

Small Business Notes

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U.S. Equal Employment Opportunity Commission (EEOC) Sets September 30, 2019, Deadline for Receipt of New Pay and Hours Worked Data

Each year, employers with 100 or more employees (and federal contracting businesses with 50 or more employees and a federal prime or subcontract of \$50,000 or more) are required to submit to the EEOC data on the composition of their workforce by ethnicity, race, gender, and job category. In 2016, the EEOC sought to add a new component (called "Component 2") to the EEO-1 data collection form used for the workforce data. Component 2 was to report employees' W-2 compensation information and hours worked for each of the reporting categories. The intent was to collect information to enable the EEOC to work toward reduction in pay gaps among the reporting categories.

The new data collection requirement was strongly opposed by the U.S. Chamber of Commerce, and other small business organizations, which saw the new data collection as unnecessarily burdensome to small businesses in terms of the time and effort required to collect and report the information. The federal Office of Management and Budget also opposed the new requirement on the grounds that it violated the federal Paperwork Reduction Act. In 2017 OMB obtained a court order imposing a stay on the collection of the new data. The National Women's Law Center sued in federal district court to have the stay lifted, which did occur in March 2019.

In April, 2019, the Office of Management and Budget filed a brief with the court proposing a deadline of September 30, 2019, for collection of the EEO-1 forms. Later that month, a federal judge approved the federal deadline of September 30 which is now in place. *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, Civil Action No. 17-cv-2458(D.D.C.). Note that the data to be provided is for Calendar Years 2017 and 2018.

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The EEOC has contracted with the University of Chicago to collect the data using a data file upload function and validation process. Information regarding use of the file and process is available at [EEO-1 Survey](#).

In addition, Frequently Asked Questions, a sample data collection form and user instructions are available.

Note that the U.S. Department of Justice has filed an appeal in the *National Women's Law Center* case but this filing does not stay the court's order in that case. Employers are still required to meet the September 30 deadline.

U.S. Department of Labor Announces Availability of New Online Toolkit to Aid Employers In Complying with the Americans With Disabilities Act (ADA)

On July 26th, the U.S. Department of Labor announced the availability of its new "toolkit" to assist employers with their ADA responsibilities in recruitment, hiring, and accommodation. The toolkit was jointly developed by the private Job Accommodation Network and the Department of Labor's Office of Disability Employment Policy.

The toolkit has three main sections: tools for recruiters, hiring managers, and supervisors; tools for reasonable accommodation subject matter experts; and tools for employees and co-workers.

Each of the three sections contains basic and advanced subject matter information, video presentations, sample policies and checklists, and examples of successful accommodations.

The Department of Labor's announcement emphasized that while "Reasonable accommodations are key to the ADA's employment provisions," none of the strategies in the toolkit create any new legal requirements or change current requirements.

The toolkit is available online at [The Jan Workplace Accommodation Toolkit](#).

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Provisions of Minnesota's New "Wage Theft" Law Take Effect July 1 and August 1

The civil provisions of Minnesota's new "Wage Theft" law took effect on July 1. These provisions will be enforced through fines and penalties by the Minnesota Department of Labor & Industry and the Minnesota Attorney General. The criminal provisions took effect August 1 with enforceability in the hands of local prosecutors.

Criminal wage theft occurs when an employer "with intent to defraud:"

- fails to pay an employee all wages, salary, gratuities, earnings, or commissions at the employee's rate or rates of pay or at the rate or rates required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater;
- directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered;
- directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer; or
- makes or attempts to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

The civil penalty section of the new law imposes new notice and record keeping requirement on employers. At the start of employment, an employer shall provide each employee with a written notice containing the following information:

- the rate or rates of pay and the basis for the rate or rates, to include whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method, and the specific application of any additional rates;
- allowances, if any, claimed pursuant to permitted meals and lodging;
- paid vacation, sick time, or other paid time off accruals and terms of use;
- the employee's employment status and whether the employee is exempt from minimum wage, overtime, and other provisions of Minnesota law, and on what basis;
- a list of deductions that may be made from the employee's pay;
- the number of days in the pay period, the regularly scheduled pay day, and the pay day on which the employee will receive the first payment of wages earned;

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- the legal name of the employer and the operating name if different from the legal name;
- the physical address of the employer's main office or principal place of business, and a mailing address if different; and
- the telephone number of the employer.

