

WIGGIN AND DANA

Counsellors at Law

NLRB “Kentucky River” Decisions Clarify Elements of Supervisory Status

On September 29, 2006, the National Labor Relations Board (NLRB) issued three related and long-awaited rulings providing guidance on when an employee is deemed a supervisor—and thus ineligible for union representation—under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (NLRA). Two of the three cases, Oakwood Healthcare, Inc. and Golden Crest Healthcare Center, involve the supervisory status of charge nurses. Croft Metals, Inc. concerns “lead persons” in manufacturing-related positions. Collectively these decisions are referred to as the “Kentucky River” cases, based on prior Supreme Court precedent rejecting the Board’s analytical framework for evaluating supervisory status. See NLRB v. Kentucky River, 532 U.S. 706 (2001).

Under the NLRA, supervisors are not considered “employees” and, therefore, are excluded from significant protections. Supervisors cannot initiate or vote in union proceedings, or participate in work stoppages or boycotts. Employers can require total loyalty from supervisors, including mandated support of company procedures. This results from the agency relationship, which also makes employers responsible for supervisors’ actions.

Section 2(11) of the NLRA defines supervisory status as the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly

to direct them, or to adjust their grievances.” Employees are supervisors if they: (1) hold the authority to engage in an enumerated Section 2(11) function; (2) the exercise of such authority is not “routine or clerical” but requires independent judgment; and (3) their authority is held “in the interest of the employer.”

The Kentucky River decisions clarify the historically oblique terms “assigns” and “responsibly to direct,” provide further insight into behavior evidencing “independent judgment,” and offer guidance as to the proper characterization of employees who supervise during a portion of their work time.

General Legal Conclusions

Collectively the decisions establish the following standards:

- “Assign” is defined to include at least one of the following tasks:
 1. Designates an employee to a place (such as a location, department, or wing);
 2. Appoints an employee to a time (such as a shift or overtime period); or
 3. Gives significant overall duties, i.e., tasks, to an employee.

The employee must also have the authority to require, not just request, that another employee take action. A mere “ad hoc instruction” regarding a “discrete task” is insufficient.

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- “Responsibly to direct” means that an employee is:
 1. Responsible for directing and has the authority to correct employees’ work; and
 2. “Accountable” for another employee’s work, meaning some adverse consequence could befall the supervisor if tasks are not properly performed.
- Supervisors must use “independent judgment” in performing their tasks, which involves more than making “routine or clerical” decisions. This means the employee is not controlled by or merely following detailed instructions. However, providing employees with a list of considerable factors will not impact their supervisory status.
- Employees who spend a “substantial” portion of their time, 10-15% of total work time, performing supervisory tasks are properly designated as supervisors under the NLRA.

**Oakwood Healthcare, Inc.,
348 NLRB No. 37 (Sept. 29, 2006).**

In *Oakwood Healthcare*, the Board’s leading decision, a narrow 3-2 majority held charge nurses were properly characterized as supervisors where they exercised independent judgment by assigning various other nurses to specific patients. The charge nurses were responsible for overseeing a patient care unit, specifically, assigning licensed practical nurses, assistants, technicians,

and paramedics to patients on their shifts. Charge nurses were also responsible for monitoring patients in their units, meeting with doctors and family members, and conducting follow-up on unusual incidents. Some of the charge nurses served permanently, while others rotated into and out of the position or filled in when the permanent charge nurse was not working. The schedule for rotating charge nurses was set among themselves or by a higher-level manager. Charge nurses could also have their own patient load, although usually at a reduced number of patients. When acting as charge nurses, RNs received an extra \$1.50 an hour. The employer sought to exclude permanent and rotating charge nurses from the unit as supervisors.

Clarifying the term “assign” the Board defined it to include “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” While the definition includes assigning specific tasks (e.g., restocking shelves) it does not cover choosing the order in which employees will perform tasks (e.g., restocking toasters before coffeemakers). Within the healthcare setting, this includes the responsibility to assign nurses and aides to particular patients, but does not include directives such as which medications to administer to patients. “In sum, to ‘assign’ for purposes of Section 2(11) refers to the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.”

