

Back to the Future:

The FCC Adopts New and Revised EEO Rules

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Part 1: Recruitment and Recordkeeping

This is Part 1 of a two-part series about the FCC's new EEO regulations, and focuses on recruitment and recordkeeping. The second part, focusing on FCC reporting and filing requirements, self-assessment, and enforcement will appear in the April/May 2003 issue of *The Financial Manager*.

They're back! As expected, the Federal Communications Commission adopted new EEO rules in November 2002 for broadcasters and revised its existing EEO rules for cable television, direct broadcast satellite, and other such video services, collectively known as multichannel video programming distributors ("MVPD"). The new and revised rules are substantially similar to the FCC's previous "Option A" requirements that were vacated in January 2001 with "Option B," which the U.S. Court of Appeals for the District of Columbia Circuit found to be unconstitutional. This article reviews the numerous recruitment, outreach, record-keeping, reporting, and FCC filing requirements imposed by the recently adopted EEO rules for broadcasters and MVPDs, and provides suggested guidelines for implementation of the rules as applied to both services. The rules will be effective March 10, 2003.

At this time, broadcasters and MVPDs are not required to apply the new requirements when filling part-time (less than 30 hours/week) vacancies. However, this could change, based on the outcome of a pending further rulemaking.

Identification of the "Employment Unit"

The FCC crafted and enforces its EEO rules based on the size of the broadcaster's or MVPD's employment unit. For broadcasters, an employment unit is defined as a station or a group of commonly owned stations (radio and/or television) in the same market that share at least one employee. An MVPD employment unit is an individual system or systems

that are under common ownership and control and are inter-related in their local management, operation, and utilization of employees.

The first step for all regulated entities is to identify the employment unit. Broadcasters and MVPDs will engage in the rules' numerous requirements as a single station/system unit, or alternatively, as a unit with multiple stations/systems. For example, two or three stations in a market that share the same business manager are required to fulfill their EEO obligations as a single unit. It is also cost-effective and practical for stations to conduct a joint EEO program.

For broadcasters, the new rules do not address the status of headquarters employees and under what circumstances they are included in a station's employment unit. However, under previous FCC decisions, headquarters staff that is extensively involved in routine daily operations of individual stations could be considered part of the station's employment unit. A broadcaster has some discretion depending on the circumstances. Conversely, MVPDs have a statutory requirement to include headquarters and corporate personnel in their EEO efforts and, in fact, are required to implement an EEO program for headquarters employment units.

Once the scope of the unit is identified, the size of the unit is determined based on the number of full-time employees (30 hours or more/week) within the unit. Small units are exempt from many of the FCC's requirements but remain subject to the anti-discrimination rules. For the purpose of allowing exemptions based on "small" employment units, the FCC treats broadcasters and MVPDs differently:

- "Small station" is defined as an employment unit that employs fewer than five (5) full-time employees.
- "Small MVPD" is defined as an employment unit that employs fewer than six (6) full-time employees.

Broadcasters that own 50 percent or more voting interests in a station ("single majority shareholder") and those that own 20 percent or more voting interests in the absence of a single majority shareholder, are not deemed to be employees, even if they would otherwise qualify as full-time employees.

For this reason, such owners would not be counted as part of the employment unit. The FCC needs to clarify whether or not this exemption applies to MVPDs.

Anti-Discrimination and Specific Recruitment Provisions

The new EEO rules adopted by the FCC did not alter the FCC's long-standing prohibition against discrimination in recruitment, hiring, and promotions based on race, color, religion, national origin, or sex, and age for MVPDs. Religious broadcasters are permitted to establish religious belief or affiliation as a job qualification for all or selected positions, but are prohibited from discriminating on the basis of race, color, national origin, or sex from among those who share their religious affiliation or belief.

To ensure that broadcasters and MVPDs reach out to all segments of the community when filling full-time vacancies, the FCC adopted a three-pronged approach requiring that all non-exempt units must:

1. widely disseminate information for each full-time job vacancy, except for vacancies filled in exigent circumstances
2. provide notification to community and recruitment organizations that have requested information on all or select job vacancies
3. participate in "longer-term" recruitment initiatives, such as job fairs, internships, scholarships, and EEO/anti-discrimination training programs.

1. Wide Dissemination of Information for Each Full-Time Vacancy, Except for Vacancies Filled in Exigent Circumstances

The FCC provides some flexibility to the broadcaster or MVPD to determine the number and type of recruitment sources it will use for each vacancy. An employment unit must use its good faith judgment to determine the recruitment sources that will reasonably and collectively reach the entire community. The FCC permits joint recruitment efforts involving more than one employment unit, state broadcasters associations, or outside sources. However, each unit remains individually responsible for compliance with the FCC's rules.

