

# AFFIRMATIVE ACTION UPDATE

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Douglas B. Brown, LLC

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Douglas B. Brown, LLC  
13715 Clover Lake Dr., Ste. 100  
Chardon, OH 44024  
(440) 564-7987 Phn. (440) 564-7989 Fax  
dbb@dbbrown.com

## EEO-1 REVISIONS

For the 2007 EEO-1 reporting cycle, employers will have to provide data using the revised racial/ethnicity categories as well as new job categories. These changes will be effective for the report due September 30, 2007.

### REVISED RACIAL/ETHNICITY CATEGORIES

The previous EEO-1 racial categories consisted of:

White (Not of Hispanic Origin)  
Black (Not of Hispanic Origin)  
Hispanic  
Asian/Native Hawaiian or Pacific Islander  
American Indian or Alaskan Native

The revised racial/ethnicity categories take the following approach. First, the new EEO-1 report looks at an individual's ethnicity in terms of whether they are Hispanic or Latino. An individual is Hispanic or Latino if they are a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

If an individual is not Hispanic or Latino, then they must be classified as to their racial classification. The revised racial classifications are:

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 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 Alaskan Native (Not Hispanic or Latino): All persons having origins in any of the original people of North and South America (including Central America), and who maintain 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.

There are some interesting nuances in the above classifications that have not been seen before. Asian is now separate from Native Hawaiian or Other Pacific Islander. In addition, members of the indigenous people of Central and South America do not have to claim ethnicity as Hispanic or Latino regardless of their race but can identify as Native American.

In review, someone of North African (Moroccan, Libyan or Egyptian) descent would be classified as White. Someone of Middle Eastern (Lebanese, Syrian, Iraqi, Iranian, Afghan) descent would likewise be classified as White. However, someone of Pakistani descent would be classified as Asian since Pakistan is considered part of the Indian Subcontinent.

EEOC's website specifies self-identification as the primary method of obtaining racial/ethnicity data from employees and applicants. The website also contemplates that employers will utilize a two-step process to obtain this data. First, employers will ask whether the individual is Hispanic or Latino. While not clearly worded, it appears that if the individual responds "Yes," then the process stops. If the individual is not Hispanic or Latino, then they would be asked to identify their race.

The website specifies that an employer must accept an employees/applicants self-identification. Employers may use employment records or visual identification only if an individual refuses to self-identify. This may require an employer to accept some confusing outcomes. For example, an individual who was born in Brazil and who appears to be Black could legitimately self-identify as Hispanic or Latino. On the other hand, that individual's twin could independently self-identify that he/she is Black or African American. Because the new guidelines say that employers must accept an individual's self-identification, the two twins could legitimately be classified under two different racial and ethnicity classifications. No, it doesn't make sense. Yes, the employer would be required to classify them as such.

In regard to resurveying your workforce, while not required, resurveying is strongly encouraged. The reality is the only significant change is to separate Asian from Pacific Islander. As such, it is possible to resurvey only those individuals currently classified as Asian. However, with the new "Two or More Races" category, individuals of any racial classification (except Hispanic or Latino) may wish to change from a single racial to the multi-racial classification. Accordingly, employers have essentially four options available to them.

1. Do Nothing
2. Resurvey everyone
3. Resurvey only Asians
4. Provide information on the new classifications to everyone and invite those who wish to change their racial classification to come down to HR and do so.

Option 4 may be the most realistic approach to providing opportunities to self-identify. If someone is currently classified as Asian/Native Hawaiian or Other Pacific Islander and they do not change their racial category, under the new system they would be considered Asian.

One concern is whether existing HRIS systems will allow for the recording of the new categories. It is strongly recommended that employers review their HRIS systems to determine whether they are either up to date with the new categories or have the flexibility to record the new categories.

Both the new Instruction Booklet and the EEOC website are silent as to whether employers should be asking applicants to self-identify using the new categories. To date, OFCCP has not issued any guidelines regarding applying the new categories to applicants. However, taking a commonsense approach to the question indicates the employers would be advised to modify their self-identification forms to conform to the new categories and to start capturing applicant data accordingly.

## **REVISED JOB CATEGORIES**

In addition to changes in the race/ethnicity categories, the revised EEO-1 has split the current “Officials and Managers” classification into two new groups. These groups will be “Executive/Senior Level Officials and Managers” and “First/Mid Level Officials and Managers.”

Before looking at the specifics of each category, it is important to note that the EEO-1 Instruction book states that the two new “...subcategories are intended to mirror the employer’s own well established hierarchy of management positions. Small employers who may not have two well-defined hierarchal steps of management should report their management employees in the appropriate categories.”

