it in September 2008?

Our Recommendations

1. With regard to **new hires**, request the information required for the new, seven EEO-1 categories for new hires from this point forward. **However, you will need to have two invitations to self-identify for new hires:**

a. With regard to new hires, you will need one request to self-identify for EEO-1 purposes; this request will include the seven choices for race/ethnicity.

b. You will need a separate request to self-identify for AAP and Adverse Impact Analysis purposes that covers the “old” five EEO-1 categories.

i. For purposes of the AAP, this will only become an issue if you utilize the Organizational Display; the Organizational Display requires that you identify the race of each departmental supervisor. Otherwise, consider “two or more races” as a Minority.

ii. The Adverse Impact Analysis, however, requires that you compare target groups against the preferred group; currently, you would not know where to place employees that select “two or more.”

2. It is up to you when you request these two forms of self-identification. Here are some alternatives:

a. Develop one request to self-identify that has the EEO-1 set of definitions on one half of the page, and the older AAP set of definitions on the other half of the page. Part of your introductory, instructional language would indicate that differing federal regulations require that you have them self-identify under two different sets of definitions.

OR

b. Keep your current request to self-identify for applicants as it is with five categories; then, once you hire an individual, request that they complete another request to self-identify with the new seven categories. Technically, you do not need the EEO-1 compliant race/ethnicity categories for applicants, only for hires. This seems to be the most “user friendly” option for employers.

OR

c. Do some combination of the above; one client is planning to keep its first request to self-identify “old school” (i.e., with 5 categories), and then have a two-

page split five- and seven-category request for those employees actually hired. This is simply in an effort to increase the number of employees who respond.

3. With regard to your current employees, first determine how long it will take you to resurvey your workforce. Consider factors such as: workforce size, use of technology, geographic proximity, and past experience with similar initiatives.

2. Hold off on resurveying for as long as you can and at least until after October 1, 2007. We might get some clarity on the highly-conflicting Veterans regulations by that time (and you would likely have to resurvey your current workforce for that purpose as well – may as well save all the resurveying for one effort if you can); and we might get some more clarification regarding how to handle the differing racial categories required in the Adverse Impact Analysis.

4. Time your resurvey effort by using September 30, 2008 as your deadline, and – depending on how long you determine it would take you to complete the resurvey – count backwards from that date to decide when to start the resurvey effort.

Whenever you request self-identification, make sure your language indicates supplying the information is **voluntary**. The EEOC has suggested, but not required, the following language:

The employer is subject to certain governmental recordkeeping and reporting requirements for the administration of civil rights laws and regulations. In order to comply with these laws, the employer invites employees to voluntarily self-identify their race or ethnicity. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information obtained will be kept confidential and may only be used in accordance with the provisions of applicable laws, executive orders, and regulations, including those that require the information to be summarized and reported to the federal government for civil rights enforcement. When reported, data will not identify any specific individual.

If it is good enough for the EEOC, it is probably worth using on your forms.

Closing Thoughts

Keep your ears open for updates from the OFCCP on its attempt to resolve the 5-category/7-category conflict. Also be on the lookout for regulations concerning the conflicting definitions of protected veterans. These could drastically change your plans for resurveying your workforce, as well as requesting information from new hires.

Also, it's always good to remember not to request any self-identification regarding disability until after an employee has been given a conditional job offer and before he or she begins work. Save your veterans and disability request for when the employee is completing new hire paperwork.

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