



LEGAL NEWS FOR YOUR BUSINESS

May 2022

Up First

A REMINDER FOR AN IMPORTANT EEOC DEADLINE

FOR IMMEDIATE RELEASE

April 12, 2022

EEOC ANNOUNCES OPENING OF 2021 EEO-1 COMPONENT 1 DATA COLLECTION
Deadline to Submit and Certify Reports is May 17, 2022

WASHINGTON – The U.S. Equal Employment Opportunity Commission (EEOC) announced today that the 2021 EEO-1 Component 1 data collection is now open. The deadline for submitting and certifying 2021 EEO-1 Component 1 Report(s) is May 17, 2022. To meet this deadline, the EEOC strongly encourages eligible filers to begin the filing process as soon as possible.

For the 2021 EEO-1 Component 1 data collection, the EEOC is continuing to modernize the agency's EEO data collections and improve the quality of data collected. The EEOC is also improving the filing process by making it more user-friendly and streamlining functions, including additional self-service options, and providing a new **Filer Support Team Message Center** for filer support.

This new message center allows filers to submit their requests for assistance to the EEOC within the **EEO-1 Online Filing System** as well as update requests with new information, terminate requests, and track the status of requests. It also provides filers with more self-service referencing capabilities to quickly connect to relevant materials. All filer inquiries regarding the 2021 EEO-1 Component 1 data collection should be submitted through the Filer Support Team Message Center.

Filers should visit the dedicated EEO-1 Component 1 website at www.eeocdata.org/eeo1 to access the online filing system and to find this year's updates and resource materials. Filers

needing additional assistance can use the Filer Support Team Message Center at www.eeocdata.org/eo1/support/contactus.

The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees and federal contractors with 50 or more employees meeting certain criteria, to submit workforce demographics including data by race/ethnicity, sex, and job categories. The filing by eligible employers of the EEO-1 Component 1 Report is required under section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-8(c), and 29 CFR 1602.7-.14 and 41 CFR 60-1.7(a). Employers can find additional eligibility information on the EEO-1 Component 1 website at www.eeocdata.org/eo1.

The EEOC advances opportunity in the workplace by enforcing federal laws prohibiting employment discrimination. More information is available at www.eeoc.gov. Stay connected with the latest EEOC news by subscribing to our [email updates](#).

General Business Alert

BEWARE OF PAYROLL SOFTWARE HACKS!

Cyber-attacks are becoming more common as employers depend on new technology. Without the proper protections in place, employers could be faced with massive lawsuits.

On December 11, 2021, Ultimate Kronos Group (UKG), a Florida-based HR management software company, discovered a ransomware attack on one of their cloud-based time and attendance systems. The hack resulted in outages across the system for weeks, affecting over 2000 companies, from hospitals to government agencies. The data breach forced employers to manually track employee time and caused difficulties managing end-of-year vacations and payroll and bonus calculations.

Although UKG restored most system capabilities within about six weeks, concerns remained over whether the breach left employee information exposed and whether some employers had violated the Fair Labor Standards Act (FLSA). Since January 19, 2022 lawsuits have been filed against employers in connection with the security breach. The employees' claims vary from recouping back wages and overtime pay (due to unrecorded working hours during the breach and the additional time employees spent tracking their hours) to security-based claims over the employer's failure to adequately protect employees' private information, such as their social security numbers.

What can employers do to protect themselves in the event their third-party vendor is hacked?

Employers faced with potential claims arising out of their third-party vendors security breach may have a good-faith defense if they take certain measures to ensure the security of third-party vendors. To help minimize risk, employers should:

1. ***Ask their third-party vendors whether they conduct regular security assessments.*** Security assessments should, at minimum, identify potential risks, estimate the likelihood and potential impact of those risks, and implement specific protections against those risks.
2. ***Make sure their third-party vendors have written security policies and procedures in place in the event of a data breach.*** Employers may even want to go a step further and evaluate whether the vendor's policies and procedures align with their own security standards.
3. ***Choose vendors with high-level security certifications.*** Selecting companies that have earned recognized security standards or attestations of compliance, such as Service Organization Controls (SOC) 2 Certification, or Payment Card Industry Data Security Standard (PCI-DSS) Compliance can help reduce risks of data breaches and potential fallout for your company.

