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NAB CONVENTION

HCCB's managing partner Joe Chautin will be attending the NAB convention in Las Vegas from April 13-16. If you would like to and have time to meet, please reach out to Joe at ichautin@hardycarey.com or 504-439-2350. Joe looks forward to seeing you there!

FIRST 2024 RANDOM EEO AUDIT FOR BROADCASTERS

On March 22, 2024, the FCC's Enforcement Bureau issued a [public notice](#) commencing a random audit of radio and television station EEO compliance over the past two years. Approximately 250 stations are included on the audit [list](#). Usually, the FCC sends the audit notice by mail to stations. Other than that notice, the only way to find out which stations must respond is to review the notice.

The deadline to respond to the audit is May 6, 2024. The scope of a station's response depends on many factors. For stations that are part of a station employment unit with five or more full-time employees (30 hours/week), documentation showing the SEUs outreach activities for each full-time vacancy filled in the prior two years, as well as for each outreach menu option completed in the prior two years, is required. Stations are required to keep such documentation (though not in the public file) anyway in order to substantiate their outreach efforts.

Even stations that do not have five or more full-timers have to respond to a random audit by disclosing how many employees they have, the job titles and number of hours for each position, and EEO contact information, among other items.

Responding to an audit is accomplished via an upload to the station public file (every station in the SEU must upload the audit response to their online

public file). The public notice / audit letter must also be uploaded to the public file (if your station is on the list, the time to post the notice is now). The online public file has an EEO section that includes a “EEO Audits” subfolder where audit materials are to be uploaded.

Stations that were recently subject to an EEO audit or whose license renewal was granted within the last two years may be exempt from responding to the audit, but have to email the FCC at EB-EEO@fcc.gov for additional guidance on whether a response is required.

The FCC randomly audits up to five percent of broadcast stations every year. So, if your station is not on this audit list, it may be on the next one. With the FCC’s overall renewed focus on EEO issues, stations should be extra vigilant to ensure complete and verifiable compliance with EEO matters.

NEW CORES TWO-STEP VERIFICATION PROCESS ANNOUNCED

The FCC is getting into the two-step authentication process when it comes to its payment systems. Per a [public notice](#) detailing the new authentication processes, the FCC’s Office of Managing Director announced that beginning tomorrow, March 29, 2024, logging in to the FCC’s Commission Registration System (CORES) will require a two-step authentication using a code sent to the related email of the CORES user who is logging in.

Broadcasters will be familiar with CORES as the site where new FCC Registration numbers are obtained, or where existing FRNs can be updated or associated with CORES usernames. CORES is also necessary for paying any fee to the FCC, including application and regulatory fees. During the login process, the system will prompt the user to request a 6-digit code, which will then be sent to each email address associated with the CORES username (a primary and secondary email address are allowed). CORES users may want to confirm that they have access to the email address associated with their username in order to retrieve the verification code.

The FCC’s LMS site login page now has a new highlighted ribbon warning of the new procedure that reads: *Beginning March 29, 2024, 2-step authentication will be mandatory to login to the FCC’S Commission Registration System (CORES) and its associated FCC User Registration System. Paying application fees, requesting an FCC Registration Number (FRN) or updating an FRN Password require accessing FCC CORES with a Username Account. Please ensure your FCC Username Account is up to date and that you have access to the corresponding e-mail inbox.*

WE ALL SEE IT

Remember the Progressive Insurance commercial where the life coach, in an attempt to avoid a student’s awkward outburst at seeing someone with blue hair, carefully mutters “we all see it, we all see it.” It doesn’t work of course. The honest but oblivious student blurts out “he has blue hair.”

Reading the FCC’s recent [Report & Order](#) reinstating the annual public filing of an EEO form to collect race, ethnicity and gender information on broadcast station employees was kind of like watching that Progressive commercial. Despite commenters raising legitimate legal concerns about the form’s data being made public on a station-by-station basis, the FCC majority marched straight past those concerns to mandate that the form be specific to a station and in the station public file. The justifications for making it public are flimsy at best and themselves raise new concerns. Here’s the crazy thing - the majority’s objective could have been accomplished without the data being public, and it may have even resulted in a 5-0 vote in favor. Cue in the Progressive commercial. We all see it. It’s classic regulatory overreach, the kind that results in legal challenges, confusion, tough decision making and potential liability for broadcasters.