While not specifically set forth as such, the above seems to indicate the examples below are just that, examples, and employers retain some discretion in categorizing employees into the two new groups in a manner which reflects the actual management structure of the employer.

### Executive/Senior Level Officials and Managers

This being said, the Instruction Booklet indicates that Executive/Senior Level Officials and Managers are those positions “...within two reporting levels of the CEO, whose responsibilities require frequent interaction with the CEO.” These positions are at the highest levels of the organization and typically found in larger organizations. Duties include planning, directing or coordinating activities with the support of subordinate executives and staff managers. Examples provided include “...chief executive officers, chief operating officers, chief financial officers, line of business heads, presidents or executive vice presidents of functional areas or operating groups, chief information officers, chief human resources officers, chief marketing officers, chief legal officers, management directors and managing partners.” The Instruction Booklet indicates that these positions reside at the highest levels of an organization.

## First/Mid Level Officials and Managers

These are managers other than Executive/Senior Level Officials and Managers. They "...receive directions from Executive/Senior Level Officials and Managers... Examples are vice presidents and directors; group, regional or divisional controllers; treasurers; human resources, information systems, marketing and operations managers." The category "...also includes those who report directly to middle managers... Examples of these kinds of managers are: first-line managers; team managers; unit managers; operations and production managers; branch managers; administrative services managers; purchasing and transportation managers; storage and distribution managers; call center or customer service managers; technical support managers; and brand or product managers."

An obvious question is what about first-line supervisors? It would appear that if they are salaried and they only supervise and do not perform the same work as those that they supervise, they would be classified as a First/Mid Level Official and Manager. However, if they are hourly or perform the same work as those they supervise, then they would be classified in the same EEO category as those they supervise.

Ultimately, employers should look at their organization, reporting structures, management hierarchy and span of control and classify their current Officials and Managers using the two sub-categories as guidelines but also applying their own structure to the process. In a large organization with many levels of management, there may be significant and distinct sub-categories among the Officials and Managers. In other small, flatter organizations, there may be little if any differentiation.

Again, employers must review their HRIS systems to determine whether the system is capable of reporting the two new Officials and Managers sub-categories.

OFCCP has not indicated whether there will be any changes in Affirmative Action compliance in light of the new categories. However, OFCCP's practice has been to direct contractors to not cross EEO-1 job categories when creating job groups. As such, it is likely that as of October 1, 2007, employers who in the past used only one affirmative action job group for Officials and Managers may have to create and use two Officials and Managers job groups which mirror the new EEO-1 job categories.

### **GOING FORWARD, WHAT SHOULD WE BE DOING??**

1. Employers should be reviewing their HRIS systems to ensure they can capture and record data regarding the new racial/ethnicity categories as well as the new EEO-1 job sub-categories for Officials and Managers.
2. Employers should be revising their self-identification forms to allow employees and applicants to self-identify as to the new racial/ethnicity classifications (A sample self-id form is attached).
3. Employers should begin using the new self-identification forms for employees and applicants.

4. Employers should decide on their strategy for resurveying their current workforce in regard to the new racial/ethnicity classifications. Options include:
  - Do Nothing
  - Resurvey everyone
  - Resurvey only Asians
  - Provide information on the new classifications to everyone and invite those who wish to change their racial classification to come down to HR and do so.
5. Employers should be reviewing positions currently categorized as Officials and Managers and subdividing them into the Executive/Senior and First/Middle Level Officials and Managers EEO-1 job categories.

## **VETERANS' AND DISABLED OUTREACH OBLIGATIONS.**

When interacting with the OFCCP, most government contractors and subcontractors tend to focus on their obligations towards minorities and females under Executive Order 11246. This is due mainly to the fact that OFCCP's current focus during the compliance review process is primarily on identifying discrimination in compensation and personnel activity (hires, promotions and terminations) regarding minorities and females.

Contractors need to remember that in addition to the obligations under the Executive Order, there are also Affirmative Action regulations regarding Veterans and the Disabled. In the past, OFCCP has not spent much time on monitoring contractor's compliance with these regulations. However, several recent reviews with which we have been involved indicate that the Agency is in fact making compliance with the Veterans and Disabled regulations a more significant part of the compliance review process .

In particular, OFCCP is now inquiring as to what veteran's and disabled referral sources the contractor is utilizing in its efforts to reach out to each group. In addition, the Agency has specifically asked for the results of the good faith efforts by inquiring as to who was referred by the source and what was the disposition of the referral.

