

H.R. ALERT*

SEPTEMBER 2006

Employers Take Note – The Equal Employment Opportunity Commission Announces Changes to EEO-1 Reports

Just this past summer, the Equal Employment Opportunity Commission (“EEOC”) announced that it has made significant alterations to its EEO-1 reports. As many employers know, if an employer has 100 or more employees or, if an employer is one who is also a federal government contractor and has 50 or more employees, that employer must file an EEO-1 report no later than September 30th of each year. Filing is usually done electronically through the EEOC website: www.eeoc.gov. Under the changes recently announced by the EEOC, the filing of the EEO-1 report electronically by September 30th has not changed. Therefore, employers have until September 2007 of next year to get ready.

While there are many changes to the EEO-1 reporting form, significant and notable changes include the following:

i) Job Categories

Previously there were nine job categories to classify employees; now there are ten. The Officials and Managers category has been divided into two distinct categories based on responsibility and influence within the organization. The Officials and Managers category is now divided into two distinct levels: Executive/Senior Level Officials and Managers which normally plan, direct and formulate policy, set strategy and provide overall direction, and, First/Mid-Level Officials and Managers which normally direct implementation or operations within specific parameters set by the Executive/Senior

Level Officials and Managers. This level normally oversees day-to-day operations.

The instruction booklet issued by the government agency provides additional guidance as to how to classify job titles. Employers will have to reclassify some of their job titles even if the job categories have not changed.

ii) Racial and Ethnic Classifications

The new EEO-1 reporting form will require employers to break out Hispanic or Latino employees separately from any racial classification. Additionally, the former classification of Asian Pacific Islander has been split into Asian or Native Hawaiian or other Pacific Islander.

Note: A new racial classification of two or more races has been created and the EEOC strongly endorses self-identification of race and ethnic categories as opposed to visual identification by employers.

The foregoing represents but a few of the significant changes announced by the EEOC to its EEO-1 reporting requirements which will become effective no later than September 30, 2007, when all covered employers will be required to comply with the requirements.

Employer tip: All covered employers should undertake a careful review of the EEO-1 instruction booklet which is available at the EEOC’s website at www.eeoc.gov.

New Orleans Employment Law Practice

10 YEARS & COUNTING

* H.R. ALERT is intended to provide late-breaking news in the employment arena.

Supervisor's Knowledge of His Own Malfeasance Contrary to OSHA's Regulation Is Not Imputable to the Employer Where the Employer's Safety Policy, Training and Discipline are Sufficient to Make the Supervisor's Conduct in Violation of the Employer's Safety Policy Unforeseeable

In a seminal case of first impression, the United States Court of Appeals for the Fifth Circuit, which governs federal district court cases in Louisiana, Mississippi and Texas, recently addressed the issue of supervisory liability under the Occupational Safety and Health Act ("OSHA") and when it could be appropriately imputed to the employer. *Yates & Sons Construction Co., Inc. v. Occupational Safety & Health Review Commission*, 2006 WL 2193045 (5th Cir.). In *Yates*, the Court was faced with a factual scenario in which a supervisor did not wear any fall protection gear while working on a slope in violation of applicable OSHA regulation. This same supervisor allowed two of his crewmen to wear their harnesses backwards, also in violation of OSHA regulation. OSHA had fined the employment construction company \$5,000 for these OSHA violations.

The Administrative Law Judge ("ALJ") upheld the citation and penalty. The construction company then took an appeal to the Fifth Circuit. In a two to one decision, the Fifth Circuit concluded the employer should be held responsible under OSHA only if it knew or should have known of the OSHA violation with the exercise of reasonable diligence of the presence of the OSHA violation.

In this case, there was no question that the basis of the OSHA citation was the supervisor's knowledge of his own malfeasance. Both OSHA and the ALJ had

concluded that the supervisor's knowledge could properly be imputed to the employer to establish OSHA liability. The Fifth Circuit, in the course of its opinion, noted that there was a difference of opinion among the various circuit courts on this key issue.

In vacating and remanding the assessment and penalty against the employer, the Fifth Circuit concluded that the supervisor's knowledge of his own malfeasance is not imputable to the employer, where the employer's safety policy, training and discipline are sufficient to make the supervisor's conduct in violation of the applicable OSHA policy simply unforeseeable. The Fifth Circuit noted that OSHA bore the burden of establishing that the supervisor's violative conduct was foreseeable and yet the record was devoid of any evidence indicating that such an analysis had been undertaken. Accordingly, the Fifth Circuit remanded the case to the ALJ in order to have OSHA undertake a foreseeability analysis to ascertain whether the knowledge of the supervisor of the OSHA violation could be imputed to the employer.

Note: Since this was a two to one decision with one judge dissenting, it comes as no surprise that OSHA has indicated that it will file a petition for rehearing *en banc* (with the full court). OSHA has requested until October 6, 2006 to file its Petition for Rehearing. We will closely monitor this case and report on future developments.

**MARK
YOUR
CALENDARS**

Texas Employment Law Seminar
November 16, 2006
Doubletree Hotel Downtown
Houston, Texas

*The 10th Annual
New Orleans Employment Law Seminar*

Thursday, November 9, 2006
Wyndham Hotel at Canal Place

- 8:00-8:30 a.m. **Registration and Continental Breakfast**
- 8:30 a.m. **Welcome Remarks** - By Kim M. Boyle
- 8:40 a.m. **Employee Leave Issues** - By David M. Korn
This session provides an in-depth look at leave obligations under federal and state law.
- 9:35 a.m. **Public Sector Nuances in the Law and How They Impact the Private Sector** -
By Kim M. Boyle
Issues unique to the public sector are now crossing over into the private sector because many clients deal with cities, parishes, municipalities, the EEOC, and other agencies as part of the daily business operations. This presentation will focus on the varied topics in this gray and shifting area of law.
- 10:30 a.m. **The Ever Changing Landscape of Employee Benefits** - By Jane E. Armstrong
Join us for the latest information relating to recent federal legislation.
- 11:25 a.m. **The Moving Target That Is Now Employment Law** - By M. Nan Alessandra
In this session we will cover the major and emerging issues that are now impacting employers of all sizes.
- 12:30-2:00 p.m. **Lunch - The Future of South Louisiana: Recovery and Rebuilding** - By Andy Kopplin
Please join us for a very special luncheon as we celebrate 10 years as an employment law practice group in New Orleans and host a guest presentation by Andy Kopplin, the Louisiana Recovery Authority (LRA) Executive Director.
- 2:00 p.m. **The New E-Discovery Rules Under the Federal Rules of Civil Procedure and the Federal Rules of Evidence** - By M. Nan Alessandra and Kim M. Boyle
In today's technology-driven environment, virtually all lawsuits will involve some level of electronic discovery. In response to increasing requests for electronic document production, amendments to the Federal Rules of Civil Procedure are set to take effect on December 1, 2006. New obligations will mean that processes and procedures for electronic data management must be top business initiative.

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Your comments, questions, and suggestions are encouraged.

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