

4-1-1966

## Title VII: Reporting and Record Keeping

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### Recommended Citation

Henry G. Pearson, *Title VII: Reporting and Record Keeping*, 7 B.C.L. Rev. 549 (1966), <http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/9>

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# TITLE VII: REPORTING AND RECORD KEEPING

HENRY G. PEARSON\*

The reporting and record keeping provision of Title VII of the Civil Rights Act of 1964, section 709(c), states that every employer, employment agency and labor union subject to the title shall make such reports as the Equal Employment Opportunity Commission shall prescribe and shall make and keep records relevant to determinations of whether unlawful employment practices have been committed. This article will describe the methods the Commission will use to implement these reporting and record keeping provisions as they apply to employers in general.<sup>1</sup> It will also examine the precedents for reporting and record keeping and comment on the benefits that can accrue from them.

## I. REPORTING

Under section 709(c) the Commission requires all employers of 100 or more to complete Form EEO-1, "Employer Information Report," by March 31, 1966. The form will also satisfy the reporting requirements of Plans for Progress and the Office of Federal Contract Compliance and will therefore be issued to most prime contractors and first-tier subcontractors of fifty or more employees. A Joint Reporting Committee representing these three agencies will administer the reporting system.

The statistical information requested by Form EEO-1 is identical to that requested by its predecessor, Form 40, submission of which has been required annually of contractors under Executive Order 10925, issued by President Kennedy in March 1961. Just as Form 40 has been one of the key factors in implementing this order, so it is likely that EEO-1 will be influential in implementing Title VII.

EEO-1 requires each employer covered by the act to take a census of all employees by sex in nine occupational levels:

Officials & Managers	Craftsmen (Skilled)
Professionals	Operatives (Semiskilled)
Technicians	Laborers (Unskilled)
Sales Workers	Service Workers
Office & Clerical	

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<sup>1</sup> At the time this article was written, the EEOC had just released its proposed Form EEO-1 with instructions and held a public hearing. Consequently, further revisions and refinements may have been made to the form and instructions by the time of publication. Because the author's experience is with employers only, and only in the North, no attempt has been made to assess the impact of reporting on employment agencies, unions, or southern employers.

Then, in parallel columns, the employer must disclose the number of minority group members within each level, *i.e.*, Negro, Oriental, American Indian, and Spanish American. A minority group is to be reported only when it is sufficiently large so as to constitute an identifiable factor in the local labor market. An instruction sheet describes the kinds of jobs that fall into each of the nine categories. Maintaining consistency between companies in "slotting" these jobs into the categories is not considered as important as maintaining consistency within the same company in reporting them from one period to the next.

#### A. Census Taking

One way the census may be taken is by head count, usually taken in units small enough that the supervisor or personnel aide actually knows everyone in the unit and can accurately report how many employees are in the unit, what jobs they hold, and how many are in what minority group. Initiates to this process tend to overemphasize the difficulties of making such judgments, but Government Compliance Officers have gradually educated them in the art. Determinations are based primarily on visual inspection. Other aids for identifying a "Spanish American," for example, are language characteristics or Spanish surnames.<sup>2</sup> But eliciting information as to the racial or ethnic identity of an employee by direct inquiry is not encouraged.<sup>3</sup> The person should be included in the minority group to which he appears to belong or is regarded in the community as belonging. After all, it is not what the minority group member says he is, but what the white man thinks he is that is material. If a supervisor thinks one of his employees looks enough like a Negro to be one, then he suffers the Negro's problems and should be so recorded.

Head counts have become fairly well accepted as a method of census taking. Only the person who takes the count knows who is considered black and who white and he keeps that information in his head, merely reporting the number of each by job. This tally is then sent to the central personnel office where the numbers of white and non-white on each job are slotted into the proper occupational levels. Thus, no personal record is ever made, and the information, at least on paper, cannot get into the hands of someone who does not know the people counted. The anonymous head count, moreover, is generally acceptable to civil rights groups which are coming to realize the utility of an annual census, because it facilitates the investigation of complaints by the Government and provides a basis for discussion when a civil rights group itself is negotiating with an employer.