In regard to veterans outreach, many contractors have replied that they post their job opportunities with America's Job Bank (ABJ). However, in response to that statement, the compliance officer in one review rejected this as evidence of good faith efforts because listing jobs with the state employment services office or ABJ is a regulatory requirement and is not evidence of affirmative outreach efforts.

Another issue with relying on ABJ is that it is currently scheduled to be closed by the Department of Labor in June of this year. A replacement of nationwide scope has not been identified as being in place by June. This means that contractors will likely have to revert back to listing jobs with the appropriate local state employment services office.

In addition to determining a replacement process for complying with the job listing requirements for veterans, an important priority is identifying other referral sources for interested and qualified veteran and disabled job candidates. Many contractors using centralized recruiting functions

have diversity related organizations as part of a normal distribution. It will be important to ensure that veterans and disabled recruitment sources are part of any blanket distributions. However, these contacts cannot occur only at a national level. To the extent that individual facilities have responsibility for doing recruiting at a local level, then facility specific good faith efforts must also be occurring. This will mean identifying local recruiting sources and making contact with those sources on an ongoing basis.

Implicit in the above is the responsibility to monitor the outcomes of both national and local good faith efforts. It appears that OFCCP may request and will expect to be provided with the names of individuals referred through outreach efforts, the referral source, and the outcome of the referral. Contractors will only be able to comply if their applicant flow systems are capturing this data so that it can be reported at a later time.

OFCCP's website (<http://www.dol.gov/esa/ofccp/ERRD/errsrvs.htm>) provides an Employment Resource Referral Directory (ERRD) which is broken down by OFCCP region. Contractors can download the EERD in PDF format. The EERD is further broken down by resources for minorities, females, veterans and the disabled by state. The website cautions that this list is not inclusive and contractors would be advised that they should conduct their own search for recruitment sources, particularly at the local level.

There appear to be some organizations at a national level providing contractors with opportunities to reach out to veterans. These include "HireVetsFirst, GIJob.net, America's Service Locator, and the Department of Veteran's Affairs Vocational Rehabilitation & Employment Service."

Unlike the national resources for employment of veterans, employment referral sources for the disabled are more localized in nature. As such, contractors will have to research local resources with which to partner regarding the employment of the disabled. Resources may include local schools and colleges, vocational rehabilitation providers, social service organizations or agencies (e.g. United Way Services, etc.).

The bottom line is that OFCCP has been charged with assessing contractor's efforts in the employment of veterans and the disabled. They now appear to be making this assessment a larger part of the compliance process. Contractors need to understand that listing jobs with the local state employment services office or ABJ will not be deemed to be sufficient compliance with the outreach obligation. Efforts to make those outreach efforts, tracking the results of those efforts and monitoring their success are obligations that contractors need to be undertaking now.

If there are any questions or comments concerning anything contained above, they can be directed to this office at the address shown on page one, by calling us at 440-564-7987 or sending an email to [dbb@dbbrown.com](mailto:dbb@dbbrown.com). This discussion of this matter is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.

# SAMPLE FORM

## (ORGANIZATION NAME) SELF-IDENTIFICATION FORM

Employee/Candidate Name: \_\_\_\_\_ Employee No.: \_\_\_\_\_

Position Applied For: \_\_\_\_\_ Current Position: \_\_\_\_\_

As an employer with an Affirmative Action Obligation pursuant to Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act, and the Rehabilitation Act, we must comply with government regulations regarding the collection of demographic information about our employees and about those individuals being considered for employment with our organization. We are required to invite individuals being considered for employment to self-identify as to gender, ethnicity, and racial origin. Only if an offer of employment is extended, individuals are invited to self-identify as to disability or disabled veteran status. We are also required to invite all employees to self-identify for consideration under our Vietnam Era Veteran's and Disabled Affirmative Action Programs as well as to other veteran status. Individuals invited to self-identify may do so immediately or at anytime in the future.

If you believe that you are covered by the above Acts, the Company invites you to self-identify for consideration under its Affirmative Action Programs. Provision of this information is voluntary and refusal to provide it will not subject the applicant or employee to adverse treatment. Further, if provided, the information will be kept confidential and used only in accordance with the Acts and regulations.

### Gender:

I am: \_\_\_\_\_ Male \_\_\_\_\_ Female

### Race/Ethnicity:

Please select only one classification.

\_\_\_\_\_ **Hispanic or Latino:** A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.

\_\_\_\_\_ **White:** (Not Hispanic or Latino) A person having origins in any of the original people 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.

\_\_\_\_\_ **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.

\_\_\_\_\_ **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.

\_\_\_\_\_ **American Indian or Alaskan Native:** (Not Hispanic or Latino) A person having origins in any of the original people 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.