The Board's definition of "responsibly to direct" turns on whether the individual is accountable for the work of other employees. To establish accountability, the employee must have the authority to direct the work and take corrective action, and there must be a prospect of adverse consequences for the supervisor if the work is not correctly performed or corrective action is not taken. The charge nurses in question were responsible for checking the medical cart, taking inventory of narcotics, and providing statistical information, or alternatively delegating these tasks to staff members working their shifts. However, because charge nurses had no authority to take corrective action, and thus suffered no adverse consequences concerning acts of other employees, the facts were insufficient to show responsible direction within the meaning of Section 2(11).

Reconsidering its definition of "independent judgment" the Board held that this means more than making "routine or clerical" decisions and excludes individuals controlled by or merely following detailed instructions. Independent judgment, at a minimum, requires that the individual be free from control and form an opinion or evaluation based on available data. A decision is not independent if it is dictated or controlled by detailed instructions in company policies or rules, by verbal instruction of higher authority, or as set forth in a collective bargaining agreement. The charge nurses in question utilized independent judgment in deciding which nurse to match with a patient based on

experience and specialized skill, and considered the overall nature and time-demands of particular conditions and patients when allocating resources for their shift. While the hospital had a policy guiding charge nurses in their assessments, it was not so detailed as to eliminate the discretionary component.

Turning to rotating charge nurses, consistent with NLRB precedent, the Board stated that employees spending a regular and substantial portion of their time performing supervisory tasks are properly characterized as supervisors. Regular means "according to a pattern or schedule" with a substantial portion equating to 10-15% of total work time. The Board found that rotating charge nurses were not assigned to the position with any regularity or according to an established pattern or predictable schedule.

**Golden Crest Healthcare Center,
348 NLRB No. 39 (Sept. 29, 2006).**

In a companion decision issued the same day, the Board, using definitions developed in Oakwood Healthcare, found Golden Crest charge nurses were "employees" rather than supervisors. Some nurses were permanently placed in the position while others worked occasionally as charge nurses. The charge nurse schedule was set by an administrative assistant with final approval by the administrative director of nursing, who also set the CNAs schedule according to procedures outlined in the collective bargaining agreement. The collective bargaining agreement provided that CNAs

would bid for their shift, floor, and section based on seniority. The employer argued that charge nurses "assign[ed]" by directing CNAs to go home early, reassigning CNAs to other floors with staffing shortages, and ordering CNAs to stay past their shift or report to work when unscheduled. The Board found that although charge nurses made these requests, they did not have the authority to require that nurses alter their schedules in any way. Moreover, CNAs suffered no adverse consequences for failing to follow charge nurse requests.

The employer also argued charge nurses "responsibly directed" by overseeing job performance, taking corrective action where care was inadequate, and directing CNAs to perform specific tasks, such as clipping toenails, emptying a catheter, or changing a patient. The Board, acknowledging charge nurses directed employees, found however, that because they were not "accountable" for their actions in directing other nurses, they did not have the authority to responsibly direct. Although charge nurses were evaluated on their supervisory skills as part of the employee review process, there were no material consequences for failing to perform in directing other employees. The performance reviews were "merely paper" consequences and insufficient to establish "accountability."