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<sup>2</sup> President's Committee on Equal Employment Opportunity (PCEEO), *Plans for Progress Report with Instructions*, Nov. 1964, p. 1.

<sup>3</sup> EEOC, *Proposed Rule Making*, 30 Fed. Reg. 14660 (1965).

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Larger companies, however, with hundreds of job classifications, even larger numbers of incumbents, and dozens of locations have preferred another method of taking the census, that is, by keeping a permanent set of central records designating the employee's color. The record starts at the time the person is hired when a special card is filled out indicating name, sex, hiring date, job and job level, and a minority group code number. The minority group judgment is made by some person involved in the hiring process, either by first-hand observation or by photograph. EEOC, like its predecessor committee, recommends that this minority group card file be kept in a central location, normally separate from other kinds of personnel records, and not subject to day to day inspection by personnel staff members, supervisors, or those responsible for personnel decisions; *e.g.*, as part of an automatic data processing system in the payroll department.<sup>4</sup> This central file is kept updated to indicate job changes, transfers and terminations. When the annual census is taken, these cards are sorted and counted by hand or machine for sex and occupational level and then combined with a comparable sort and count for all employees in the company. This method produces the same data as the head count—total employees by occupational level and sex, and minority group employees by occupational level and sex.

The advantages of this system are that the color judgments are made consistently and by a minimum number of people. Thus, there is no need at census time to issue or reissue instructions and forms to dozens, maybe hundreds, of supervisors on how to take and report a head count, and maximum confidentiality is maintained. Equally important is the advantage that a central wage administrator or computer takes over responsibility for consistent classification of hundreds of jobs and their incumbents into the nine occupational levels.

Even though large employers use this system only to make reports to the Government and to assess their own progress in employing and upgrading minority group employees, some minority group members still feel uneasy about it. A Negro member of a state fair employment practices commission, who fully understood the purpose of record keeping, said that he nevertheless disliked the idea that if he worked for such a company his color would somewhere be designated against his name. This attitude is understandable. After all, for the last twenty years in which civil rights groups have fought for fair employment practice laws they have successfully sought to bar all forms of pre-employment record keeping, such as oral and written inquiries about color, race, place of birth, or ethnic social affiliations. Even the space for a maiden name was ruled off the application blank as being a superfluous ques-

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<sup>4</sup> *Id.* at 14661.

tion prying into national origin. The photograph, its name derived from the Greek words for "light" and "write," was likewise defined as a prejudicial "light record," and banned. As employers in states with FEP laws learned to live with these rules, they became accustomed not to discuss these matters, at least overtly, and officially assumed a "see-nothing, know-nothing" attitude about the racial identity of both applicants and employees.

B. *Impact of Executive Order No. 10925 Reporting*

It was this posture, quite understandable and quite correct, which in 1961 the reporting requirement of Executive Order 10925 shattered. This order was for many managements the turning point away from utter ignorance to acute awareness of the Negro's problem. When the President of the United States instructed federal contractors that it was lawful and desirable to find out how many Negroes they employed and at what levels, the taboo against talking about and counting color started to disappear. Employers were assured, moreover, that enforcement authorities in all states and localities with anti-discrimination laws had advised that their laws did not preclude employers from gathering such information subsequent to employment for the purpose of government surveys.<sup>5</sup>

Now for the first time managements saw statistical reports that showed them exactly how many Negroes worked for them, in what jobs and in what locations. If they reacted as I did when I first saw the data, they must have been shocked to see the overwhelming clustering of Negroes in the semiskilled and unskilled entry jobs. Now they could begin to use data to correct racial imbalances just as they use statistics to catch and remedy such conditions as high frequency of accidents, low quality yields, low output, high costs, or slithering sales. Reluctant though they were to let the Government gain another foothold in their territory, they had to admit that this was the businesslike way to approach the problem. The reporting tool thus became one of the principal factors in awakening managements to the minority group cause. A representative of the Urban League, at a hearing before EEOC Chairman Franklin D. Roosevelt, Jr. and the Commission, described the report form as a vital educational device. It is not surprising that EEOC is making use of it, and plans to issue some 60,000 forms to employers covered by the title.