How to Define "Community"

An employment unit should conduct a threshold analysis to define its community before initiating recruitment efforts. While leaving the definition of "community" to the reasonable good faith discretion of broadcasters and MVPDs, the FCC cautioned that the local community should include areas reasonably expected to elicit applicants and is not necessarily limited to a market, service area, or franchise area. In making this determination, a unit should consider the following factors:

- technical coverage based on antennae height and transmitter strength (broadcasters); location or footprint of system, location of head ends and associated fiber, satellite dishes, set-top boxes, etc. (cable and other MVPDs)
- marketing, promotional, and advertising practices
- pertinent market definitions adopted by public agencies or commercial services, such as Nielsen and Arbitron
- requests for notices of job vacancies from locally based community groups.

Selection of Recruitment Sources

After defining its community, an employment unit must design a recruitment program that is "reasonably calculated" to reach the entire community. This requires developing a list of recruitment sources that will reach a variety of persons and yield qualified applicants depending on the nature of the job and its qualifications. Units need not use the same sources for every vacancy. Also, the FCC no longer mandates the use of minority and women-targeted sources nor does it preclude such use. If a general source, such as the local newspaper, adequately reaches minority or women segments of the community, the FCC emphasizes that one recruitment source is sufficient—but only if the unit can substantiate that the source reaches all segments of the community.

Regional or national recruitment sources—such as ads in the trade press or Internet job sites such as the BCFM Job Bank—may be used if such sources are an effective way to publicize the vacancy to persons with specialized skills (i.e., CFO, engineer, or meteorologist) located within the community. However, the exclusive use of the Internet for posting job vacancies is not sufficient to ensure wide dissemination of such information, although the Internet may be one of many sources.

While the FCC emphasized that outreach must be sufficiently broad to ensure that all segments of a community have an equal opportunity to compete for job openings, the rules do not require an employment unit to demonstrate that any particular segment of the community actually was aware of the vacancy or applied for the position.

Advance planning to implement a recruitment plan in a timely and thorough manner is important. Last-minute recruitment efforts limit the ability to recruit broadly and may force increased reliance on insular sources. Word of mouth recruitment is acceptable but not as the sole method. Developing a file for each vacancy is recommended to track and manage the recruitment process and provides for centralized recordkeeping. Developing an additional file and recordkeeping system for each recruitment source (including community groups as discussed below) will assist in tracking correspondence and activity for that source. Such files will prove helpful in the reporting and self-assessment process also required under the new rules.

The following are recommended factors to consider when selecting viable recruitment sources and developing a community-wide recruitment plan:

- the geographic reach, i.e., subscriber base or location of distribution outlets of the source
- the demographic reach of the source
- the specialty, subject matter, or target audience of the source
- the frequency of information distribution (daily, weekly, monthly) of the source
- the services or benefits provided by the source (e.g., advertising, referrals, employment training).

Exigent Circumstances Exception

Under the previous rule, employment units were only permitted to not recruit for a specific vacancy when recruitment was not “feasible”—because, for example, an employee departed without notice and his or her duties could not be fulfilled, even briefly, by another employee. The new rules provide increased flexibility based on business realities for recruitment in special circumstances. In appropriate circumstances when there is a need to preserve confidentiality in filling a vacancy so as not to alert an existing employee (whom the broadcaster or MVPD is seeking to replace) or competitors as to its plans, recruitment may not be required. However, the FCC cautioned that this use of the exception may not be justified when the use of blind ads may be sufficient to preserve such confidentiality. Another possible exception may occur when there is the need to hire a specific talent who is so unique and exceptional that a broadcaster or MVPD could reasonably conclude that a comparable talent is unlikely to be found through broad recruitment. The circumstances in which the use of the exception might be appropriate are not limited to these examples.

As a practical matter, the exigent circumstances exception should be used only on rare occasions. The FCC will look to the entirety of a unit’s recruitment efforts in assessing its use of the exception on a case-by-case basis. In the absence of abuse, the FCC would not necessarily find a violation of its rules even if it disagreed with the unit’s decision as to a particular hire, as long as the decision was made in good faith. Therefore, the unit should maintain detailed records when invoking the exigent circumstances exception and be prepared to justify such use upon review by the FCC or a challenge from the general public.

Use of Same Applicant Pool for Similar Vacancies

The FCC also provides flexibility when recruiting for substantially similar vacancies (e.g., account executive) that occur within a brief period of time (i.e., three months). Applications received for the first vacancy would not necessarily be “stale”

and can be used for the second vacancy. If a unit recruits for the first vacancy in accordance with the requirements of Prong 1, and in the unit’s good faith judgment the applications remain viable at a later date, it may hire for the additional position without initiating a new recruitment process. Moreover, the use of applications or resumés already collected via Prong 3 recruitment initiatives (such as job fairs) may be used to supplement the applicant pool.