The employers must also keep a copy of the notice signed by each employee acknowledging receipt of the notice. The notice must be provided to the employee in English with text informing the employee that the employee may request the notice in a language other than English. The Minnesota Department of Labor & Industry shall assist employers with translation of the required notice.

The employer must also provide the employee with any written changes to the information contained in the notice prior to the date those changes take effect.

Also, in addition to the information items currently required to appear in the employer provided earnings statement provided to the employee each pay period, these new additional items must be provided:

- the rate or rates of pay and the basis of those rates, including whether an employee is paid by the hour, shift, day, week, salary, piece, commission, or other method;
- allowances, if any, claimed pursuant to permitted meals and lodging;
- the physical address of the employer's main office or principal place of business, and a mailing address if different;
- the telephone number of the employer.

Employers must also document the date on which employees were given copies of the employer's personnel policies and copies of any notices of updates made to those policies.

Records must be retained for 3 years with the new law adding a \$5,000 penalty for each failure to maintain the record (this in addition to the \$1,000 penalty under the old law).

Employers must pay employees at least once every 31 days (commissions to be paid at least once every three months). For employees paid by piece rate, employers must track not only the employee's hours worked each day (as currently required) but also to track the actual number of pieces completed at each piece rate.

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Internal Revenue Service Releases Proposed Income Tax Regulations on Cloud Transactions and Transfer of Digital Content

On August 9, 2019, the Internal Revenue Service released proposed regulation PR 130700-14 amending and expanding current IRS tax regulation 1.861-18 relating to computer programs to now include the tax treatment of transactions involving cloud computing and the transfer of other digital content. Published at 84 Fed.Reg.157,40317 (August 14, 2019).

Section 1.861-18 was finalized in 1998 and provides for the tax treatment of transactions like the sale, rental, or lease of a computer program; but it does not explicitly deal with other digital content such as digital music, digital video, and cloud transaction models such as Software as a Service (SaaS) or Platform as a Service (PaaS). Both the proposed regulations and the economic analysis that accompany them are clear that in the absence of clear guidance on classification different taxpayers could interpret the applicability of current regulations differently with resulting inefficient allocation of economic efficiency among taxpayers and create opportunities for taxpayers to take positions on the character of transactions that “inappropriately minimize their taxes.”

As with all IRS income tax regulations, the proposed regulations contain substantial examples and analysis. Three major conclusions are incorporated into the proposal:

- That a cloud transaction (as specifically defined in detail in the proposed regulations) is classified solely as a lease of property or a provision of services;
- That the application of current Regulation 1-861-18 is extended to transfers of digital content (defined as all content in digital form that is protected by copyright or is no longer protected by copyright solely due to the passage of time.
- That transfer of the right under copyright law to display or perform digital content for the purposes of advertising the sale of the digital content is not on its own a transfer of a copyright right.

Interested and affected parties have 90 days from the Federal Register publication date to comment on the proposed rule. Details of comment submission, and copies of the proposed rule, are available in the announcement or at govinfo.gov.

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Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at <https://mn.gov/deed/newscenter/publications/newsletters/small-biz-notes.jsp>

Small Business Notes is published to offer timely, accurate, and useful information on topics of concern to small businesses in Minnesota. It is for general information purposes only. It is not legal advice and should not be relied on for resolution or evaluation of legal issues or questions. Readers are advised to consult with their private legal advisors for specific legal advice on any legal issues they may have.

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