Reports previously filed under Executive Order 10925 have had some practical uses for the President's Committee on Equal Employment Opportunity (PCEEO) which enforced it. A Compliance Officer could quickly appraise an annual report and determine what progress

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<sup>5</sup> PCEEO, Form 40 (Rev. Feb. 1964) Compliance Report, Instructions ¶ 3(c).

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his contractor had made in hiring from any minority group which constituted an identifiable factor in the local labor market. He could see whether the employer was working toward a better distribution of members of these groups through all nine occupational levels. For example, he could instantly spot whether the familiar clustering of Negroes in "Service" jobs, such as janitors, had been altered by an increasing percentage in Sales, Clerical and Professional. An employer might have made considerable progress by hiring Negroes in at the bottom, but have relaxed his efforts by failure to upgrade them. With facts in hand, the Compliance Officer was in a position to ask, "What have you done lately?" and management might to its surprise have found that while many Negroes were employed, few were in white collar or managerial positions.<sup>6</sup> It seems probable that an EEOC investigator armed with the report will likewise find it useful in conducting his investigation.

Federal and state FEP officials have also found color statistics useful when raw facts are needed to answer the charges of civil rights groups or individuals. A woman reported to the Springfield office of the Massachusetts Commission Against Discrimination that a large firm in Western Massachusetts employed no Negroes. The investigator assigned to the complaint was sure that the woman was wrong and that, even though the firm was in a city with less than 0.2% Negro population, some Negroes were employed. He visited the personnel manager who produced a Form 40 showing that they employed fourteen Negroes in jobs ranging from Technician to Unskilled. The investigator was thus able to assure the woman that her statement was erroneous.

Another significant result of reporting has been the consolidation of data indicating what overall progress is being made by government contractors in hiring and upgrading minority group members. The statistics were usually released by PCEEO showing two measures of progress. First, the number of Negroes were shown as a per cent of all persons employed, indicating the utilization of the Negro. Second, the actual gains in Negro employment were compared to changes in overall employment.

These data, however, have presented a basic statistical problem right from the start. They cannot be counted on to reflect accurately the overall changes in minority group employment within each occupational level because of the lack of uniformity among employers in interpreting the differences between the Skilled, Semiskilled, and Unskilled categories. Even within a single category are jobs with widely varying training qualifications. For example, within the category, Operatives (Semiskilled), which calls for jobs that can be mastered in a

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<sup>6</sup> McKersie, Comments on Equal Employment Opportunities: Problems and Prospects, 16 Lab. L.J. 471 (1965).

few weeks and require only limited training, are included jobs demanding such disparate training periods as dressmaker and parking attendant.

Now it is possible for a single company, within its own job description structure, to maintain consistency from one report to the next in classifying these jobs in the same level. But it is difficult for a Compliance Officer to maintain consistency among the firms that he services. He does not have the advantage of the Bureau of Labor Statistics wage surveyist who makes sure that each company he visits is reporting wages on the identically same job, as, for example, insuring that "Machinist B" means the same in each company. Instead, the compliance officer must generally accept what the employer submits and hope for the best, because if the classification is incorrect and is changed in the next report, statistical havoc can be wrought. One Compliance Officer decided that a group of mounters in a large semiconductor plant was incorrectly reported in 1963 as Operatives (Semiskilled). He asked the company to upgrade the job to Craftsman (Skilled) in the 1964 report. The incumbents consisted mostly of women with an unusually high per cent of Negroes. Thus the 1964 report quite unintentionally gave the impression that the company had upgraded a large number of Negroes from factory operatives to skilled craftsmen, when in fact this group of Negro women had remained on the same job all the time.

This reclassification illustrates another problem with the data. One occupational level, Craftsmen (Skilled), has had to cover a much broader range of jobs than anticipated. This category originally included machinists, electricians, engravers, typesetters and other trades that require an extensive period of training. In the rubber industry, however, the job of tire maker does not require long training, but pays in the \$3 to \$4 range and is considered by the industry to be in the "Skilled" category. Likewise, in the electronics industry, there are mounters and inspectors whose training may approximate six months on the job, but who are also rated as "Skilled."

