Missouri Alliance for HOME CARE

SESCO management consultants

The SESCO Report

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Mid-Year Update and Reminders

Deadline Looms for Expanded EEO-1 Filings

For US employers with 100 or more employees, extensive new information relating to their prior EEO-1 filings must be submitted by **September 30, 2019**. Specifically, in addition to categorizing employees by race/ethnicity, gender and job type, employers are now required to assemble and submit, with respect to each subcategory, aggregated employee data regarding compensation and annualized hours worked. Assembling the required data may be much more complicated than many employers are expecting, so it is important to begin planning now.

What is the EEO-1?

For many years, the US Equal Employment Opportunity Commission (EEOC) has required employers with 100+ employees to complete and file an EEO-1 form annually. The EEO-1 was essentially a relatively simple demographic snapshot of the employer's workforce, capturing the number of employees in each of several job categories by gender and by race/ethnicity. The Office of Federal Contract Compliance Programs (OFCCP) also has long required the EEO-1 for federal government contractors with at least 50 employees.

What is Different this Year?

Late in the Obama administration, the EEOC and OFCCP issued rules requiring employers to start providing additional information regarding compensation groupings and hours worked for each of the existing job, gender and race categories. Before these rules were fully implemented, however, the Trump administration's Office of Management and Budget (OMB) halted the rules, asserting that the revisions were overly burdensome and created privacy concerns. Private organizations, in turn, challenged the OMB action, and in March 2019, a federal court ordered the EEOC to move forward with collecting the new compensation and hours data (collectively referred to as "Component 2" data). Following further court hearings, the EEOC established September 30, 2019, as the new deadline for submission of the data.

Who Needs to Worry about This?

Only **employers with 100 or more employees** need to submit the new Component 2 data. (Most federal contractors with 50 to 99 employees still must submit the Component 1 data annually, but need not submit the Component 2 data.)

The 100-employee benchmark is not based on a particular establishment, but on the employer's workforce as a whole. All full-time and part-time employees must be counted for purposes of determining whether the employer meets the 100-employee threshold. The 100-employee benchmark is determined by the number of employees as of the years 2017 and 2018, not the current number of employees.

What New Data Needs to be Submitted by September 30?

Each covered employer must submit Component 2 data for both 2017 and 2018. There are two aspects of the new Component 2 data: compensation levels and aggregate hours worked.

First, employers must take the data from Component 1 (the number of employees, broken down by job category, race and gender) and further sort the employees into the twelve different salary bands (ranging from "$19,239 and under" to "$208,000 and over"). An employee's salary band is determined by the compensation reported in Box 1 of the employee's W-2 form for the relevant calendar year. (Note that, if an employee has an annualized salary of $100,000, but begins employment on October 1 of the relevant year, the Box 1 data will put the employee in the salary band that includes $25,000 rather than the salary band that includes $100,000.)

Second, employers are required to report the aggregate number of hours worked per job category. For example, if in the first section an employer reports a total of nine "administrative support workers" who identify as "White (Not Hispanic or Latino)" and who are further identified as female, the employer will next calculate the total number of hours worked by those nine employees in the applicable calendar year. For FLSA-nonexempt employees, actual hours should be used; for FLSA-exempt employees, proxy hours (40 hours per week for full time, 20 hours per week for part time) may be used instead.

Similar to the Component 1 EEO-1 requirements, employers will select one "snapshot" pay period between October 1 and December 31 for purposes of determining which employees will be included in the Component 2 data.

How do We Submit Information?

Component 2 reporting is via an electronic, online application. The EEOC requires that EEO-1 reports be submitted via the Component 2 EEO-1 Online Filing System, or as an electronically transmitted data file. Employers who wish to submit this data manually may now do so via the online form through the EEO-1 Survey Portal located at https://eeoccomp2.norc.org. Larger employers who wish to upload the data via a specifically formatted CSV file may do so beginning in

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mid-August. Most employers should already have received login information by mail from the EEOC.

Will Submitted Data be Available to Competitors or the Public?

The data will not be directly accessible to the public. It is possible, however, for Component 2 data to be released in response to a Freedom of Information Act (FOIA) request. The EEOC has taken the position that, unless a lawsuit has been filed on an investigated charge, it will withhold EEO-1 data based on FOIA exemptions for information prohibited from disclosure by federal law and for confidential trade secrets, commercial or financial information.

If you have any questions concerning this reporting requirement, please do not hesitate to contact us. We specialize in preparing Affirmative Action Plans and assisting clients in complying with EEO-1 reporting.

Marijuana in the Workplace

Employers' policies should restrict marijuana use to the extent permitted by law.

