



E. K. Ward & Associates AAP Bulletin 2016

New EEO-1 Format

On September 29, 2016, the White House Office of Management and Budget (OMB) approved the revised EEO-1 Report submitted by EEOC. As a reminder, the EEO-1 is a mandatory annual federal reporting requirement that was originally intended to provide a “snapshot” profile of a company’s workforce by race/ethnicity, gender and job category. EEO-1s must be filed annually by 1) any employer subject to Title VII of the Civil Rights Act of 1964, and 2) federal contractors and subcontractors subject to the Office of Federal Contract Compliance Programs (OFCCP) written affirmative action (AAP) requirements. Covered employers with multiple establishments must file an EEO-1 for each company establishment employing 50 or more persons, a list of establishments having fewer than 50 employees (or as an alternative, an EEO-1 Report for each establishment of fewer than 50 employees), a “headquarters” report, and a “consolidated” report.

Under the revised EEO-1 Report:

- Covered employers will be required annually to report summary compensation and hours worked data.
- Compensation data will be reported by the number of employees in each of 12 pay bands by each EEO-1 job category and demographic group.
- Compensation is to be measured by using calendar year W-2 wages.
- For each data field with a headcount entry, employers must report the total hours worked for all employees in the data field on a separate form.
- Employers are to report actual hours worked. For exempt employees, a proxy of 40 hours for full-time and 20 hours for part-time may be used
- The “snapshot” date and reporting deadline have been changed. The snapshot must be taken during the fourth quarter of the calendar year. Reports must be filed by March 31 of the following year. Revisions go into effect for reports that must be filed in March 2018, with 2017 calendar year data.

The collection of pay data has been a longtime priority of the Obama administration in its attempt to eliminate unlawful pay discrimination. While the EEOC proposed using the EEO-1 to collect compensation data, it is clear that OFCCP has an interest in the data as well. In response to the GAO report on the OFCCP, Director Shiu specifically claimed the revised EEO-1 will “provide more detailed information on federal contractor compensation disparity patterns, which we anticipate will further strengthen OFCCP’s selection process”. Despite claims to the contrary from various employer and contractor groups, there is a belief that this data will somehow help identify pay discrimination. In as such, E. K. Ward & Associates will continue to research this issue in order to identify how best to prepare our clients to minimize their risk in meeting this new submission requirement.



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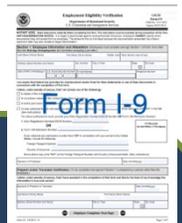
GAO Report - Who's Policing the Police?

The Government Accountability Office (GAO), the research and investigatory arm of the United States Congress, has released a new report examining the enforcement and compliance assistance activities of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The report was requested by Rep John Kline, R-Minn and Rep Tim Walberg, R-Mich, who have both been critical of OFCCP. The GAO began its review in February 2015. It examined six years of OFCCP data on evaluations and enforcement. GAO, focusing primarily on supply and service contractors, interviewed various stakeholders including representatives from 14 industry groups, 13 civil rights/advocacy groups, 24 federal contractors as well as OFCCP officials.

GAO specifies areas where OFCCP can improve its efforts and makes six recommendations regarding changes to OFCCP's audit selection and distribution system, contractor and worker outreach and assistance, and monitoring contractor compliance. The report also contains a detailed response from OFCCP Director Patricia Shiu, in which she generally agrees with the GAO's findings and discusses several initiatives underway that she claims are in line with GAO recommendations. Based on the overall assessment, GAO recommends that OFCCP engage in six specific actions to improve its enforcement and outreach efforts:

1. **Change the way contractors are selected for audit to identify and focus on contractors with the greatest risk of noncompliance.** Interestingly enough, the GAO appears to accept the OFCCP premise that there is rampant discrimination occurring and going undetected in federal contractor workplaces. This in spite of the fact that OFCCP found no violations of any kind in 78% of the audits conducted.
2. **Develop a mechanism to monitor the affirmative action programs (AAPs) on a regular basis,** such as collecting AAPs and update information electronically- According to OFCCP data provided to GAO, 85% of contractor establishments "did not submit an AAP within 30 days of receiving a scheduling letter". From this GAO drew the conclusion that many contractors are not preparing timely AAPs.
3. **Provide for more even distribution of audits** across the country.
4. **Improve training of new and existing compliance officers and staff.**
5. **Improve information and guidance provided to both contractors and workers.**
6. **Assess current guidance materials for clarity.**

