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## New EEO-1 Report Due September 30, 2008

The Equal Employment Opportunity Commission (“EEOC”) has implemented three modifications to the EEO-1 report to be filed by employers this year on or before September 30, 2008: (i) new race and ethnicity categories; (ii) employee self-identification of race and ethnicity; and (iii) a two-question format for EEO-1 survey of workforce. 70 Fed. Reg. 71294-71303 (Nov. 28, 2005).

An EEO-1 report is an employer-generated report that profiles the employer’s workforce by gender, race and ethnicity classifications, as well as by defined job categories. EEO-1 reports must be submitted annually to the EEOC by private employers with 100 or more employees or employers with 50 or more employees having a federal contract of at least \$50,000. Reports are due September 30<sup>th</sup> each year and must reflect employment data from one payroll period during July, August or September of the current survey year.

### New Race and Ethnicity Classifications

The new EEO-1 report contains several new or modified race and ethnicity categories. Employer reports and surveys of their workforces are required to reflect the following race and ethnicity classifications under the EEOC’s newest regulations:

- **Two or more races.** The EEOC added “Two or more races” as a new classification that employees may select.
- **Hispanic or Latino.** The prior “Hispanic” classification is now “Hispanic or Latino.”
- **Black or African American.** The former “Black” classification is now “Black or African American.”
- **Asian.** The prior “Asian or Pacific Islander” classification has been divided, and “Asian” is now a separate category.
- **Native Hawaiian or Other Pacific Islander.** “Native Hawaiian or Other Pacific Islander” is now a separate classification.

## **Employees Allowed to Self-Identify**

The EEOC now strongly encourages employers to ask employees to self-identify their race and ethnicity for reporting in the EEO-1 report due September 30, 2008. See, 70 Fed. Reg. at 71296 (“self-identification is the preferred method for gathering ethnic and racial information for the EEO-1 Report”). Previously, the EEOC allowed employers to report workforce race and ethnicity by making their own determinations, without a direct communication to their employees. Under the new regulations, employers may only use their own visual observation or employment records where employees decline to self-identify.

There is no required form for the employer’s communication to its employees asking them to self-identify. However, the EEOC states that an employer’s invitation to self-identify must: (i) offer employees the chance to self-identify their race and ethnicity; and (ii) include a statement ensuring employees that self-identification is voluntary.

## **Two-Question Format For Workforce Survey**

While the EEOC did not designate specific language for employers to use when asking employees to self-identify race and ethnicity, it did adopt a two-question format for the new EEO-1 workforce survey. First, employers must ask employees about their *ethnicity*. The EEO-1 report lists two possible ethnic categories: “Hispanic or Latino” and “Not-Hispanic or Latino.” Where employees select “Hispanic or Latino,” no further information is required. Second, where employees choose “Not-Hispanic or Latino,” employers must ask employees about their *race*. The EEO-1 report provides six possible race categories: “White,” “Black or African American,” “Native Hawaiian or Other Pacific Islander,” “Asian,” “American Indian or Alaska Native,” and “Two or more races.”

An employer must defer to the employee’s self-identification, even when it suspects the identification is incorrect. However, where an employee selects an ethnicity of “Hispanic or Latino” and then identifies additional race categories, the employer should only report “Hispanic or Latino” on the EEO-1 form. Similarly, if an employee chooses “Two or more races” but then identifies each race individually, an employer should only report the “Two or more races” designation. Employers are only required to submit an EEO-1 report, but they must retain employees’ self-identification data as an employment record.\*

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\* There are also changes to job classifications featured on the new EEO-1 form, effective previously for EEO-1 reports filed on or before September 30, 2007. The prior category “Officials and Managers” has been subdivided into the following two subcategories: (i) “Executive/Senior Level Officials and Managers;” and (ii) “First/Mid-Level Officials and Managers.” Also, non-managerial business and financial occupations previously listed in the “Officials and Managers” category are now classified in the “Professionals” category on the EEO-1 form. 70 Fed. Reg. 71298-71300.

## **Implications for Affirmative Action Plans under Executive Order 11246**

Employers who are also federal contractors (50 or more employees and federal contracts of at least \$50,000) subject to Executive Order 11246 will have additional responsibilities when preparing their Executive Order 11246 and Veterans/Rehab affirmative action plans going forward. While budgetary constraints are the most likely reason that the Office of Federal Contract Compliance Programs (“OFCCP”) has not issued guidance as originally planned, OFCCP is expected to advise federal contractors that all affirmative action plans prepared after re-survey of a workforce must include a workforce analysis or organizational profile which includes both the revised “Officials and Managers” classifications and the new “Two or more races” group. At present, OFCCP has indicated that it plans no changes to the utilization analyses of placement goals sections of affirmative action plans. OFCCP will keep the “total minority” and “total non-minority” designations for those sections of affirmative action plans. Federal contractors must provide all job seekers with the opportunity to self-identify using the new race and ethnicity classifications at this time.

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This is an update provided for informational purposes to our clients and friends.

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