

# Complete AAP News

**Inside this issue:**

EEO-1 continued	2
Responsibility for Recruitment Firms	3
Changes at the OFCCP	4

## Preparing for the 2007 EEO-1 Report

Many contractors are scrambling to prepare for changes to the 2007 EEO-1 Report. The changes include adding Hawaiian/Pacific Islander and Two or more races to the existing race categories. Part of the struggle is whether contractors must resurvey their workforce in response to the new race categories used in the EEO-1 Report. The issue is further complicated because data used for EEO-1 and affirmative action tracking may differ.

A notice titled "Agency Information Collection Activities..." originally posted November 28, 2005 in the Federal Register gives contractors some guidance. It can be accessed at: <http://edocket.access.gpo.gov/2005/pdf/05-23359.pdf>. This notice

signals a major shift in how to identify race:

*...for the first time, employers would be strongly encouraged to rely on employee self-identification to identify their ethnicity and race... Employers may use employment records or visual observation to gather race and ethnic data for EEO-1 purposes only when employees decline to self-identify.*

Race identification was previously based upon how someone was perceived by others. Contractors visually identified the race of applicants and employees as part of the hiring process. Now contractors must record how an individual perceives him or herself. An employee



may appear to be White, but if that employee self identifies as Two or More Races, they are classified as a Minority for EEOC and OFCCP purposes. The notice defines minority:

*OFCCP's targeting system requires that EEO-1 data be reported in a format that can be easily folded into this analysis. Adoption of the "Two or more races" category will allow OFCCP to count this new category as "minority" and*

## 2007 EEO-1 continued...

*to continue using the current methodology with minor adjustments.*

Although the September 2007 EEO-1 form will list the new race categories, contractors are not required to re-survey their workforce and use the new race categories until the 2008 EEO-1. The relevant language from the Federal Register states: *“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.”* The OFCCP recently announced they will be issuing guidance about how to use the new race categories in affirmative action plans, but no timetable has been announced.

Contractors who choose to immediately re-survey their workforce using the new race categories should consider that they may need to survey their workforce again when new



Although the September 2007 EEO-1 form will list the new race categories, contractors are not required to re-survey their workforce and use the new race categories until the 2008 EEO-1.

Veterans definitions are written into the OFCCP's and Veterans Administration regulations. The proposed changes would eliminate Veterans of the Vietnam Era, rename Special Disabled Veterans to Disabled Veterans, and add a category called Armed Forces Service Medal Veterans. The OFCCP had intended to release their veterans guidelines in the spring, but this has been delayed. There is no current timetable for when these new definitions might be implemented.

Some attorneys are advising that contractors ask applicants to self identify using the “old” race categories and also the “new” categories. This requires a “tear off” or self identification sheet with two columns, or two separate identification sheets.

Another option is to convert all the “old” race categories to the “new” race categories in all

pre an post employment records. It appears the OFCCP will consider the Two or More Races category to be a “minority” group. But other unanswered issues arise if the OFCCP asks for an availability breakdown by individual minority group. Should a contractor complete an availability analysis for Two or More Races as a separate minority subgroup? Are goals set for recruiting qualified Two or More Races persons? What sort of recruitment sources would specialize in recruiting Two or More Race individuals? The OFCCP needs to clarify how to handle situations like these.

One final option is to continue using the “old” race categories through 2007. Put off re-surveying the workforce until 2008 at a time when the OFCCP has hopefully announced how it intends to use the new race categories in affirmative action plans.

## Responsibility for Recruitment Firms

Government contractors are required, as part of their affirmative action efforts, to track the race and gender of applicants and analyze the selection process for illegal discrimination.



More and more contractors are outsourcing portions of their recruitment function. Most third party recruitment firms do not track the race and gender of applicants for the contractor.

Compliance Officers are increasingly attempting to convince contractors that recruitment firms must track applicants for them. One legal theory supporting this requirement is based on agency. In general terms, a "principal," in this case the contractor, is responsible for the actions of its "agent," the recruitment firm. Crucial to the finding of an agency relationship is consent and control. Most recruitment firms are acting as screening services that put applicants into contact with contractors, who then interview and make the final decision to hire. Contrac-

tors do not control the means or manner used by recruitment firms. The few cases brought before courts alleging an agency relationship between recruitment firms and

employers have found no such relationship.

A second theory that might support contractor liability for recruitment firms is the doctrine of Non-Delegable Duty. This theory prevents a contractor from avoiding liability for discrimination by delegating the recruitment process to a third party. The general idea is that a contractor, as an affirmative action employer, is responsible for ensuring that their selection process is free of discrimination. They are in fact required to take affirmative action to attract qualified women and minority applicants. The argument goes that the responsibility to recruit in a non-discriminatory manner cannot be delegated. Public policy demands that the contractor remain responsible for how the recruitment firm

exercises these important duties.

There are few cases addressing this Non-Delegable Duty doctrine in the context of recruitment and most of these have involved public employers. Whirlpool Corporation was recently involved in an OFCCP claim involving an employment test that disproportionately discriminated against Blacks. The test was administered by a county agency on behalf of Whirlpool. While not admitting any liability, in 2005 Whirlpool paid \$850,000 and agreed to offer positions to 48 rejected applicants to settle the claim.

In light of this potential liability, some contractors are entering into indemnity agreements and provisions to track applicant race and gender with their recruitment firms.

At this point in time, there may not be enough case law for the OFCCP to successfully take the issue of Non-Delegable Duty doctrine into litigation, but it appears they are at least beginning to attempt to use the theory to pressure contractors into settlements.

## **Yocom & McKee, Inc.**

15401 West 9th Avenue  
Golden, CO 80401

Phone: 303-277-0692  
Fax: 303-277-9098  
Email: [info@yocom-mckee.com](mailto:info@yocom-mckee.com)

## **Changes at the OFCCP**

During recent compliance reviews, many contractors have noticed Compliance Officers spending more time on technical compliance concerns and less on substantive affirmative action issues. Over 40% of the OFCCP's staff has retired since 2004, so perhaps this focus on technical compliance is due to training new individuals.

There is also a move toward utilizing persons with specialized skills within the OFCCP during audits. Pioneered in the

Chicago office, one person might complete the initial intake checklist for the submitted AAP. The analysis of compensation issues could be given to a Compliance Officer in another office, while the examination of employment activity is done by yet another person.

Some contractors have noticed they are not getting very quick answers when calling to inquire about the status of their AAP audit. If several different Compliance Officers are now involved in examining different parts of the plan, it takes some time to contact and update the status of the review.

The OFCCP also reports that there is a growing backlog of audits with compensation related issues. These cases are

linguishing in the offices of OFCCP's few statistical experts. There are no deadlines for OFCCP to complete reviews, so these cases could remain open for years.

For 2006, the OFCCP announced that every 25th audit will automatically include an on-site investigation.

