

Broadcast Station Update: EEO Reports Due Aug. 1

By Brendan Holland

July 28, 2011

- Annual EEO Public File Report Deadline—Aug. 1
Affected States: California, Illinois, North Carolina, South Carolina and Wisconsin
- Form 396 EEO Report—Aug. 1
Affected States: North Carolina and South Carolina

By Aug. 1, 2011, radio and television Station Employment Units in the listed states must prepare and place in their Public Inspection File and post on their website, if they have one, their FCC Annual EEO Public File Report. A Station Employment Unit (SEU) is a group of stations, under common control, serving a common area and sharing at least one employee. If an SEU includes stations in different states or territories with different filing deadlines, the SEU can select which filing deadline it will use. Once selected, the Annual Report filing deadline should be consistently applied for all future EEO Annual Reports. The states with the Aug. 1 EEO Public File Report deadline are: California, Illinois, North Carolina, South Carolina and Wisconsin.

Special Note: EEO Report on FCC Form 396 Required Aug. 1 for Radio Stations in North Carolina and South Carolina

In addition to preparing the Annual EEO Program Report by Aug. 1, all radio stations in North Carolina and South Carolina must also prepare and file electronically with the Commission an FCC Form 396 EEO Report in connection with their license renewal applications. The Form 396 certifies to the licensee's continuing compliance with the EEO rules, and provides the FCC with copies of the Station Employment Unit's two most recent Annual EEO Program Reports (the reports from this year and last year).

Furthermore, the Form 396 is required as part of the license renewal process, and is an important part of both the station's compliance with the EEO rules and the Commission's monitoring procedures. As Aug. 1, 2011, marks the license renewal filing deadline for radio stations in North Carolina and South Carolina, these stations will need to also prepare and file an FCC Form 396 EEO Report by that date.

Background on EEO requirements

The FCC's EEO rule requires all radio and television SEUs, regardless of staff size, to afford equal employment opportunity to all qualified persons and to practice nondiscrimination in employment. The Annual EEO Public File Report summarizes the activities of SEUs with five or more full-time employees ("Nonexempt SEUs") that demonstrate compliance with the FCC's three-pronged outreach requirements.

All Nonexempt SEUs must comply with the following "prongs" of the EEO outreach requirements: (1) broadly and inclusively disseminate information about every full-time job opening except in exigent circumstances (commonly referred to as the requirement for "Wide Dissemination"); (2) send notifications of full-time job vacancies to recruitment organizations that have requested notice; and (3) participate in a specified number of outreach initiatives (so-called "Supplemental Efforts") from the FCC's menu of such options during each of the four two-year segments that comprise a station's eight-year license term.

The Supplemental Efforts must be conducted even if a station has had no job openings in the prior year in an effort to educate the community as to the types of jobs available at broadcast stations, the training and qualifications required for such jobs, and the way in which people can find out about and apply for broadcast openings.

The specifics of these rules are complex, and the requirements must be carefully observed, as the FCC has recently fined stations who have overlooked their obligations. A primer on the EEO requirements summarizing these requirements in greater detail, can be found on our website.

Annual EEO Public File Report deadline, contents

By Aug. 1, 2011, all Nonexempt SEUs of radio and television stations, including Class A television stations, licensed to communities in the states and territories listed above, must: (1) place their Annual EEO Public File Report in the public inspection files of all stations comprising the SEU; and (2) post the Report on their websites, if any station in the SEU has a website.

The Annual EEO Public File Report summarizes the Nonexempt SEU's EEO activities during the previous 12 months, and it must include the following:

- A list of all full-time vacancies filled during the preceding year, identified by job title.
- A list of the recruitment source(s) used to fill each of those vacancies (including organizations that specifically requested notification of all job vacancies pursuant to Prong 2 of the EEO outreach rules), including the address, contact person and telephone number for each source. Prong 2 sources should be specifically identified.
- An identification of the recruitment source that referred the person hired for each full-time vacancy.
- Data reflecting the total number of persons interviewed for full-time vacancies during the preceding year, and the total number of interviewees referred by each recruitment source during the year (be careful to insure that the number of interviewees broken down by recruitment source equals the number you give for the total number of interviewees during the preceding year).
- A list and brief description of Prong 3 menu options implemented during the preceding year. The list should be sufficiently detailed so as to demonstrate that each activity involved a substantial and meaningful commitment of staff time to the particular activity by SEU employees.