While the GAO does not require OFCCP to take action on any of its recommendations, Director Shiu's responses are the first step in letting the agency who controls the purse strings (Congress) know that their criticisms have been heard. After all, it is no coincidence that the OFCCP has experienced budget and staffing constraints in recent years.

A thumbnail image of the Employment Eligibility Verification Form I-9, showing the title 'Form I-9' in blue text at the top right of the document.

Revised I-9

The White House Office of Management and Budget (OMB) has given final approval to a new version of the **Employment Eligibility Verification Form I-9**. The United States Citizenship and Immigration Services (USCIS) was given 90 days from the date of approval to incorporate the changes into the I-9 and make it available to employers.

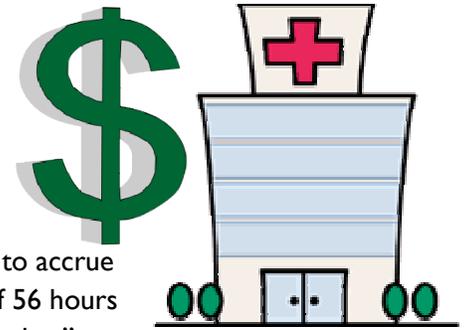
This makes the proposed release date around Thanksgiving, 2016. The approval requires employers to begin using the new form within the next 60 days, **no later than January 22, 2017**.

The new version of the I-9 contains added "smart features" intended to help employers complete the form electronically; however, the form cannot be signed electronically. The new form will be made available to employers by the United States Citizenship and Immigration Services.

Paid Sick Leave

The DOL issued its final rule implementing Paid Sick Leave for Federal Contractors

On September 30, the final rule implementing the requirements of President Obama's 2015 EO 13706 was published. The rule requires covered federal contractor and subcontractors to allow eligible employees to accrue one hour of paid sick leave for every 30 hours worked up to a maximum of 56 hours per year, for either themselves or to care for a broadly defined "family member".



Coverage is determined by the type of federal contract held by a contractor. As with the EO for a new federal contractor minimum wage, contracts for supplies or materials are not covered. Specifically, the paid sick leave rule applies to new contracts or contract-like instruments, on or after January 1, 2017, or a contract awarded outside the solicitation process on or after that date, including replacement for expiring contracts that are:

- Procurement contracts for services or construction covered by Davis-Bacon Act (DBA)
- Contracts for Services covered by the Services Contract Act (SCA)
- Contracts for concessions, including any concessions contract excluded from coverage under the SCA; or
- Contracts entered into with respect to federal property and related to offering services for federal employees, their dependents, or the general public

In order for the rule to apply, the wages of employees performing on or in connection with a prime contract must be governed by the DBA, SCA, or the Fair Labor Standards Act (FLSA). The paid sick leave rule applies to employees who are otherwise exempt from the FLSA's minimum wage and overtime provisions. Additionally, the paid sick leave rule does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. Moreover, it applies only to contracts to be performed in whole or in part within the United States. If the contract is to be performed partly in the U.S., the regulations apply only to the work performed in the U.S.

A few other points to note with the published rule.....

- There is no exemption for Contractors that already provide paid sick leave at or above 56-hour requirement.
- Employees who work "on" or "in connection with" a covered Contract are covered. This includes if the employee directly performs the specific services called for by the contract or if the work is "in connection with" could include receptionists, mail room clerks, administrative assistants, and recruiters. Employees who do not work on or in connection with a covered contract are not covered by the rule. The final rule exempts from eligibility an employee who performs less than 20 % of their work in a particular workweek.
- The rule requires covered contractors to give employees notice of their rights using a new DOL poster available at <https://www.dol.gov/whd/regs/compliance/wh1090.pdf>.
- There are recordkeeping requirements associated with this rule covering a three year period.
- It is the expectation of the DOL that this rule interact with other paid time-off policies.