**Croft Metals, Inc.,
348 NLRB No. 38 (Sept. 29, 2006).**

Again using the standards articulated in Oakwood Healthcare, but this time not in

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a healthcare context, the Board considered whether “lead persons” were supervisors within a manufacturing plant. Lead persons spent a majority of their time performing hands-on tasks similar to those performed by other employees within the bargaining unit, and were paid hourly as opposed to other salaried supervisory employees. They did not enjoy the same benefits as other supervisors, nor were they required to attend weekly supervisors’ meetings. Lead persons were not designated as supervisors on the company payroll, and had been included in the production and maintenance bargaining unit for the past thirty years. As distinguished from Oakwood charge nurses, lead persons did not assign work schedules, production lines, departments, shifts, or overtime, nor did they assign job classifications. At times a lead person would switch tasks among employees on the line, but for the most part assignments were “pretty routine” day in and day out. Lead persons were not involved in decisions to hire or fire employees, but occasionally contributed to annual employee evaluations. If the need arose for a replacement due to turnover, the lead person would generally notify a supervisor charged with making decisions to hire or transfer an employee. Lead persons made decisions regarding work assignments, chose the order in which work was to be performed, and were expected to correct job performance and make necessary

repairs. Employees in this position were historically subject to discipline if the line failed to make production goals or if they failed to correct other line shortcomings.

The Board found lead persons’ responsibilities did not meet the definition of “assign” because they were sporadic in nature and more closely resembled ad hoc instruction to complete a specific task. The evidence did however support a finding of authority to responsibly direct. In addition to assigning specific tasks and correcting performance, lead persons were responsible for meeting set production goals and were held accountable for their line. Stopping short of finding supervisory status, the Board determined the direction of employees was routine and clerical rather than an exercise of independent judgment. Lead persons often followed established schedules and loading patterns. Moreover, once employees were trained in their positions, they required minimal guidance.

Overall Implications of the Kentucky River Decisions

The Economic Policy Institute, a labor-supported body, concludes in its study that approximately 8 million workers in a broad grouping of industries including accounting, construction, mining and other skilled occupations could be affected by the Board’s rulings in the Kentucky River cases, although the greatest impact is almost certain to fall on the nursing profession. Some have touted the decisions for easing the employer’s burden to establish the supervisory status of employees. Despite the initial outcry from

dissenters, Robert Battista, Chairman of the NLRB, cautions against reading the Kentucky River decisions too broadly. Tempering the holdings is the fact that all three decisions were the product of particularized inquiries into job responsibilities of specific positions with specific employers. Moreover, two of the three cases deemed the individuals in question “employees” protected by the NLRA. Practically speaking, the Oakwood Healthcare decision is sure to go up on appeal, perhaps all the way to the United States Supreme Court, which has twice rejected the Board’s consideration of the Kentucky River issues.

Next Steps for Employers

Although chiefly targeted to the healthcare industry, the new standard undoubtedly implicates new considerations when assessing employee actions protected by the NLRA, employees subject to discipline, and enforcement of loyalty expectations. Before union organization activity, nonunion employers should carefully evaluate the authority and responsibility of employees currently regarded as supervisors and make necessary alterations or clarifications to job descriptions and other documentation to ensure completeness and accuracy. This includes a crystallized articulation of the authority to assign and direct tasks, and specific accountability provisions concerning subordinates’ work. Making these determinations in advance, and ensuring the exercise of delegated supervisory authority where appropriate, can reduce the likelihood of disputes down the road.

Unionized employers should examine whether specific job classifications within existing bargaining units are supervisory in nature in light of the recent rulings. If supervisory employees are improperly included, an employer may file a unit clarification petition with the NLRB within the appropriate time frame. Unit decisions are made on an employer-by-employer basis, with determinations only affecting the specified unit. In addition, during contract negotiations employers should be wary of union attempts to include language aimed at circumnavigating the issues of supervisory status.

Although supervisory status is usually considered in the context of union organization, employers should also be aware of the need to provide additional training and compensation for supervisors, as well as the potential exposure to liability resulting from the agency relationship. ■

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*Counsellors at Law**Connecticut Department of Labor Reverses Course, Opining That CNA Training is Non-Compensable*

The Connecticut Department of Labor (“CDL”), Wage and Workplace Standards Division, recently issued an opinion letter reversing a position held for over two decades that employers must compensate trainees for the 100-hour course required to gain licensure as a Certified Nurse’s Aide (“CNA”).

