

New EEO Rules for Broadcasters Coming Soon

February 2000

More than a year after a court struck down the affirmative action component of the Federal Communications Commission's equal opportunity employment ("EEO") rules for broadcasters, the FCC has acted to revise and/or reinstate some—but not all—of its former EEO mandates. The new rules will go into effect for most purposes on April 17, 2000. (Because of the need for approval by the Office of Management and Budget, however, the effective date of the new "outreach" and recordkeeping rules may be delayed beyond that date.)

The now-completed rulemaking proceeding was designed to address a federal appellate court's 1998 decision in *Lutheran Church-Missouri Synod v. FCC*. Prior to that case, the agency's decades-old EEO rules imposed two basic obligations: broadcasters were forbidden to discriminate on the basis of race, color, national origin, gender or religion; and each licensee was required to make—and extensively document—systematic efforts to recruit minorities and women. Broadcasters also were required to assess the success of their outreach efforts by comparing the number of minorities and women in their own employment ranks to the percentage of minorities and women in the local labor force.

This second obligation was directly at issue in the *LCMS* case. The appellate court held that the affirmative action obligations were unconstitutional because they "pressure[d] stations to maintain a work force that mirrors the racial breakdown of their 'metropolitan statistical area.'" The first component, the prohibition against discrimination, was not struck down, although the court called into question the Commission's power to impose those requirements.

The FCC chose not to seek Supreme Court review of the *LCMS* decision but instead opened a new rulemaking to determine whether, and how, it could salvage some aspect of its EEO rules. In a lengthy order, the Commission now concludes that it has power to require broadcasters to continue making "outreach efforts" to minority and female applicants without obligating licensees to compare their own work force demographics to those of the local labor force. (The same basic rules also will apply to cable operators.)

The new regulations impose two basic sets of obligations: (1) "outreach" obligations, designed to ensure that notice of job openings is widely disseminated, and (2) reporting and record-keeping obligations, designed to allow both the FCC and the public to monitor a broadcaster's outreach efforts. The outreach mandates require broadcasters to disseminate widely notices concerning job openings, but they provide some flexibility as to how this is to be accomplished. Licensees may either (a) provide information on job openings to organizations that request it (including women's and minority groups) and also participate in a specified number of

outreach programs (such as job fairs, mentoring programs, and internships), or (b) design their own outreach programs. If broadcasters opt for the latter course, they must collect more extensive data concerning the recruitment sources, gender and race/ethnicity of their applicant pools—and provide much of that information in an annual report placed in the station public file.

The new rules also reinstate certain filing requirements—and add still other filing obligations. Briefly, these are:

New "Annual Employment Reports" — Broadcasters must place a new employment report (of their own design) in their station's public file each year. The information that must be reported depends on which of the two "outreach" alternatives the licensee chooses.

Revised Annual EEO Report (Form 395-B) — The FCC reinstated the requirement that broadcasters file an annual employment report to be filed on a revised version of FCC Form 395-B. Although the form requires that the station set forth the gender and race/ethnicity status of its full-time employees, licensees no longer need compare their own employment statistics to data concerning the number of women and minorities in local work force.

New Biennial "Statement of Compliance" (Form 397) — Broadcasters who employ five or more workers full time must file a "Statement of Compliance" (on a new FCC Form 397) every second, fourth, sixth, and final year of the station's license term. These once-every-two-years filings must be submitted by the anniversary of the date on which the next renewal application is due. Copies of the form also must be placed in the station's public file.

License Renewal EEO Programs Report (Form 396) — In conjunction with their license renewal applications, broadcasters must also file with the FCC and place in the public file a revised version of FCC Form 396, the "Broadcast Equal Employment Opportunity Program Report." The FCC has pledged to use station employee data only to monitor industry employment trends and prepare reports submitted to Congress; the data is not to be used as the basis of EEO complaints against a station or as a challenge to a license renewal.

CP or station sale applications (Form 396-A) — Applicants for station construction permits or for assignment or transfer of an existing station license involving a station employment unit with five or more full-time employees must file a "Model EEO Program" on a revised FCC Form 396-A.

In addition, the Commission has reaffirmed its rule prohibiting discrimination against individuals on the basis of race, religion, color, national origin or gender. However, the agency noted that, in most instances, it will continue to defer to action being taken by the federal Equal Employment Opportunity Commission or in court—and would deviate from that course only in circumstances that indicate the existence of an egregious problem.

The FCC also has formalized a change to the nondiscrimination rule. At the request of religious broadcasters, the agency has codified a recent policy change allowing such licensees to establish faith or denominational affiliation as a *bona fide* occupational qualification for all station employees. This change is modeled on a similar exemption under Title VII, the federal employment statute, for religious organizations generally.

Finally, the agency has taken the unusual step of leaving the EEO rulemaking docket open "to facilitate any additional further proceedings"—such as, perhaps, imposing more burdensome rules in the future. The Commission notes that certain commenters had pressed for more extensive "remedial" rules to address alleged past discrimination industry-wide. In leaving the record open, the FCC effectively invites "any interested party" to submit "a national employment disparity study" or other information "germane to these issues or proposals."

WR&F has prepared a detailed memo to help stations prepare to comply with the new EEO mandate. If you have not yet received a copy, please contact us. We also would be happy to assist you in devising your compliance plan.