E.O. 13658 - Minimum Wage Increase

Under E.O. 13658 signed by President Obama in 2014, which requires certain federal contractors and subcontractors to pay a higher minimum wage to employees working on covered contracts, **the current minimum wage will increase from \$10.15 to \$10.20 effective January 1, 2017**. The current federal statutory minimum wage is \$7.25 an hour. E.O. 13658 on does not apply to all federal contracts and subcontracts, but only to employees working under four categories of covered contracts:

1. Procurement contracts for construction covered by the Davis- Bacon Act;
2. Service contracts covered by the Service Contract Act;
3. Contracts for concessions; and
4. Contracts entered into with the federal government in connection with federal property or land and related to offering services to federal employees, their dependents, or the general public.

State/Local Paid Leaves Keep Growing

There are 5 states (California, Connecticut, Massachusetts, Oregon, and Vermont) and more than 20 major cities including Chicago, Los Angeles, Minneapolis, New York City, Philadelphia, San Francisco, Seattle and San Diego that now mandate paid sick leave.

These states or localities enacted laws that require covered employers to allow employees to accrue anywhere from 24 to 56 hours of paid sick leave per year and use those hours for their own illness as well as to take care of family members. If you operate on a multi-state basis, this can amount to an ever-increasing myriad of new state and local requirements that can differ from jurisdiction to jurisdiction. Even for companies that are federal contractors covered by President Obama's 2015 Executive Order 13706 mandating paid sick leave, variations in state and local laws where they do business can result in different obligations. Since the chances of Congress approving a federal paid sick leave law are slim at this point, action at the state and local level is likely to continue.

There are some provisions that are common to most of these paid leave laws. They are as follows below:

- Employees can accrue and use a certain number of hours of sick leave each year, and they must be paid for sick leave at their current rate of pay.
- Employees can use the paid sick time for their own illness and health problems or to take care of a "family member" and in some cases to deal with domestic abuse, stalking, or other personal safety concerns.
- Employers are prohibited from retaliating or discriminating against employees for exercising their right to use their paid sick leave entitlement
- Employers are generally not obligated to pay employees for any accrued but unused paid sick leave at the end of the year, although most jurisdictions allow carry-over of accrued leave.

While there are some common provisions, each law has its own distinctions relating to issues such as which employers are subject to the law, which employees are eligible, how sick time is accrued, whether there is a cap on how much time can be accrued, etc. If you operate on a multi-state basis, E. K. Ward & Associates encourages you to become familiar with the mandatory leave requirements in each state or locality where you have operations.

Revisions to 1997 Race/Ethnicity Reporting Standards

The White House Office of Management and Budget (OMB) has published an official notice announcing that it is conducting a review and possibly a limited revision of the current standards governing race and ethnicity categories used in collecting and reporting demographic data to the federal government.



These standards, last revised in 1997, set the framework for the classifications of race and ethnicity data used by various federal agencies, including the Census Bureau, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Under review is: 1) the use of the two question format in which race and ethnicity are solicited separately; and 2) the addition of a Middle Eastern and North African group classification and reporting category. The seven race/ethnicity categories used today by employers and federal contractors are :

- Hispanic or Latino
- 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) ; and
- Two or More Races (Not Hispanic or Latino)

As a historical reference, OMB, in the issuance of the 1997 standards observed that “There was no general agreement in public comment about the geographic definition of “Middle East” and that an Arab or Middle Eastern ethnic category should not be added to the data standards because the definition of Arab or Middle Eastern is problematic. Occasionally, E. K. Ward & Associates has fielded questions from clients with regard to how to classify applicants and employees of “Middle Eastern” origin and whether or not they should be recorded as “White” or “Asian”. Current standards identify peoples of Europe, North Africa, or the Middle East as White. However, while Afghanistan is considered in the Middle East, it is not a part of the Indian Subcontinent (Pakistan, India or Bangladesh) where the data race classification is Asian.