Background

State law requires that CNA candidates complete 100 hours of training before they are eligible to apply for a license, of which 75 hours must be dedicated to training in basic nursing skills, personal care skills, care of cognitively impaired residents, recognition of mental health and social service needs, basic restorative services and residents’ rights. The remaining 25 hours focus on specialized training in understanding and responding to challenging behaviors related to physical, psychiatric, psychosocial and cognitive disorders.

The law does not address whether an employer who offers the 100-hour CNA training program must compensate trainees. Nonetheless, the CDL had taken the position that such training was compensable on the theory that nursing homes providing the training were offering employment only to the best trainees.

What is a Trainee under Federal Law?

Relying on the U.S. Supreme Court’s decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148, (1947), the U.S. Department of Labor developed a six-factor test to determine whether, in general, trainees are employees for purposes of the Fair Labor Standards Act (“FLSA”). See WH Admin Op., FLSA2004-16 (October 19, 2004). Thus, under federal law, if a training program meets the following six factors, the prospective employer providing the training does not have to compensate the trainees:

- 1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- 2) The training is for the benefit of the trainee(s);
- 3) The trainees do not displace regular employees, but work under close observation;
- 4) The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;
- 5) The trainees are not necessarily entitled to a job at the completion of the training period; and
- 6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Recent CDL Opinion

In its September 27, 2006 opinion letter, the CDL applied this six-factor test and abandoned its long-standing position that CNA training is always compensable. The CDL did not elaborate on the first factor of the test because it is self-explanatory. Turning to the second factor, the CDL acknowledged that CNA training is for the benefit of the trainee because “upon successful completion of the training, the individual is eligible to apply for a license which he or she may take elsewhere to seek employment as a certified nursing assistant.”

Applying the third factor, the CDL concluded that “no existing employees are displaced by the trainees because such trainees while unlicensed cannot perform such functions according to the Department of Public Health.” The CDL also underscored that the trainees’ time cannot count toward meeting state-mandated staffing requirements, so there is no concern that CNA trainees would displace regular employees.

In examining the fourth factor, the CDL considered that an employer providing CNA training at its facilities may benefit from familiarizing the prospective employee with “the exact methods utilized by its operation.” Additionally, the CDL believed that the employer could benefit from identifying the “most attractive candidates for hire.” Nonetheless, the CDL concluded that the employer offering CNA training does not derive a benefit because “there is no guarantee that the candidate . . . will agree to accept employment.”

Under the fifth factor, the CDL considered that, generally, no trainee “is guaranteed a job upon the completion of training because such trainees are not eligible for employment until they also have met state licensing requirements.”

Finally, applying the sixth factor of the test, the CDL assumed that an employer providing CNA training would inform trainees that they are not entitled to compensation for the time spent in training. In fact, the CDL suggested that an employer offering CNA training highlight in its training packet that the training is not compensable.

One cautionary note bears mention—a CDL opinion is based on the agency’s interpretation of the law based on the facts described by the employer. As a result, the CDL opinion does not preclude the possibility of private actions which may be based on different interpretations of the law. Nonetheless, employers will likely welcome the opinion because, previously, in addition to providing CNA training free of charge to trainees as a recruiting tool, employers had to compensate the trainees for the required 100 hours of training. Going forward, the trainees may still obtain the training they require to apply for a CNA license free of charge, and the employers will be able to expand their available pool of potential employees without having to incur the high costs of paying dozens of trainees even when perhaps only a few would ultimately end up working for the employer providing the CNA training.

Practice Pointers

- Specify in the training materials that training time is not compensable.
- Confirm in writing that trainees are not guaranteed employment upon completion of the training.
- Inform trainees they are free to seek employment elsewhere.
- Assign employees to supervise trainees at all times. Never allow trainees to “fill in” for regular employees or perform regular employment tasks unsupervised.
- Allow all trainees to apply for employment. ■

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*Counsellors at Law**Second Circuit Grants Discrimination Claimants Two Bites at the Apple.*

Weighing in on a controversial issue that has divided the United States Courts of Appeals, the Second Circuit, in Nestor v. Pratt & Whitney, held that a plaintiff who successfully recovered back pay damages on her state law sex discrimination claims in an administrative hearing could also bring a lawsuit, based on the same facts, seeking additional damages under federal law.

