

New Equal Employment Opportunity Rules

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Following court rejection of its two prior attempts, the Federal Communications Commission has adopted a third set of broadcast equal employment opportunity (EEO) rules.

The Commission's original EEO rules subjected stations' hiring practices to scrutiny if the composition of their full-time staffs fell substantially below the racial representation in their local service area. After three decades, those rules were invalidated in 1998 as an unconstitutional scheme of racial preference. The Commission's second attempt to formulate EEO rules focused on outreach, so as to ensure wide dissemination of job opportunities to all elements of the local community, and afforded broadcasters a choice between two recruitment options. "Option A" prescribed participation in specified activities, whereas "Option B" enabled stations to design their own programs, the effectiveness of which were to have been evaluated by tracking the race and ethnicity of applicant pools. The court invalidated those rules on the ground that Option B improperly encouraged race-based hiring.

The Commission has now attempted to address the court's concern with its prior set of EEO rules by eliminating Option B and requiring all but the smallest stations to implement the elements of its previous Option A. The new rules impose three outreach requirements and record-keeping and reporting obligations. They do not address the further issue of annual reporting of a station's workforce by race/ethnicity and gender (as had been required in all former EEO rules), leaving this to be considered in a future rulemaking. The Commission has also left open the question of whether or how to apply its new rules to part-time hiring (positions of less than 30 hours per week).

The following is a summary of the Commission's new EEO rules:

Anti-Discrimination – The courts have never questioned the Commission's fundamental requirement that broadcasters avoid intentional employment discrimination. The Commission will continue to defer action on individual complaints of discrimination to the Equal Employment Opportunity Commission or other agencies and courts.

Scope of Rules – Although this memorandum is directed to broadcasters, substantially similar rules will apply to cable operators and other multichannel video programming distributors (including multipoint distribution service and direct broadcast satellite). Stations having fewer than five full-time employees are exempt from all but the anti-discrimination aspects of the new rules. Religious broadcasters will continue to be permitted to establish religious belief or affiliation as a job qualification for all station employees.

Outreach Prong 1 – Recruitment – Broadcasters will be required to recruit for nearly all full-time vacancies. Broadcasters will be required to develop and use recruitment sources sufficient to ensure wide dissemination of information about each full-time job opening throughout the entire community. Unlike previous rules which required recruitment within a station's county or Metropolitan Statistical Area, the Commission will defer to a licensee's good faith discretion to

define the relevant recruitment community in light of a station's technical coverage and marketing. The Commission recognizes that appropriate recruitment sources may vary according to the qualifications for different positions. The Commission further recognizes that regional and national sources may supplement, but not replace, sources oriented toward the local community. Licensees may rely upon a pool of previously recruited candidates for similar positions. Although permitted, recruitment sources specifically targeted to minorities or females are not required. While Internet access is increasingly widespread, the Commission does not yet consider on-line job databases to be effective sole recruitment sources.

The Commission will recognize two exceptions to the need to recruit for every full-time position. The first exempts internal promotions and temporary employees (emergency replacements for absent regular employees or those hired to perform a particular job for a limited period of time). However, a temporary employee moved into a permanent slot (or a part-time employee made full-time) requires recruitment either upon initial hiring or at the time of promotion. The second exception is for exigent circumstances. Although the Commission has declined to catalog specific circumstances in which this exception might apply, it mentions as examples the need to replace immediately an employee who departs without notice where his or her duties cannot be fulfilled, even briefly, by other staff, or where a preferred hiree has a talent so unique and exceptional that no comparable candidate is likely to be found. The Commission cautions, though, that the circumstances triggering either exception should be rare and cannot be invoked to defeat its general requirement that broadcasters routinely recruit for full-time openings.

Outreach Prong 2 – Notification – As a “safety valve” to ensure that no segment of the community is inadvertently omitted from recruitment efforts, broadcasters will be required to provide notice of full-time job vacancies to all recruitment organizations requesting such notice. Emails or communication through clearing-houses may be used, if effective. An organization becomes eligible to receive notices upon providing a broadcaster with its name and contact information.