It may seem hard to fathom but, in 2019, **marijuana is legalized for medical use in 34 states and the District of Columbia, and 10 states plus the District of Columbia have legalized recreational marijuana use**. Legalization efforts have not slowed, and marijuana use in the United States continues to rise along with it. Employers are in a precarious position when tasked with maintaining the productivity of their workplaces, and more importantly, the safety of their employees, their clients, and their data in the midst of surging marijuana use. And unlike other drugs, marijuana's precarious position between legal and illegal makes it different than other impairing substances.

Marijuana is Both Legal and Illegal in Most States

Despite the widespread wave of marijuana legalization in the United States, marijuana remains an illegal drug. The federal government has held firm in classifying marijuana or cannabis as a Schedule I drug.

While marijuana is illegal at the federal level in the United States, the federal government has generally chosen not to prosecute those who possess and distribute marijuana in compliance with state laws. Thus, marijuana inhabits an in-between zone of legality: legal and illegal at the same time. While the federal government generally does not prosecute federal marijuana possession laws, it also does not budge on treating marijuana as an illegal drug for purposes of oversight, distribution, federal disability law protection, etc. Federal requirements for drug-free workplaces still require that employees test negative for marijuana along with other illegal drugs.

Marijuana Use Compared with Alcohol Use

Recreational marijuana is often compared to alcohol, but for employers, there is a key difference. At this point in time it is nearly impossible to assess a marijuana user's level of impairment. A simple and noninvasive breath or saliva test can tell an employer on the spot how impaired an employee is due to alcohol use and can allow a timely decision to take an employee out of a dangerous position.

Assessing marijuana impairment is much more complicated. Oral fluid testing is currently the best practice, as it can detect recent marijuana use, exclude long-past use, and do so with a noninvasive test. Urine testing is unable to discern recent use from weeks earlier and often cannot capture use that happened within the last few hours. This being so, there is no test currently on the market that can assess the level of marijuana impairment. While science can tell us that a blood alcohol concentration of .08 percent has specific effects on a person's functioning, science cannot tell us what effect a certain concentration of THC (nanograms per milliliter) will have on an individual.

Best Practices for Employers

Because marijuana use inhabits a gray area of the law, it is of utmost importance that employers communicate their marijuana policies clearly to employees. Employees may believe that if marijuana is legal in their state, they are free to use it without consequence. Employers should take care to inform employees of their workplace policy and to apprise them of the consequences of violating that policy.

Employers' policies should restrict marijuana use to the extent permitted by law. Workplace safety and productivity should be a top priority for employers, and marijuana impairment can have an enormous impact. The state of Colorado saw a huge climb in marijuana-related traffic deaths as well as marijuana-related hospitalizations following recreational marijuana legalization. Employers should not risk a microcosm of this within their workplaces. In all states and all industries, policies must at the very least prohibit marijuana use in the workplace as well as marijuana impairment during work hours or in the workplace.

All employers should continue to test for marijuana, using a testing method such as oral fluid testing, which indicates recent use as opposed to historical use. In states where medical marijuana users receive protection from workplace discipline, workplace policies should require employees to verify their medical marijuana authorization to a Medical Review Officer. Employers and managers should be trained to identify marijuana impairment and know what to do when an employee is suspected of impairment on the job. Policies should prohibit any marijuana use by employees in safety-sensitive positions.

SESCO specializes in developing compliant policy and as such, clients should have their handbook reviewed by a SESCO professional.

DOL Proposes New Salary Threshold for 'White Collar' Exemption

The U.S. Department of Labor (DOL) announced a proposed rule that would increase the minimum salary level for the Fair Labor Standards Act (FLSA) “white collar” exemption from $455 to $679 per week (or $23,660 per year to $35,308 per year) beginning on January 1, 2020.

The white-collar regulations implement exemptions from the FLSA’s minimum wage and overtime pay requirements for executive, administrative, professional, and certain other employees. The overtime threshold was last updated in 2004. A 2016 final rule that would have changed the overtime threshold was invalidated by a court order.

The proposed rule would also:

- Increase the salary requirement for Highly Compensated Employees (HCEs) from $100,000 to $147,414 per year.
- Allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10% of the standard salary level.

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The proposed rule would not make changes to the job duties test, nor would it include a provision to automatically adjust the salary threshold. However, the DOL does recognize the need to adjust the salary level on a more frequent basis (and suggests doing so every four years through the notice and comment process).

SESCO was founded on Wage-Hour compliance in 1945. As the number one liability for all employees, SESCO recommends an annual Wage-Hour compliance audit. Please call us to discuss our services.

6 Reasons to Check Your Handbook Policies Now

Here's a good reason to dust off that employee handbook and re-familiarize yourself with the ins and outs of your policies. The National Labor Relations Board (NLRB) recently reviewed an employer's handbook and issued memoranda, offering guidance on the legality of certain policies.

What's Lawful, What's Not

While not an official ruling from the NLRB, the advice division's stances on certain handbook policies can be used as a blueprint for employers creating and updating them.