The PCEEO has been conservative in releasing data about progress made between these occupational levels. Instead, it has focused on progress in the White Collar jobs as a group (Officials, Professionals, Technicians, Sales Workers, Office & Clerical), as contrasted with the Blue Collar jobs (Craftsmen, Operatives, Laborers, Service Workers). The most recent data shows that the per cent of Negro employees is increasing. In 4,455 identical units employing a total of 2,760,000 employees and filing reports in 1963 and 1964, Negroes increased their proportions as follows:<sup>7</sup>

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<sup>7</sup> Office of Federal Contract Compliance, Department of Labor, Total Employment and Negro Employment in 4455 Units which Filed Compliance Reports in both 1963 and 1964 (unpublished data released Nov. 5, 1965).

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	1963	1964
	%	%
Total employment	6.9	7.1
White Collar	1.6	1.8
Blue Collar	10.2	10.5

This confirmed a trend reported between 1962 and 1963 in 4,610 identical reporting units:<sup>8</sup>

	1962	1963
	%	%
Total employment	6.4	6.5
White Collar	1.2	1.3
Blue Collar	9.7	9.8

C. *Reporting under Plans for Progress*

Reporting has also been adopted by Plans for Progress, a group of nation-wide corporations, including contractors and non-contractors, who accepted the invitation of PCEEEO to pledge themselves voluntarily to non-discrimination and affirmative action in recruiting, hiring, training and promoting. As of mid-1965, there were 308 Plans for Progress (P for P) employers employing 8,600,000 and filing a brief version of Form 40.

The most recent P for P report, released by Vice President Humphrey in June 1965, shows the gains made between 1963 and 1964 by the first 100 companies to join, which employed four million persons in 5,000 installations.<sup>9</sup> The trend in this period parallels that of the 4,455 units noted above, some of which are included in the first P for P group:<sup>10</sup>

	1963	1964
	%	%
Total employment	5.9	6.5
White Collar	2.1	2.5
Blue Collar	9.2	10.0

The report also showed that whereas total employment gained only + 3.0%, non-white employment gained + 14.5%. More impressive is

<sup>8</sup> Marshall, *Equal Employment Opportunities: Problems and Prospects*, 16 Lab. L.J. 456 (1965).

<sup>9</sup> PCEEEO Press Release, June 11, 1965.

<sup>10</sup> A direct comparison of the non-white percentages is not quite valid because PCEEEO reported only Negroes while Plans for Progress reports Negroes, Indians and Orientals.



the comparison in white collar employment, which overall gained only + 0.9%, while Negro white collar gained + 16.2%.

As the P for P sample becomes larger, and more service employers like banks, retailers, insurance firms, universities and hotel chains are added, the reports will reveal an inherent weakness. The nine occupational levels were designed for industrial firms. They are not directed toward making an analysis or reporting the complexion of a work force which is largely white collar and which therefore has various levels of sales personnel (like a department store) or office personnel (like an insurance firm). Such employers must lump together these various levels under "Sales Workers" or "Office & Clerical."<sup>11</sup> EEOC will be faced with the same problem unless it eventually undertakes to devise a new reporting form that adds more levels to Sales Workers and Office & Clerical.

#### D. *Reporting under Voluntary Plans*

The effectiveness of reporting has resulted in its adoption by three voluntary plans in Massachusetts, Rhode Island, and Chicago. Participants in the Massachusetts Plan for Equal Employment Opportunity, launched by former Governor Endicott Peabody and continued under Governor John A. Volpe, are required to report the same information as is contained in Form 40. It is filed with the employer association under whose sponsorship the firm entered the plan, these being the Associated Industries of Massachusetts, the Greater Boston and the Cambridge Chambers of Commerce, and the Joint Civic Agencies of Greater Springfield.

The first progress report for the Massachusetts plan contained data filed in 1964 and 1965 by twenty industrial and research establishments employing 100,000 persons, about equally divided between white collar and blue collar. It showed that in a period of overall declining employment (-4.7%) these companies were able to maintain Negro employment almost unchanged (-0.3%). The breakdown between white collar and blue collar jobs showed how this came about: total white collar employment decreased -4.5%, but Negro white collar increased + 29.0%.<sup>12</sup> These data had special value in helping the Negro community and civil rights groups to understand that although manufacturing employment was on the decline in 1964, employers were compensating for these losses to Negroes of blue collar jobs by hiring them in white collar jobs.