Positions Not Subject to Recruitment

Promotions, internships, and temporary positions (e.g., emergency replacements for absent regular employees or those hired to perform a regular station function for less than six months) are not subject to recruitment. However, if the temporary position will be converted to a full-time position or it lasts longer than six months, recruitment is required unless the temporary position was initially filled by broad recruitment. The FCC cautioned that excessive instances of temporary hires that are converted to permanent hires without recruitment could result in a finding of non-compliance.

Appropriate Timing for Filling Vacancy

Employment units should allow a reasonable time after recruitment is conducted for applications to be submitted before the position is filled. The FCC did not define “reasonable,” but stated that only in extraordinary circumstances does it foresee using a short time period for filling a vacant position. As a practical matter, reasonableness depends on the circumstances, the amount of time that it takes both for the information to be disseminated through the selected recruitment sources, and for interested members of the community to act on the vacancy information. Under normal conditions, two weeks is a reasonable waiting period.

2. Notification to Community Groups

Employment units are required to provide notice regarding all full-time vacancies to any community group requesting such information. This requirement is considered a supplement to, and not a substitute for, use of recruitment sources under Prong 1. Such groups are entitled to request information about all or selected vacancies. A community group need only notify a unit once in order to be entitled to notification for all or selected future full-time vacancies. If there is uncertainty as to the community group’s continuing interest in receiving vacancy notices, the unit is free to contact the group to resolve any questions. It is no longer required to find a replacement for the community group if the group does not provide any referrals or applicants.

Units must undertake reasonable efforts to publicize the FCC’s notification requirements so that community groups are alerted that they can request to be on the unit’s notification list. Each unit may determine how best to meet this

requirement: “on air” announcements, Web site, or outside sources. Joint publicity efforts with state broadcasters’ associations are acceptable.

To help ensure that the notification process for each vacancy is timely, accurate, and efficient, a unit should develop and maintain a formal database of all requesting community groups. A unit should predetermine exactly how and when each community group will be contacted. The various methods of notification are within the discretion of the unit and can include emails, faxes, or mailings, or a combination of methods. For example, all sources can be notified simultaneously when a vacancy occurs with a single email, if notification by email is possible to all groups.

Recommended information to be included in the community group database includes:

- date, month, and year the community group first contacted the unit to be placed on the notification list, and mode of contact for notifications
- name of organization, name of contact person and title, mailing address, email address (if applicable), telephone, fax number, and category of vacancies
- type of organization (e.g., church, local chapter of national organization, secondary school, college/university, employment service, or job bulletin board). This information is helpful in reporting and self-assessment efforts.

A designated person(s) should be responsible for the development and implementation of the community group notification process, maintenance of the database, and serving as a contact person for community groups. These are important functions because failure to fulfill Prong 2 requirements could result in a finding of non-compliance.

3. Menu of Longer-Term Recruitment Initiatives

Employment units must choose from among 16 recruitment initiatives designed to inform the public about employment opportunities and to reach segments of the labor force that may be inadvertently omitted from vacancy-specific recruitment. The FCC emphasized that these initiatives are intended as a supplement to, and not as a substitute for, the core non-delegable obligations as set forth in Prong 1. The majority of the initiatives are substantially similar to the previous rule’s Option A but with important modifications and nuances not discussed herein. There are also three new initiatives (#s 13, 14 and 15).

1. participation in at least four (broadcasters) or two (MVPDs) **job fairs** by unit personnel who have substantial responsibility in the making of hiring decisions
2. hosting of at least one **job fair**
3. co-sponsoring at least one **job fair** with organizations in the business and professional community whose membership includes substantial participation of women and minorities
4. participation in at least four (broadcasters) or two (MVPDs) **events sponsored by organizations representing groups present in the community** interested in broadcast/MVPD employment issues, including conventions, career days, workshops, and similar activities
5. establishment of an **internship program** designed to assist members of the community to acquire skills needed for broadcast/MVPD employment
6. participation in **job banks, Internet programs**, and other programs designed to promote outreach generally (i.e., that are not primarily directed to providing notification of specific job vacancies)
7. participation in **scholarship programs** designed to assist students interested in pursuing a career in broadcasting/multichannel video programming (“MVP”) communications
8. establishment of **training programs** designed to enable unit personnel to acquire skills that could qualify them for higher level positions
9. establishment of a **mentoring program** for unit personnel
10. participation in at least four (broadcasters) or two (MVPDs) **events or programs sponsored by educational institutions** relating to career opportunities in broadcasting/MVP communications
11. sponsorship of at least two (broadcasters) or one (MVPD) **event(s) in the community designed to inform and educate members of the public** as to employment opportunities in broadcasting/MVP communications
12. **listing of each upper-level category opening in a job bank or newsletter** of media trade groups whose membership includes substantial participation of women and minorities
13. provision of **assistance to unaffiliated non-profit entities** in the maintenance of websites that provide counseling on the process of searching for broadcast/MVP communications employment and/or other career development assistance pertinent to broadcasting and MVP communications
14. provision of **training to management level personnel** as to methods of ensuring equal employment opportunity and preventing discrimination
15. provision of **training to personnel of unaffiliated non-profit organizations** interested in broadcast/MVP communications employment opportunities that would enable them to better refer job candidates for job positions
16. **participation in other activities** designed by the employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting/MVP communications to job candi-