Administrative Background

Gale Nestor was a machinist at Pratt & Whitney for 19 years until she was discharged on September 2, 1992 following an alleged altercation with a male employee. On November 5, 1992, Nestor filed a charge of discrimination with the Connecticut Commission on Human Rights and Opportunities (“CHRO”), alleging that she had been terminated on account of her gender in violation of the Connecticut Fair Employment Practices Act and Title VII of the Civil Rights Act of 1964. Although Nestor was reinstated pursuant to a labor arbitration in 1993, she proceeded with her charge of discrimination seeking back pay for the period during which she was unemployed. As is standard practice, Nestor’s complaint was automatically dual filed with the U.S. Equal Employment Opportunity Commission (“EEOC”).

While her complaint was pending at the CHRO, the agency advised her that it lacked authority to award compensatory damages for emotional distress, but that

such damages could be awarded in state court. Nevertheless, Nestor decided to continue pursuing her discrimination claims at the administrative level rather than seeking a release of jurisdiction from the CHRO, or a “right-to-sue” letter from the EEOC, which would have permitted her to file, respectively, a state or federal lawsuit.

The CHRO conducted a public hearing on Nestor’s claim in June of 1998, and decided the case in her favor on September 20, 1999, finding that Pratt had discriminated against Nestor on the basis of her gender when it terminated her employment. As a result, the CHRO ordered Pratt to pay Nestor the back pay for the period during which she was unemployed. The company appealed the CHRO’s determination to the Connecticut Superior Court, which, applying a deferential standard of review, affirmed the CHRO’s decision and award. Pratt appealed again, this time to the Connecticut Appellate Court, without success. Although the company applied for certification to appeal to the Connecticut Supreme Court, that application was denied and Pratt was effectively left without further recourse.

Nestor’s Federal Lawsuit

More than a year later, on February 19, 2003, Nestor received a “right-to-sue” letter from the EEOC and promptly filed a lawsuit in federal court seeking damages unavailable in CHRO proceedings, such

as compensatory damages in excess of back pay, punitive damages, attorneys' fees, and prejudgment interest. Pratt moved for summary judgment, asserting Nestor's federal law claims were barred by Connecticut's *res judicata* doctrine. In essence, Pratt argued that, because Nestor had already litigated her discrimination claims in the administrative forum, she was bound by the results of that litigation, including not only the favorable finding on the merits but also the availability of damages. The United States District Court for the District of Connecticut agreed with Pratt and granted summary judgment.

This time Nestor appealed. Pratt argued to the United States Court of Appeals for the Second Circuit that, because Nestor's suit was a "damages only" action, the federal courts lacked subject matter jurisdiction. In addition, Pratt again asserted that the judicial doctrine of *res judicata* barred relitigation of Nestor's discrimination claims, including litigation as to claims for relief unavailable at the CHRO. The Court began its opinion by noting that its sister Circuits had split over the issue of whether a plaintiff who prevailed on discrimination claims before a state agency could subsequently file suit in federal court for damages unavailable in the administrative forum. The Court observed that had Nestor filed her federal action while the CHRO proceeding was pending, the CHRO would have been forced to relinquish jurisdiction, therefore depriving Nestor of the opportunity to proceed in that forum. Similarly, if Nestor filed her federal lawsuit while Pratt's appeals were pending in state court,

the federal court would have stayed the action and given preclusive effect to the appellate determination.