Imagine as a broadcaster trying to complete the form later this year by selecting an employee’s race, ethnicity or gender, realizing in a unique situation that you don’t have the information needed for 100% certainty, seeing that the form instruction allows you to make an informed guess,

doing so, and then having the employee or someone else challenge the accuracy of the submitted form. Or, what if someone files a complaint that the station licensee is attempting to mislead the FCC? That's no fun. Yet one of the R&O's justifications for making the form public was to "increase the likelihood that erroneous data will be discovered and corrected," and to "incentivize stations to file accurate data to avoid third-party claims that submitted data is incorrect." Does the majority not trust broadcast licensees? This one example opens a Pandora's box of questions, some of which may require a stop at your employment attorney for advice.

Then there's the constitutional law question as to whether making the report public is designed to ensure that individual businesses are targeted and pressured into making hiring decisions based on race and gender. The FCC's two prior efforts to collect and require disclosure of employee demographic data after the Supreme Court found employee quotas unconstitutional were shot down in court on – you guessed it – constitutional grounds, violations of the Due Process Clause of the Fifth Amendment. The FCC majority dodges that sticky question, choosing an approach that is likely to draw a legal challenge, and not withstand Court review. We all see it. Commissioner Brendan Carr not only saw it, but spoke it in his [dissent](#), declaring that "this is no benign disclosure regime" and pointing to "activist groups" as the catalyst for requiring public disclosure of the collected employment data.

So here we are. Trying to understand a new rule, one for which there is no new form or form instructions yet, one that still has to be approved at the Office of Management & Budget, and one that will likely draw a legal challenge that throws an unknown wrench into whether broadcasters will have to file it this fall. The new requirement has blue hair. It's the public disclosure. We all see it. But the FCC majority didn't care and blurred it out anyway.

DATES TO REMEMBER

April 8, 2024

Deadline for Application Prioritization NPRM reply comments

April 1, 2024

Radio and TV Stations located in Indiana, Kentucky, Tennessee, Texas, Delaware & Pennsylvania: if five (5) full time employee threshold is met, prepare EEO public file report covering the period from April 1, 2023 – March 31, 2024, upload it to the station online public inspection file and post it on the station website

Mid-Term EEO Review for Radio stations located in Indiana, Kentucky and Tennessee: if station employment unit has **eleven (11) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with the 2023-24 EEO public file report due April 1, and when uploading the report, each station in the SEU must indicate that the SEU has 11 or more full-timers using the "Mid-Term Review" tab in the OPIF settings section. If the SEU has **between five and ten full-time employees**, when uploading the 2023-24 report, each station in the SEU should indicate that the SEU has fewer than 11 full-time employees using the "Mid-Term Review" tab in the OPIF settings section (by doing so, no mid-term review of the SEU will take place)

April 10, 2024

TV, Class A, AM & FM Stations (commercial & noncommercial): deadline to complete and upload to online public file the 1st Quarter 2024 issues/program lists and any foreign sponsorship identification reports

Class A TV Stations Only: deadline to complete and post to your online public file the 1st Quarter 2024 certification of ongoing Class A eligibility

Noncommercial Broadcast Stations: deadline to complete and post to your online public file the 1st Quarter 2024 report for any 3rd Party Fundraising conducted during the quarter

June 1, 2024

Radio and TV Stations located in Washington DC, Maryland, Virginia, West Virginia, Michigan, Ohio, Arizona, Idaho, Nevada, New Mexico, Utah, and Wyoming: if five (5) full time employee threshold is met,

prepare EEO public file report covering the period from June 1, 2023 – May 31, 2024, upload it to the station online public inspection file and post it on the station website

Mid-Term EEO Review for Radio stations located in Michigan and Ohio: if station employment unit has **eleven (11) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with the 2023-24 EEO public file report due June 1, and when uploading the report, each station in the SEU must indicate that the SEU has 11 or more full-timers using the “Mid-Term Review” tab in the OPIF settings section. If the SEU has **between five and ten full-time employees**, when uploading the 2023-24 report, each station in the SEU should indicate that the SEU has fewer than 11 full-time employees using the “Mid-Term Review” tab in the OPIF settings section (by doing so, no mid-term review of the SEU will take place)

Mid-Term EEO Review for Television stations located in Washington DC, Maryland, Virginia and West Virginia: if station employment unit has **five (5) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with your upload of the 2023-24 EEO public file report due June 1. By uploading an EEO public file report, the FCC automatically knows that your television station meets the 5 or more full-time employee threshold for a mid-term review. There is therefore no OPIF mechanism available or needed to specify how many employees the SEU has

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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