Another significant fact was revealed by the distribution of "All Employees" and of "Negro Employees" throughout the nine occupa-

<sup>11</sup> Letter from Charles D. Redding, Oct. 4, 1965.

<sup>12</sup> Associated Industries of Massachusetts, Massachusetts Plan for Equal Employment Opportunity: A Report, Industry, Aug. 1965, p. 16.

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tional levels. As would be expected, wide disparities showed up. For example, 17% of All Employees are Office & Clerical but only 6% of Negroes are; 14% of All Employees are Craftsmen but only 8% of Negroes are; 20% of All Employees are Professionals but only 7% of Negroes are. However, in one category, Technicians, the Negro distribution is almost in line: 8.4% of All Employees are Technicians and 7.4% of Negroes are.<sup>13</sup> The reason for this similarity in distribution may be that Technician jobs do not have excessive educational requirements, and promotion from blue collar jobs into the Technician's field is feasible. This trend confirms the impressions of one researcher who believes that the most effective measures to improve Negroes' job patterns lie partly in giving reassurance and support to workers in the buffer zone between technical and professional jobs where there is constantly increasing demand.<sup>14</sup>

### *E. Objections to Reporting*

Ever since reporting was initiated under Executive Order 10925, there have been objections. One objection has been that by counting non-whites and reporting their numbers, emphasis is laid upon the very distinction which it is the aim to eradicate. But with the distribution of Form EEO-1, an entirely new objection—a legal one—is being raised. Section 709(c), which authorizes the Commission to request reports and records, is restricted by section 709(d), which says that section 709(c) does not apply to an employer "with respect to matters occurring in any State" with a Fair Employment Practice (FEP) law. Some feel that EEOC is thus exceeding the intent of Congress and question the statutory basis for imposing this requirement in FEP states. The Commission has met this objection head on by including in Section I of Form EEO-1 Instructions a warning that the existence of a State or local FEP law does not exempt an employer from reporting unless he has filed such a report or a substantially similar report with the State or local FEP agency.

At a hearing on Form EEO-1 in Washington in December 1965, a member of the California FEP Commission, Dwight Zook, stated that if California passed a law requiring employers of over 250 persons to submit racial count reports, he expected that EEOC would cede jurisdiction on this matter to California. A member of the EEOC staff present concurred and said that EEOC would probably accept California's reports if they were substantially the same. Off the record a member of the staff explained that the Commission's right to request

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<sup>13</sup> Associated Industries of Massachusetts, Massachusetts Plan for Equal Employment Opportunity, First Progress Report of 16 Companies, Jan.-July 1964 (unpublished report at Associated Industries of Massachusetts, Boston, Mass.).

<sup>14</sup> Marshall, *supra* note 8, at 467.

reports from states with FEP laws rests primarily on the premise that under 709(d) report gathering could be one of the "matters occurring in any State" with an FEP law. If this activity is *not* being conducted by the state FEP agency, then section 709(c) allows EEOC to preempt the field. It would appear, however, that EEOC's legal grounds are not too firm, and that it might have to seek clarifying amendments to sections 709(c) and (d) to assure its authority.

## II. RECORD KEEPING PROPOSAL

The Commission has thus continued and extended reporting to 60,000 employers but has not, however, invoked section 709(c) to require employers in general to keep records. At the White House Conference on Equal Employment Opportunity in August 1965, the EEOC staff had originally proposed that in order to facilitate investigations of complaints and compilation of reports, employers should keep records of race, sex and source of referral, but only subsequent to hiring. These would be obtained by observation and would not be available to those responsible for personnel decisions.<sup>15</sup> This recommendation was based on the technique developed by PCEEO for government contractors, who were allowed to index racial identity "in post-employment files separate and apart from active personnel folders or records to avoid misuse."<sup>16</sup>

This proposal was opposed by some representatives of civil rights groups on several grounds: records might fall into the hands of those who are disposed to discriminate at times of transfer and promotion; keeping them might be in conflict with state laws; investigators do not need records to establish the validity of a complaint; and, as mentioned previously, the federal government should not sanction a practice which minority groups have fought for years. Employer representatives present objected on the grounds of public intervention in private employment and warned of the difficulties of administering and enforcing a uniform system of record keeping in 60,000 firms, each with its own particular system of personnel records.