dates who might otherwise be unaware of such opportunities.

These recruitment initiatives must be completed as follows:

Broadcasters

- Station employment units with more than 10 full-time employees in large markets must complete four (4) recruitment initiatives within each two-year period.
- Station employment units with five to 10 full-time employees, and/or larger units located entirely in small markets, must complete two (2) initiatives within each two-year period.

“ Small market is defined as a community of license, franchise or service area that is outside of a metropolitan area, as defined by the Office of management and budget, or is located in a metropolitan area that has a population of fewer than 250,000 persons. Such definitions are subject to change in 2003 with new standards based on census 2000 data.”

The two-year period generally begins on the date a broadcaster files its renewal application and renews on the second, fourth, and sixth anniversary of that filing date. Moreover, where four initiatives are required every two years, one (1) initiative is expected to be performed every six months. However, if a broadcaster owns a station(s) for less than the full two-year period, it is required to complete one initiative every six months, prorated within that limited timeframe (e.g., a station under new ownership for 18 months must complete three initiatives).

MVPDs

- MVPD employment units with more than 10 full-time employees must complete two (2) recruitment initiatives annually.
- MVPD employment units with six to 10 full-time employees, and/or larger units located in whole or in part, in small markets (as defined above) must complete one (1) initiative annually.

The annual period for MVPDs commences on October 1, the 12-month period preceding the September 30 filing date for Annual Employment Reports. It is assumed that MVPDs under new ownership may also prorate the number of initiatives.

Broadcaster or MVPD employment units may perform these recruitment initiatives on a joint basis with other units (related or unrelated); national, state, or local trade associations; or with a parent company's corporate headquarters. However, any unit seeking credit for such joint efforts must have meaningful involvement in the activity for which credit is sought.

Recordkeeping Requirements

All non-exempt employment units must keep, but not routinely submit to the FCC, records documenting the unit's recruiting efforts and its completion of Prong 3 recruitment initiatives. Such records may be maintained in electronic format.

The FCC's internal recordkeeping requirements for both services include:

- listings of all full-time jobs filled by the employment unit, identified by job title
- all of the recruitment sources used to fill each vacancy, including, if applicable, any organizations that are entitled to (which should be separately identified), identified by name, address, contact person and telephone number
- dated copies of all advertisements, bulletins, letters, faxes, emails, or other communications announcing vacancies (including Web site postings)
- documentation necessary to demonstrate performance of the recruitment initiatives required under Prong 3, including sufficient information to fully disclose the nature of the initiative and the scope of the station's participation, including the station personnel involved
- the total number of interviewees for each vacancy and the referral source for each interviewee
- the date each vacancy was filled and the recruitment source that referred the hiree.


Broadcasters must maintain internal records until after grant of the renewal application for the term during which the vacancy was filled or the initiative occurred. MVPDs must maintain internal records for seven years.

Recordkeeping for broadcasters and MVPDs is critical given that the above information must be compiled and reported in an annual EEO public file report (“EEO Public File Report”), placed in the public inspection file (and on the website, if one is maintained) and ultimately submitted to the FCC in conjunction with other FCC forms (e.g., broadcast license renewal applications and MVPD Supplemental Investigation Sheets).

Specific information concerning the preparation, retention, and filing requirements for the EEO Public File Report, and other FCC Reports (e.g., FCC Form 397 Broadcast Mid-Term Report) will be included in Part 2 of this series.

Television stations in New York, New Jersey, Delaware and Pennsylvania will not be required to file a Broadcast Mid-Term Report in 2003 because of the short time frame between the effective date of the rules and the filing dates.

The old rules are new again, but with several important changes that impact the business realities facing the broadcast and MVPD industries today. In Part 2 of this series, we will focus on FCC reporting and filing requirements, self-assessment, and FCC review and enforcement.

The challenge of how best to implement a compliant FCC EEO program, in addition to other state and federal EEO requirements, is met with advance planning, detailed recordkeeping, and, of course, guidance from your legal counsel. 

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