While the review of the 1997 standards is probably the first step in a very long process, it is important to remember that federal anti-discrimination laws provide protection regardless of how a person is classified. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of, among other things, race, religion and national origin.

IWD & Protected Veteran Outreach Evaluation

Are Jobs the Only Thing That Matter?



As we wind down the first year of the new regulations designed to improve job opportunities for Protected Veterans and Individuals with Disabilities, now is a good time to look back to review past outreach and determine if current sources are providing qualified candidates. While you won't be cited if you do not reach your Protected Veteran Benchmark or your Utilization Goal for Individuals with Disabilities, you will be cited if you do not show adequate outreach effort.

The typical questions for evaluating outreach include:

- Did the activity attract qualified applicants who are disabled and/or protected veterans?
- Did the activity result in the hiring of protected veterans and/or individuals with disabilities?
- Did the activity expand the Contractor's outreach to protected veterans and/or individuals with disabilities in the community?

It isn't just about how much you post and advertise your job openings, but more so about whether you are able to pull in candidates from the disabled and protected veteran populations. If you aren't able to attract candidates from these populations, then you need to be able to show that you are trying different avenues and options. The Office of Disability Employment Policy ("ODEP") states that a federal contractor's talent pipeline should include the following: 1) a recruitment plan that establishes and develops strong relationships with new and diverse recruitment sources; 2) an outreach strategy that reflects the contractor's commitment to a workforce that includes qualified employees with disabilities; and 3) meaningful assessment and a willingness to "shift gears" and try something new if a specific strategy isn't working.

Here's a checklist to review your current outreach against. Have you:

- Trained critical personnel on the new requirements of outreach and hiring goals for Protected Veterans and IWD's
- Assessed that job openings/posting are reaching the veteran/disabled populations
- Ensured that the application process is accessible to individuals with disabilities and protected veterans
- Ensured that applicants are notified that accommodations for disabilities are available during the application process and are provided instructions and timelines for requesting such accommodations
- Audited job listing activities and job ads. Confirmed that the method you (or your third-party vendor) are using to post jobs to state and local employment offices is accepted by all relevant offices
- Ensured that your EEO tagline now contains the required veterans/disabled nondiscrimination language
- Reviewed job descriptions to ensure there are no outdated mental and physical requirements listed
- Ensured that the company's HRIS systems have fields to capture the disabled and veteran identifications
- Established a process to build, document and assess relationship outreach with advocacy organizations for Protected Veterans and Individuals with Disabilities and create brand recognition

Examples of outreach that show good faith effort may include:

- ✓ Enabling employees to represent the organization by volunteering at a regional Special Olympics event
- ✓ Helping translate military experience onto a resume for veterans
- ✓ Donating to the Wounded Warrior project
- ✓ Establishing and maintaining partnerships with disability and veteran organizations
- ✓ Establishing goodwill by attending community events or building brand recognition
- ✓ Upholding partnerships with industry-specific recruitment organizations

- ✓ Implementing new, industry-relevant recruitment sources into the annual affirmative action program
- ✓ Seeking out recruitment efforts that are more targeted to the organization's specific objectives
- ✓ Removing or reducing use of ineffective recruitment sources
- ✓ Increasing visibility in new areas and communities
- ✓ Determining appropriate outreach and recruitment strategies based upon results from applicant and/or hiring analytics.
- ✓ Hosting speakers from Vocational Rehabilitation Services and Veterans/Disabled Outreach organizations to speak at monthly recruiter meetings to share information about the clientele they serve and how best to advise them in their job search
- ✓ Conducting mock interviews with vocational rehabilitation clients and sharing interviewing/resume-writing resources with them
- ✓ Attending community job fairs, such as local high schools, technical community colleges and local Career Centers to raise awareness of job opportunities and hiring processes
- ✓ Partnering with community organizations that advocate for the Disabled and Veterans to assist current disabled employees with specific job related needs
- ✓ Helping disabled employees perform effective job searches and ensuring that they have the tools necessary
- ✓ Developing recruitment plans that include discussion points addressing a variety of diverse groups, including candidates with disability to identify advertising options
- ✓ Sharing job opportunities with local job banks having expertise with veterans and Individuals with Disabilities needs
- ✓ Participating in military job fairs
- ✓ Offering flexible work arrangements include a wide variety of solutions such as flexible start and end times, compressed work weeks, shift swaps, and telework programs.
- ✓ Providing company-wide disability awareness and etiquette training.
- ✓ Ensuring all company online professional development classes and materials are fully accessible.
- ✓ Starting an internship for individuals with disabilities or protected veterans.
- ✓ Posting job announcements in targeted spaces; i.e., boards designed for people with disabilities, in disability-related publications, and with disability organizations.