Here are the specific questions about handbook policies and procedures the NLRB addressed:

1. **Can handbooks be confidential?** This employer labeled its handbook and policies as confidential, preventing employees from openly discussing them. The NLRB said this is unlawful.

   By prohibiting employees from talking about information in the handbook, it essentially forbids employees from discussing benefits and working conditions with each other and non-employees.

   The NLRB added that this confidentiality policy also restricted employees from disclosing pay information, which is a fundamental National Labor Relations Act (NLRA) right. The act guarantees that employees may speak freely about wages, whether it be with other employees or third parties.

2. **Can employees use work email for personal reasons?** The handbook being reviewed prohibited employees from using their work email for personal messaging, even on non-work time. The NLRB ruled this was a violation of the NLRA as well.

   Under the act, employees are permitted personal access to their work email during lunch periods and breaks — a rule completely forbidding that is unlawful, the NLRB said.

   The only exception would be if an employer could demonstrate "special circumstances" in which using email for personal reasons during breaks would disrupt production.

3. **Can we prevent employees from wearing clothing with commercial advertising?** The employer had this dress code rule in effect, and the NLRB decided this was lawful.

   A policy like this would only violate the NLRA if it could be interpreted that wearing union logos was forbidden. But a dress code simply prohibiting inappropriate or unprofessional clothing is lawful.

4. **Which employee info should be kept confidential, and which can be shared?** The employer had a rule directing employees to use a "high degree of caution" when handling customer lists, employees' personal information and HIPAA-related info.

   The rule also noted that managers with access to this information must not discuss or divulge it. The NLRB ruled this policy was lawful.

   Under the NLRA, employees have the right to share basic info such as co-workers' names and addresses if not obtained through personnel files. The NLRB said a reasonable employee wouldn't believe the confidentiality policy infringed on this right.

5. **Can we only permit designated employees to speak to the media?** The employer had designated spokespeople to speak to the media, to avoid mixed messages regarding the company's stance on issues. The NLRB ruled this policy was lawful.

   A rule like this would only violate the NLRA if employees were banned from voicing workplace grievances in public or with the media.

6. **Can we prevent employees from using cell phones in the workplace?** The employer banned the use of cell phones for the entire work day. The NLRB said this policy was unlawful.

   According to the NLRA, employees have the right to use their cell phones during breaks and lunches, so a policy banning them completely is in violation of the act.

SESCO Client Feedback

"I just want to say that Trisha is on the ball. I have sent her two separate background check authorizations and have received the results the same day. This one this morning I received within an hour. I'm impressed!" ~ Jennifer Hembree, HR Coordinator/CFO Asst. - Rural Medical Services, Inc.

"The handbook process has been very professional. Your team has provided great policy updates and other good recommendations and are very prompt." ~ Jeff Clay, COO - Regency Senior Living

"Thank you, Bill! That was excellent!!!" ~ Bruce Hoeker, Executive Director - Association of Business Administrators of Christian Colleges

Special Thanks to New SESCO Clients!

Northwest Drive Train
Houston, TX

Heritage South Community Credit Union
Shelbyville, TN

Home Instead Senior Care Center
(HIVA, Inc. & HIWV, LLC)
Winchester, VA

Mercedes-Benz of Music City
Nashville, TN

West Broad Volkswagen/Audi
Richmond, VA

First Choice Community Credit Union
Knoxville, TN

Shadrack Watersports, Inc.
Bristol, TN

First State Bank of the Southeast
Middlesboro, KY

Region Ten Community Services Board
Charlottesville, VA

SESCO
management consultants
P.O. Box 1848
Bristol, TN 37621
(423) 764-4127 • FAX (423) 764-5869
www.sescomgt.com
email: sesco@sescomgt.com

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Featured SESCO Client

SEA PINES COUNTRY CLUB

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Sea Pines Country Club
Hilton Head, South Carolina

SESCO's Fall Seminar Series 2019

Bristol, VA Courtyard by Marriott	Richmond, VA Virginia Community Healthcare Association
September 18-19, 2019 **Effective Leader/Manager**	**Septemper 25-26, 2019** **Effective Leader/Manager**
October 16-17, 2019 **Human Resources - Understanding the Basics**	**October 8-9, 2019** **Human Resources - Understanding the Basics**
November 13-14, 2019 **Human Resources for the Advanced Professional**	**November 19-20, 2019** **Human Resources for the Advanced Professional**

(SESCO has partnered with one of our valued clients, Virginia Community Healthcare Association, to host our Richmond Seminar Series.)

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State and National Business and Trade Associations, Chambers of Commerce and Human Resource Associations are welcome to contact SESCO to book a professional speaker for annual conventions and seminars. Contact Bill Ford at 423-764-4127 or by email bill@sescomgt.com.