Nestor's Suit Not Barred

Addressing Pratt's jurisdictional argument first, the Court reasoned that although federal courts had long held that they lack subject matter jurisdiction over "damages only" actions in which prevailing state law plaintiffs seek attorneys' fees under co-extensive federal laws, Nestor sought more than just attorneys' fees. According to the Court the fact that Nestor was also seeking compensatory damages unavailable at the CHRO proceedings, such as recompense for alleged emotional injuries and punitive damages, meant that her federal action necessarily entailed litigation of substantive issues (rather than simply the amount of her attorneys' fees), such as whether Nestor suffered emotional distress as a result of Pratt's discrimination and whether the company's discriminatory conduct was malicious. Because there were substantive issues to be litigated under federal law, the Court held that the federal courts had subject matter jurisdiction over Nestor's claims.

Turning to Pratt's *res judicata* argument, the Court began by defining the doctrine as "a rule against the splitting of actions that could be brought together," and noting that it varies in effect from jurisdiction to jurisdiction. Because of these varying effects, the Court examined both Connecticut and federal courts' interpretation of the *res judicate* doctrine in determining whether Nestor was barred from litigating her claims in federal court.

Confronting federal law first, the Court leaned on U.S. Supreme Court precedent holding that a complainant succeeding on a discrimination claim filed in a state administrative agency and upheld on appeal was not barred from suing in federal court under Title VII to recover attorneys' fees incurred in the state proceedings but unrecoverable under state law. In so holding, the Court explained, the Supreme Court necessarily considered a Title VII action for damages to be a supplement to state law remedies when those remedies did not provide complete relief. According to the Court, such a holding also furthered the goals of Congress, which by authorizing an award of attorneys' fees in a Title VII suit expressly considered such fees as necessary to stamping out discrimination.

Application of Connecticut's *res judicata* doctrine reared the same result. In Connecticut, a judgment on the merits of a claim serves as an absolute bar to a subsequent action on the same claim or any other claim that could have been made on the same set of operative facts. The Court noted, however, that Connecticut law provided an exception where the plaintiff could not "seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts" and the plaintiff institutes the second action to seek that relief. Thus, because the remedies Nestor was seeking in her federal action were unavailable under state law she was not precluded by principles of *res judicata* from bringing a federal lawsuit.

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Second Circuit Grants Discrimination Claimants Two Bites at the Apple. CONTINUED

What *Nestor* Means for Employers

The Second Circuit's decision in *Nestor* highlights the importance of vigorously defending against discrimination claims at the administrative level. By litigating her claims in an administrative forum, Nestor received certain advantages unavailable in state or federal court. For instance, Nestor was provided with representation by CHRO staff counsel, her case was governed by more flexible evidentiary rules, and Pratt was not permitted to take discovery which would have required Nestor to submit to a deposition and turn over relevant documents and information prior to the hearing.

Despite the advantages that CHRO proceedings confer on a complainant, the CHRO's decision on the merits has a binding effect and may not be relitigated in court. Instead, the employer will be forced to appeal the agency's decision as unsupported by substantial evidence, a difficult showing to make. Thus, if a

complainant follows Nestor's lead and files a lawsuit for relief unavailable at the CHRO, the agency's liability determination is binding, assuming it is upheld, meaning the employer will already have been adjudged to have discriminated against the employee before the damages litigation even begins. The only issue before the court will be whether the plaintiff in fact suffered damages beyond those awarded by the state agency. This is certainly not an advantageous position for the employer.

By allowing complainants who prevail at the administrative level to bring an action for damages in court based on the administrative determination, the Second Circuit essentially eliminated the only drawback for employees pursuing claims at the CHRO—the limited availability of damages. Thus, *Nestor* creates a new incentive for employees to litigate discrimination complaints at the CHRO. Employers must therefore make every effort to fervently defend themselves in the less favorable setting, or risk being bound by the agency's decision. ■

September 2007 Revisions to the EEO-1 Report

Most employers are required to submit an annual EEO-1 Report to the EEOC and the OFCCP, providing information on employees by job category, ethnicity, race, and gender. Specifically, employers with 100 or more employees, or 50 or more employees and federal government contracts worth \$50,000 or more, must file a report by September 30 each year, based on any preceding July to September pay period. Earlier this year, the EEOC finalized significant changes to the EEO-1 form, set to take effect in September of 2007. The new EEO-1, along with an instruction manual, is available on the EEOC's website. (<http://www.eeoc.gov/eo1/index.html>).