What Successful Outreach Looks Like

- Workforce demographics are reflective of the communities you serve
- Minorities and women are in leadership positions
- There are relationship pipelines established with organizations that target diverse communities—historically black colleges and universities (HBCU's), professional women organizations, Veteran organizations, etc.
- Employees have equal access to formal and informal mentoring opportunities
- Internal policies are established and implemented that prioritize hiring people with disabilities;
- The hiring of people with disabilities is part of a company's overall hiring plan
- Applications from applicants with disabilities are kept on file for future openings.
- Online job applications and electronic and social media recruitment materials are designed to be accessible by all.
- There is equitable processes and personnel activity in terms of promotions, termination, compensation.
- Diversity goals are linked to leadership performance.
- The organization is committed to ongoing learning.
- A quarterly process is in place to review outreach to IWD and Protected Veterans

New Overtime Rule - Effective December 1, 2016

The new OT regulations, which double the weekly salary threshold for determining whether a salaried worker is automatically eligible for overtime from \$455 to \$913, go into effect on December 1, 2016. As a result, the new regulations will create a new group of previously FLSA-exempt salaried workers. Regardless of their job duties, workers within this group will now be classified as non-exempt and eligible for overtime pay. This includes part-time employees working at a prorated salary who would otherwise be classified as exempt, since the regulations **do not** permit proration of the minimum salary level. In simple terms, the minimum salary level to be considered exempt for an employee who only works 3 days per week is the **same** minimum salary level for a full-time employee: \$913.

E. K. Ward & Associates identified several practical considerations in our 2nd Quarter Bulletin. One additional consideration may be whether or not employers continue to pay the newly classified non-exempt workers on a salary basis or convert them to hourly paid employees. It is important to note that nothing in the FLSA or the DOL regulations require an employer to pay non-exempt workers only on an hourly basis, but it is the most straight forward and easiest way of paying these employees because of the need to track their hours, etc. While it is usually true that non-exempt workers are paid hourly and exempt workers are paid a salary, there is nothing that prohibits paying non-exempt workers a salary. There are a number of reasons why an employer may want to continue to pay a salary to a newly classified non-exempt employee such as:

- Handling the potential negative perception of being reclassified
- Basing some benefit, like paid leave, on salaried status
- Setting a predictable income for the employee

However, paying a salary because an employer thinks it will relieve them of having to track the time of a non-exempt worker is not a good reason. A major compliance challenge with any non-exempt position is accurately tracking hours worked and it becomes more difficult when the worker is not paid on an hourly basis. For example, potential liability for “off-the-clock” work can be significant. In addition to tracking hours, employers must also be able to calculate the “regular rate” for all non-exempt workers. This is obviously a more straight forward calculation with an hourly employee than a salaried worker. The FLSA regulations provide the formula for determining the regular rate for non-exempt workers as dividing the weekly salary by the number of hours the salary is **intended** to compensate. Given the potential liability for mistakes, the employer should clearly communicate with any salaried non-exempt employees the number of hours that a salary is intended to compensate. In light of the complexity in setting and documenting hours the salary is intended to compensate, calculating the regular rate and keeping accurate time records, many employers simply choose to pay non-exempt employees on an hourly basis.



Disclaimer: This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.