

Guideline for Implementation of Executive Order No. 162 Ensuring Pay Equity by State Contractors

Pursuant to section 4 of subdivision B of Governor Andrew Cuomo’s Executive Order No. 162 (“EO 162”), the New York State Department of Economic Development is to provide guidance to contractors subject to the reporting requirements of EO 162. This document shall, among other things, describe the types of contractors that New York State agencies and authorities (“state agencies”) will require to submit workforce compensation data, what information agencies will require contractors to provide, and how contractors are to report to state agencies.

1. Who Must Report

This reporting requirement applies to prime contractors, and any subcontractors to such prime contractors, on state contracts executed on or after June 01, 2017 that require prime contractors and subcontractors to report on the gross wages of employees performing work on the subject state contract. “State contracts,” as defined in Article 15-A of the New York State Executive Law, include all contracts more than \$25,000 for services and commodities, and all contracts more than \$100,000 for construction.

Solely for the purposes of this reporting requirement, “subcontractors” shall include any entity engaged in a contract with a prime contractor to provide services directly to or on behalf of the prime contractor on a state contract.

Solely for the purposes of this reporting requirement, “subcontractors” shall not include any entity providing exclusively goods and transportation directly to or on behalf of the prime contractor on a state contract.

Agencies shall determine, in their discretion, whether requiring contractors to collect workforce compensation data is appropriate depending on the nature of the goods and services to be provided, the extent to which the workforce deployed by contractors is readily identifiable, and other relevant factors.

a. Exempted Contracts

Considering the purpose of EO 162, to collect data related to the equitable payment of New Yorkers deployed by state contractors, certain classes of contractors otherwise meeting the definition of a contractor on a state contract will generally be exempted from this reporting requirement. These include:

- any contractor with employees who exclusively perform work on a state contract outside of New York State;
- any banking or financial institution engaged solely in processing financial transactions;
- any contractor engaged solely in licensing intellectual property to a state agency or authority;
- primary and secondary school systems, and institutions of higher learning;
- American Indian or Alaskan Native tribes;
- any recipient of a grant;
- any agency of the Federal Government of the United States of America;
- any corporation owned by the Federal Government of the United States of America; and

- any contractor organized in a country other than the United States of America.

In addition to contractors, certain classes of contracts are exempt from this reporting requirement. Exempt contracts include contracts:

- for staffing or other personnel of a state agency or authority,
- debt service,
- travel reimbursements,
- utilities,
- OGS chargebacks,
- postage,
- the purchase of telephones,
- staff benefits,
- operating transfers,
- certain rentals and repairs (such as OGS space chargebacks and real estate rentals); and
- special departmental charges (such as unemployment insurance and tuition reimbursement).

Contracts between contractors and the New York State Department of Audit and Control or New York State Department of Law for goods or services required by either the New York State Department of Audit and Control or New York State Department of Law are not subject to the reporting requirement.

2. What to File

Each contractor and subcontractor party to a state contract that requires the completion of a *Workforce Utilization Report* (the “Report”) shall complete such Report as required by the state contract (see example attached).

The Report is to be completed by *both* prime and subcontractors in the manner set forth in the attached *Instructions for Submitting the Workforce Utilization Report*. The Report is to be prepared by all contractors and subcontractors to document their actual employment of minority group members and women during the pay periods covered by the report in substantially the same form as the appended form. The Report has a format similar to forms used by the Federal government (e.g., U.S. Department of Labor) for reporting equal employment opportunity data.

The *prime contractor* shall complete a report for its own workforce and either collect reports completed by each subcontractor or require the submission of such reports by each subcontractor as directed by the applicable state agency.

Prime contractors must submit Reports as directed by state agencies. Prime contractors and subcontractors must not modify the form provided by such state agencies.

3. Compensation Information to be Reported

Contractors and subcontractors are to report the gross wages paid to each of their employees on state contracts for the work performed by such employees on the contracts. Compensation information reported to state agencies should be exclusive to the subject state contract, not compensation paid by contractors to their employees for work outside of the scope of the subject state contract.

