Your Monthly Legal Update – January 2006
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PROPOSED FINAL REVISIONS MADE TO EEO – 1 REPORT & CASE LAW UPDATE

Proposed Final Revisions Made to EEO-1 Report

The U.S. Equal Employment Opportunity commission voted 3 to 1 to approve the final proposed revisions to the Employer Information Report (EEO – 1 Report), scheduled to become effective for the September 30, 2007 reporting cycle although there has been some time open for further review which could result in further changes. The proposed revisions remained after consultation with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

As most of you know the EEO – 1 Report is the principal reporting form by which certain employers must provide a count of their employees by job category and by ethnicity, race and gender. These reports are submitted annually to the EEO – 1 Joint Reporting Committee by September 30th of the calendar year, which includes EEOC and OFCCP.

The EEO – 1 Report must be filed by all private employers who are: (1) subject to Title VII with 100 or more employees, excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations; or (2) subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees. The EEO – 1 Reports are also required of all non-exempt federal contractors (private employers) with 50 or more employees and those who are; (1) prime contractors or first-tier subcontractors holding a contract, subcontract, or purchase order amounting to $50,000 or more; (2) who serve as a depository of government funds in any amount; and (3) who are a financial institution which is an issuing and paying agent for U.S. savings bonds and notes.

The recommendations received by the EEOC during the past two years and incorporated into the changes currently proposed are intended to modernize the EEO – 1 Report so that it continues to be relevant and have value, while allegedly minimizing the reporting burden. While there might be legislative intent to simplify something, we often know that that may not occur. The proposed final EEO – 1 Report retains many aspects of the original 2003 proposal. In the new proposal, the EEOC's 2003 position, which desired voluntary self-identification by employees, is the preferred method for gathering ethnic and racial information is incorporated. Employers should continue to use employment records or visual observation to gather information for the EEO – 1 Report only when employees decline to self-identify under the new proposal. The new EEO 1 – Report similarly adopts the two-question format, with the first question asking employees about

their ethnicity and the second question allowing employees to select one or more races. The proposed final revised form would require employers to report data about the number of employees who identify with two or more races (not Hispanic or Latino) but would not require further reporting of the different races within which the employees identify. There was debate as to whether this modification would lump all races together and create an unidentified multi-race group.

As for job categorization, the newly approved form would create the following sub categories: "Executive/Senior Level Officials Managers" and "First/Mid Level Officials Managers." Additionally, the proposed final EEO – 1 Report clarifies that employees would not be obliged to resurvey their workforces before submitting their first revised EEO – 1 Report. There are new requirements for Hawaii that are obviously not relevant to our group so this update will not go into those details.

It is believed that the revisions are an attempt to modernize the form while still enforcing Title VII and Executive Order 11246 while also reflecting changing demographics and government-wide revisions to standards for classification of federal data on race and ethnicity, along with allegedly limiting the burden placed on employers. The EEOC believes that the job categories are being changed to better track the representation of women and minorities at different levels of management. The revised EEO 1 – Report: (1) adds a new category "Two Or More Races;" (2) divides into two separate category "Asians" and "Pacific Islanders;" (3) allows designations for "Black" or "African American;" and "Hispanic" as "Hispanic" or "Latino;" and claims to (4) strongly endorses self identification of race and ethnic categories as opposed to visual identification by employers.

Relevant to the proposed job category changes, it appears that the legistlative intent dealt with three primary issues: (1) division of officials and managers into hierarchical subcategories; (2) renumbering job categories in a manor that placed service workers earlier on the list; and (3) adding new language to definitions of technicians and professionals. Therefore, the current category of "Officials and Managers" is to be divided into two levels based on responsibility and influence within the organization. The two new proposed levels now are: (1) Executive/Senior Level Officials and Managers" (those who plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO); and (2) "First/Mid-Level Officials and Managers" (those who direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers and oversee day to day operations). The revised EEO – 1 Report also moves business and financial occupations from the "Officials and Managers" category to the "Professionals" category with the intent to improve data for analyzing trends and mobility of minorities and women within "Officials and Managers."

Further information about the EEO – 1 Report, including questions and answers on the final proposed revisions, is available on the agency's website at www.eeoc.gov.

Case Law Update

Of note at this time is that the 7th Circuit U.S. Court of Appeals, which covers Wisconsin, recently held for the first time that an employer can be liable to an employee who is allegedly harassed by an independent contractor. The facts of this case are as follows Lisa Dunn worked as a nurse for several years at Washington County Hospital in Nashville, Illinois. This was a small hospital with only 59 beds, so members of the staff had to work together, making it difficult to readily separate antagonists for the employer. Dunn filed suit against the hospital alleging that Thomas J. Coy, the head of Obstetric and Emergency services, allegedly made life miserable for her and other women on the staff through his harassing behavior. The District Court, the trial level court, dismissed the case because at the time of the alleged incidents, Coy (the alleged harasser) was not an employee of the hospital but was an independent contractor with staff privileges. Therefore, that District Court concluded that because the hospital could not allegedly control the details of an independent contractor's work, that the employer could not be held liable for his actions. Dunn then proceeded to appeal that ruling to the Seventh Circuit which overturned a lower court.

The Seventh Circuit did reaffirm that employers are answerable for sexual harassment based on their own actions. They are responsible for every "tangible employment action" (hiring, firing, promotion or its absence, wage setting, and the like) plus any other discriminatory term or condition of employment that an employer fails to take reasonable care to prevent or redress. When a supervisor causes the objectionable conduct, proof of reasonable care, is an affirmative defense for the employer. In other cases, the employee has the burden to support a showing that the employer knew of the problem and did not act reasonably to equalize the working conditions once it had that knowledge.

The Seventh Circuit held in this case that because liability is direct rather than derivate, it makes no difference whether the person who is alleged to be the harasser is an employee, independent contractor, or for that matter a customer. The court reasoned that the ability to control the alleged perpetrator plays no role as to the employer's potential liability. Therefore, the Court was not focusing on the alleged harasser's actions but rather the employer's response to the harasser's actions as the ultimate issue.

The Court continued on to reason that employers have many incentive and sanction options that can be applied to deter such conduct within their workplace and that the failure to use those options makes an employer responsible. The Court ultimately concluded that independent contractors are no different from a worker's co-employee and that the employer's responsibility is to provide non-discriminatory working conditions. The focus of this entire case was on how the employer handled the problem, not where the harassment originated from.

In Dunn's complaint she alleged that the hospital knew Coy made life miserable for women but not men and that they did nothing in response. The Seventh Circuit ultimately found that her allegations substantiated the claim for sex discrimination under federal law and reversed the lower court's decision. The case was sent back to the District Court to determine whether Coy's conduct was severe enough and whether the hospital's response was reasonable enough to justify

liability against the hospital for it. *Dunn vs. Washington County Hospital*, case number 05-1277 (7th Circuit November 17th, 2005).

Employers should be alerted that you need to take prompt action regarding any formal complaint of harassment, whether it is from a customer, vender, independent contractor and/or any other individual that is allowed on the premises. According to this case, an employer does not have a defense that it can turn the other way and not act to remediate such a situation. For that matter, one should question whether an employer can turn them away if they receive an informal complaint. I would err on the side of caution and take reasonable remedial action.