Outreach Prong 3 – Menu Options – In order to create a general interest in broadcast employment opportunities (as opposed to recruitment for specific positions under prong 1), the Commission requires broadcasters to engage in a specified number of recruitment initiatives within each two-year period – two activities for employment units with five to ten full-time employees or if located in a smaller market (defined as not being in a metropolitan area of 250,000 or more persons) and four activities for all others. (An employment unit consists of commonly owned stations in the same market that share at least one employee.) The relevant two-year period begins when a licensee files its renewal application. The first such period, beginning with the effectiveness of the new rules and ending at the next regular pertinent anniversary, will permit an appropriate proration of the required efforts.

The Commission's menu contains sixteen options. The first twelve were the same as under the old “Option A” – job fairs, job banks, internship programs, scholarships, mentoring and training programs and participation in media trade group listings. The four new options are as follows:

- providing assistance to outside non-profit entities and the maintenance of websites that provide counseling on the process of searching for broadcast employment and/or other career development assistance pertinent to broadcasting;
- providing training to management-level personnel as to methods of ensuring equal employment opportunity and preventing discrimination;
- providing training to personnel of unaffiliated non-profit organizations interested in broadcast employment opportunities that would enable them to better refer job candidates for broadcast positions; and
- participating in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.

Unfortunately, the Commission has not yet provided guidance to help define the scope of these new categories. Menu options may be performed on a joint basis, either with other area broadcasters, state organizations or co-owned stations, so long as each participant has meaningful involvement in the activity for which credit is sought.

Recordkeeping – Broadcasters will be required to collect the following documentation:

- the job title of all full-time hires;
- the name, address, contact person and telephone number of each recruitment source used to fill each vacancy (including separate identification of each organization entitled to notification);
- dated copies of all advertisements, bulletins, letters, faxes, emails or other communications announcing vacancies;
- documentation necessary to demonstrate performance of the prong 3 menu options, including the scope of the station's participation and the specific personnel involved;
- the total number of interviewees for each vacancy and the referral source for each interviewee; and
- the date each vacancy was filled and the recruitment source that referred the hiree.

Although these materials need not be submitted routinely to the Commission, they must be available upon Commission request. They may be kept in an electronic format, and must be maintained until after grant of the renewal application for the term during which the vacancy was filled or the initiative occurred. Unlike the former requirements, the recruitment sources of mere applicants (as opposed to interviewees and hirees) need not be ascertained, nor is any data required as to the race, ethnicity or gender of any person.

Public File – Each year, on the anniversary date of filing a renewal application, broadcasters will be required to place the following materials in their local public files for hiring and activities during the preceding year:

- the job titles of all full-time hires;
- the name, address, contact person and telephone number of each recruitment source used to fill each vacancy (including separate identification of each organization entitled to notification);
- a list of the recruitment sources that referred the people hired for each full-time vacancy;

- the total number of persons interviewed for each such vacancy and the total number of interviewees referred by each recruitment source utilized in connection with that vacancy; and
- a list and brief description of each prong 3 initiative undertaken.

The same information must also be posted on the station's website, if it has one. When a license is assigned, only the information subsequent to consummation need be included. Public file reports are to be compiled for station employment units rather than for individual stations. Time brokers are to include their employees in the report of whichever station is geographically closest to the brokered station. Time brokers which are neither licensees nor controlled by a licensee are not required to prepare or file EEO reports.

Filing of EEO Information and Enforcement – Prospective EEO programs (on FCC Form 396-A) will accompany all applications for new stations, license assignments and transfers of control. License renewal applications will require a report (Form 396) describing all pending or resolved EEO complaints and, for stations having five or more full-time employees, the name and title of the person responsible for implementation, a narrative statement of the station's efforts to achieve broad and inclusive outreach during the previous two years, and a copy of the two most recent annual EEO public file reports. After the fourth year of their license term, radio employment units having eleven or more full-time employees and television employment units having ten or more full-time employees will also have to submit mid-term reports (Form 397) including their two most recent public file reports. Each year, approximately 5% of all licensees will be subject to random audits which may entail additional documentation of recruitment efforts beyond the material required for the public file. Sanctions may be imposed for violations or deficiencies.

The new rules are to take effect March 10, 2003. The Commission's *Report and Order*, including the text of the new rules and prototypes of the required forms, is available on the FCC's website http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-303A1.pdf.