For individuals compensated at an hourly rate, the contractor shall report the product of such employees' hourly wage and the number of hours worked on the state contract during the period covered by the Report.

For salaried individuals not compensated on an hourly basis, the contractor shall first determine the average hourly gross wages of such employees by dividing the employees' gross wages by the estimated number of hours worked by such employees during the period covered by the Report. After determining the average hourly gross wages of salaried employees, contractors shall report the product of such employees' average hourly wage and the number of hours worked on the state contract during the period covered by the Report.

When all employees of the contractor perform functions that prevent the contractor from determining the number of hours worked on the state contract, such as call center operators simultaneously providing call center services for multiple clients, the contractor may report the total gross wages of such employees.

When some employees of a contractor perform functions that prevent the contractor from determining the number of hours worked on the state contract, but the contractor can determine the number of hours worked on the state contract by other employees of the contractor, the contractor should report only on the gross wages of the employees whose work on the state contract can be precisely determined and need not report the gross wages of any other employees.

Where required, note that this requirement will not relieve contractors' responsibility to submit payroll certifications as elsewhere provided. If the agency or authority finds that the information provided within the payroll certification is sufficient to fulfill the requirements of the Executive Order, additional information may not be required.

4. When to Report Employee Compensation

Contractors shall provide Reports, as described below, following the execution of a state contract subject to the reporting requirement. Only contracts executed on or after June 01, 2017 shall be subject to the reporting requirement with the first Reports becoming due after **January 1, 2018**. Contractors shall compile all relevant gross wage information for the period beginning January 1, 2018 and ending March 31, 2018 in order to provide the requisite information for the first quarter report

Most state agencies and authorities require that contractors submit Reports within seven (7) to ten (10) days following the end of each monthly or quarterly reporting period. Accordingly, no Reports from contractors shall be due prior to April 7, 2018, which is seven (7) days after the end of the first quarter reporting period. The specific report date will be designated by the relevant contracting agency

or authority. Upon request, agencies and authorities may grant contractors and subcontractors a thirty (30) day extension to provide the first report.

For commodities and services contracts, each contractor must report employee gross wages on the workforce utilization report on a quarterly basis, and ensure that each subcontractor performing work on the contract reports such information on a quarterly basis.

For construction contracts, each contractor must continue to provide workforce utilization reports monthly, and ensure that each subcontractor performing work on the contract reports such information monthly. However, employee gross wages information on the workforce utilization report may be reported quarterly.

When reporting gross wages of employees on state contracts, each contractor and subcontractor is to report gross wages of employees by gender, racial or ethnic group, and job title. By way of example, if a contractor employs two Hispanic-American men as electricians and one Caucasian woman as an insulation worker on a state contract, the contractor should report the combined gross wages of the two Hispanic-American men employed in the same job title as one entry on the workforce utilization report. The contractor should report the gross wages of the Caucasian woman as one entry on the workforce utilization report as she is the only Caucasian woman employed by the contractor on the state contract under the title of insulation worker.

5. How to Report Employee Gross Wages

When the workforce utilized in the performance of the contract can be separated out from the contractor's and/or subcontractor's total workforce, the contractor and/or subcontractor shall submit a Report of the workforce utilized on the contract. When the workforce to be utilized on the contract cannot be separated out from the contractor's and/or subcontractor's total workforce, information on the contractor's and/or subcontractor's total workforce may be included in the Report.

6. How to File

Reports are to be submitted electronically using the provided Report worksheet. Each state agency and authority provides organization-specific instructions for submitting Reports as an appendix to each state contract.

7. Confidentiality

Reports do not require contractors to identify any individual employee by name, number, or other identifier specific to any individual. The state will notify contractors of any Freedom of Information Law (FOIL) requests that are made to obtain any of the data provided on any Report, and will protect the confidentiality of Report data to the maximum extent possible, consistent with FOIL and the trade secrets exemption as set forth pursuant to Public Officers Law Section § 87(2)(d).