Changes to the Ethnic and Racial Categories

The new EEO-1 Report makes the following changes to ethnic and racial categories:

- Adds a new “two or more races” category;
- Divides “Asian or Pacific Islander” into “Asian” and “Native Hawaiian or other Pacific Islander;”
- Renames “Black” as “Black or African American;”
- Renames “Hispanic” as “Hispanic or Latino” and considers this ethnicity separate from race; and
- As previously informally acknowledged, strongly encourages self-identification of race and ethnic categories.

The most noted change is the addition of the “two or more races” category. The EEOC acknowledges that this alteration generally requires, in addition to amending requests for information from applicants, that employers resurvey their existing workforce for self-identifying ethnic and racial information, and encourages employers to do so as soon as possible. However, while the new EEO-1 form must be used for 2007 reports, the new information (i.e., the number of individuals within the two or more races and Hawaiian categories) need not be reported until September 2008, giving employers an additional year to collect this information. As a practical matter, if this information is still unknown in September 2007, employers should leave these responses blank.

If an employee refuses or fails to self-identify, an employer may obtain the necessary information from existing employment

records or visual observation. With respect to the “two or more races” category, the EEOC continues to maintain that determinations should be based on the category an employee most identifies with.

Changes to the Job Categories

The new EEO-1 Report makes the following changes to job categories:

1. “Officials and Managers” are divided into two levels based on responsibility and influence within the organization:
 - (a) Executive/Senior Level Officials and Managers (individuals who plan, direct and formulate policy, set strategy and provide overall direction— i.e., within two reporting levels of the CEO); and
 - (b) First/Mid-Level Officials and Managers (individuals who direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers and oversee day-to-day operations); and
2. Business and financial occupations will be moved from the “Officials and Managers” category to the “Professionals” category.

The job category changes do not require a resurvey and, as such, employers should begin using the new reporting categories in their 2007 EEO-1 Report. The EEOC provides a job classification guide, available on its website.

How do these changes affect reporting for affirmative action plans?

Changes to the ethnic and racial categories affect only the EEO-1 form. The OFCCP has not changed its regulations to match the requirements of the EEOC, nor does it appear they intend to do so in the near future. Therefore, for affirmative action reporting, federal contractors should continue to record and report employees in the same existing five ethnic/race categories: White, Black, Hispanic, Asian/Pacific Islander, and Native American/Alaskan Native. n

WIGGIN AND DANA

Counsellors at Law

EMPLOYMENT DEPARTMENT CONTACTS

JOHN G. ZANDY, *Chair*

203.498.4330, jzandy@wiggin.com

KAREN L. CLUTE

203.498.4349, kclute@wiggin.com

SHERRY L. DOMINICK

203.498.4331, sdominick@wiggin.com

PETER J. LEFEBER

203.498.4329, plefeber@wiggin.com

LAWRENCE PEIKES

203.363.7609, lpeikes@wiggin.com

JOAN ALLEN ROWE

203.498.4548, jrowe@wiggin.com

RACHEL B. ARNETT

203.498.4397, rarnedt@wiggin.com

GREGORY A. BROWN

203.498.4401, gbrown@wiggin.com

MEGHAN D. BURNS

203.498.4382, mburns@wiggin.com

ERIC I. DIAZ

203.498.4462, ediaz@wiggin.com

C. MARLOWE MITCHELL

203.363.7662, mmitchell@wiggin.com

GISELE ROEMER, *Paralegal*

860.297.3712, groemer@wiggin.com

ROBIN CLARK, *Affirmative Action Specialist*

860.297.3710, rclark@wiggin.com

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