There is no FCC form for the Annual EEO Public File Report. Nonexempt SEUs may use any format that clearly provides the required information. For example, if a Nonexempt SEU used the same recruitment sources for all its vacancies, it may maintain a single list of those sources, which indicates that they were used for all vacancies. If a Nonexempt SEU used different sources for different vacancies, it may maintain a master list of all its sources and use a cross-reference system to show which sources were used for which vacancies. For a model Public Inspection File Report, which can be tailored by your station to reflect your station practices, please see Appendix A.

According to the FCC rules, the Annual EEO Public File Report covers activities during the period from Aug. 1, 2010, through July 31, 2011. However, the FCC has issued a public notice allowing nonexempt SEUs to opt to "cut off" the reporting period up to 10 days before July 31. This gives the SEU a period of time in which to prepare the report and place it in the public file, and upload it to the website, before the Aug. 1 deadline. If you elect to use this 10-day grace period, be sure that the next reporting period begins the day after the cut-off date that you select. For example, if the Nonexempt SEU has cut off the reporting as of July 25, 2011, for this year's report, then next year the Nonexempt SEU must use the period beginning on July 26, 2011, for the 2012 report.

Job openings must be "widely disseminated"

In several recent decisions, the FCC made clear that wide dissemination of information about job opportunities at broadcast stations cannot be achieved solely by posting information about job openings on websites. Instead, the FCC's decisions make clear that additional recruitment sources must be used in order to ensure that the notice of the job opening reaches all groups within a community. As a result of the failure to widely disseminate information about job openings, as well as other EEO rule infractions found in these cases, the FCC imposed fines ranging from \$3,000 to \$12,000.

On a practical level this means that simply using internal station sources plus online postings, walk-ins, and referrals, is insufficient to assure wide dissemination under the FCC's EEO rules. To avoid this problem, broadcasters must use some other traditional sources (e.g., employment agencies, community groups, educational institutions, local newspapers, and the stations airwaves), to ensure that they meet the Commission's wide dissemination requirements.

If outreach is not documented, it did not happen

Records documenting performance under the EEO Rule are critical because the Commission will not allow credits for Menu Option Initiatives that are not reported in an SEU's Annual EEO Public File Report nor adequately documented. We recommend that stations have communications counsel review their draft report, including supporting material, prior to placing it in the public file. The Commission enforces the EEO rules through review at the time of license renewal, at mid-term for larger broadcasters, and through random audits and targeted investigations resulting from information received as to possible violations.

The Commission selects for audit approximately 5 percent of all licensees in the radio and television services each year. The random audits check for compliance with the requirements outlined in this update, and are planned to continue indefinitely. The FCC's Public Notices listing audited stations are available at www.fcc.gov/mb/policy/eo.

FCC Form 395-B

In the past, FCC Form 395-B, the Broadcast Station Annual Employment Report, was due by Sept. 30. In 2004, the FCC readopted the requirement that Form 395-B be filed with the FCC by that date each year. However, the FCC has put the filing requirement on hold until it determines if the information gathered by the Form 395-B will be available for public review, or if it will be kept confidential and used only by the FCC for compiling overall industry statistics. While the issue of confidentiality is being considered, no filing deadline has been established. Thus, the FCC never gave notice of a date for the filing of the 2004 or 2005 reports, and has not yet said anything about a deadline for any 2011 Form 395-B. Unless such a date is announced, no Form 395-B filing is due in 2011.

This update can only briefly summarize the detailed requirements of the EEO Public Inspection File Report. For more information on your obligations, and practical compliance advice, please contact any of the lawyers in the Davis Wright Tremaine LLP Broadcast group.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.