Those supporting the staff's proposal argued that taking a census by head count is inaccurate and expensive, whereas a record provides a more factual basis for reporting. It was pointed out that the keeping of a record per se is not discriminatory. This can only be determined by the purpose for which it is kept. Moreover, those who really want to discriminate will do so regardless of the record.<sup>17</sup>

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<sup>15</sup> Workshop Report—Panel No. 4, Subject: Record Keeping and Reporting Requirements, 59 Lab. Rel. Rep. 335 (Aug. 30, 1965).

<sup>16</sup> PCEEO, Affirmative Action Commitment under Executive Orders 10925 and 11114, Jan. 1964, p. 2.

<sup>17</sup> Workshop Report, *supra* note 15, at 335-36.

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Probably because of the objections and the expense and burden of attempting to push employers into a government record keeping procedure, the Commission reconsidered the original proposal and made record keeping permissive rather than mandatory. Consequently, it has not adopted any requirement generally applicable to employers, except that they may keep post-employment records if permitted by state law. Concerning their location, the Commission "recommends the maintenance of a permanent record . . . for the purpose of completing the report form only where the employer keeps such records separately from the employee's basic personnel form. . . ."<sup>18</sup> Unofficially, members of the staff have made it clear that the Commission is not likely to get involved in where or how the records are kept. For instance, no objection will generally be made to a company's use of photographs that are attached to personnel or security records.

By year's end when the Commission held a public hearing, much of the dispute over Form EEO-1 appeared to have subsided. A representative of the Urban League endorsed the reporting concept, and a representative of the Student Nonviolent Coordinating Committee urged that record keeping be made mandatory. No one from CORE or NAACP at a national level appeared, and both organizations at local levels, *e.g.*, Massachusetts, have endorsed record keeping for statistical purposes. The United States Chamber of Commerce, Illinois State Chamber of Commerce, and a scattering of firms registered disapproval of reports being required in states with FEP laws, but three chambers of commerce in Massachusetts and the Associated Industries of Massachusetts were registered as sponsoring the statewide affirmative action program mentioned previously that requires reports from its members. Almost a dozen large Plans for Progress firms also registered approval. Overall, it would appear that the groundwork has been laid for achieving a good measure of acceptance of EEO-1 when it is distributed in 1966. However, it is difficult to predict its impact on the thousands of small employers who have never heard of the form and will be confronted with it for the first time.

One of the most fortuitous results of reporting under Executive Order 10925 is that a precedent has already been established for reporting occupational levels not only by color but also by sex, and four years of data yielding patterns in employment of women in the nine occupational groups has been collected. This data clearly shows the clustering of female employees in the lower-rated blue collar levels, *i.e.*, Operatives (Semiskilled), and Laborers (Unskilled). By extending its own EEO-1 to 60,000 employers, the Commission will be able to collect more invaluable information about these patterns for all types

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<sup>18</sup> EEOC, *supra* note 3, at 14661.

of industry and quickly begin to educate employers about the inequities that exist in the employment of women.

### III. CONCLUSION

The decision of EEOC to require reports from all covered employers represents a significant step not only in enforcing equal employment opportunity among firms that are discriminating, but also in requiring all employers to analyze their work forces by color and sex and to examine the startling contrasts between the way whites and non-whites, males and females, are distributed through the organization. Merely as a device for self-analysis, Form EEO-1 will pay off. But it will also serve to stimulate the sympathetic employer to action because, although the report by itself may not constitute evidence of discrimination, it does measure from year to year what success he is achieving in improving the employment status of females and minority group members in all levels and occupations. Moreover, when the resulting information is compiled, coded, punched and sorted by sex, minority group, occupational level, plant location, employer, industry, city, state and region, it will yield massive data as to where patterns of discrimination lie and where progress is being made to correct them. Eventually, it will constitute a mighty annual census on sex, color and occupation in a nationwide labor market—but a census which can be used to improve the very conditions it reports. Finally, this information can prove crucial in assessing the effectiveness of Title VII of the Civil Rights Act of 1964.