If you have questions or concerns about employer obligations under the FLSA or would like to have a policy or procedure reviewed, please do not hesitate to reach out to any member of Gardner Skelton's employment team.

General Business Alert

ARE YOUR EMPLOYEES PROPERLY CLASSIFIED?

The most basic, and yet sometimes most important, question when bringing on workers is whether the worker will be classified as an employee or an independent contractor. Unfortunately, the answer is anything but simple because it depends. It is not only a question of what the worker's particular factual scenario is, but also who is asking the question. An individual may be an employee under one test of a governmental agency or federal or state law, but an independent contractor under another. Similarly, the answer varies from state to state.

Looking at the two most frequently examined tests may help you determine if your employees are properly classified. However, this article is by no means the magic answer (if it were that simple, we'd be out of a job). Rather, employers should use this more for awareness and issue spotting than a guide as they attempt to navigate this uncertain landscape. Please remember that a true determination of your worker's classification requires a deep look into your business and your worker's role and relationship with your business.

Department of Labor

The Department of Labor's employee v. independent contractor test grew from the Fair Labor Standards Act (FLSA). North Carolina's Wage and Hour Act was modeled after the FLSA, so the FLSA's test can be helpful in that arena as well. The FLSA's test focuses on the "economic realities" of the relationship between the worker and employer – not what is written down on paper, but what is really happening. Here are some questions an employer may ask themselves when determining the classification of their employees under the FLSA or NCWHA:

- Am I exercising substantial control over my workers?
- Does the worker have a low risk of loss and a lesser opportunity to make a profit?
- Am I supplying my workers with the equipment they need to perform their job?
- Does the worker require significant training and skill to perform the work?
- Is the relationship ongoing and indefinite?
- Are the services the worker performs a key part of my business?

Answering mostly yes to these questions may indicate that your worker is an employee and not an independent contractor.

Internal Revenue Service

The IRS looks at 11 factors (reduced from the 20 it previously assessed) within three categories to make its determination: behavioral, financial, and type of relationship. Businesses should weigh all the factors when determining their status; there is no set number of satisfied or unsatisfied factors that makes a worker an employee or independent contractor.

- ***Behavioral:*** Does the employer have control or have the right to control what the worker does and how the worker performs their job?
 - This category focuses on the type of instructions the employer gives the worker, the evaluation of the work performed, and how much training is received. More detailed instructions on when and how to perform work, evaluations measuring the detail of the work performed, and periodic or ongoing training may be indicative of an employer/employee relationship.
- ***Financial:*** Are the business aspects of the worker's job controlled by the employer?
 - Under this category, the IRS assesses how the worker is paid, whether they are reimbursed for expenses, who provides the equipment, the worker's opportunity for profit or loss, and the method of payment. If the worker is required to bring their own equipment, runs the risk of incurring a loss, and is paid a flat fee for their services, the worker may look more like an independent contractor in this category.
- ***Type of Relationship:*** Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?
 - The focus of this category is on whether there are written contracts, whether the worker is receiving employee-like benefits, the permanency of the relationship, and the services provided. If a worker

receives benefits, plans to work indefinitely, and provides services that are a key aspect of the business, then the relationship may be leaning more towards that of an employer/employee.

As you may notice, regardless of who is asking the question, the inquiry is somewhat similar, and a common thread is: how much control the employer exercises over the worker. The more control the employer has over the manner in which the worker's work is performed, the more likely the worker is to be an employee.

The dangers of misclassification can be grave, ranging from liability for failure to withhold income taxes for employees to lawsuits over failure to pay wages or employee benefits. Recently, the DOL began funding state grants to improve data-sharing between states and the IRS to crack down on misclassification. Classifying employees can be confusing and difficult. If you think your workers may be misclassified or need help classifying them, please do not hesitate to reach out to our firm.



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