

## EO 162 Comments and Responses

1. The reporting cycle for compensation data under EO 162 is too frequent. NYS should require reports on an annual basis.

*Collecting data on an annual basis would result in the loss of significant data due to the expiration of the term of state contracts prior to the annual reporting date and the inability to account for changes in staffing during the course of a project. Moreover, EO 162 requires contractors to submit data on compensation in conjunction with existing workforce reporting requirements. EO 162 merely requires providing additional salary information with reports that thousands of contractors are already completing and required to provide in current state contracts subject to the requirements of Executive Law Article 15-A.*

2. Prime contractors should not be responsible for ensuring that subcontractors complete workforce utilization reports.

*Prime contractors are required to ensure that subcontractors, with whom they have contractual privity, submit workforce utilization reports pursuant to preexisting regulatory requirements. EO 162 does not create a new obligation on the part of prime contractors with respect to ensuring the compliance of subcontractors, but rather expands on an existing obligation.*

3. Tracking the hours worked by salaried employees on state contracts is particularly burdensome for contractors.

*This data is already required under the existing workforce utilization reporting requirements, and is essential for NYS to compare compensation paid to such individuals. Without data on the hours worked by salaried employees, it would be impossible for NYS to meaningfully compare compensation for these individuals across employers and industries.*

4. EO 162 does not control for employees' experience and credentials, project timelines, and other non-discriminatory variables that affect employee compensation. Therefore, the data will result in the unfair labeling of some contractors as discriminatory based on comparisons to other contractors in different situations.

*EO 162 will not provide NYS with information sufficient to determine whether any particular contractor has acted in a discriminatory manner on any particular contract. By aggregating data from thousands of contracts, NYS intends to investigate whether there are generalizable trends in employee compensation based on race, ethnicity, or gender. This data will guide future study of pay disparity.*

5. This effort is redundant with the federal EEO-1 data collection effort scheduled to begin in 2018.

*The proposed EEO-1 form provides only ten categories into which contractors are to classify all of their employees, measures the number of employees that fall into broad pay bands rather than actual compensation data, and requests total annual compensation rather than compensation connected with government work. NYS believes that EO 162 will yield more instructive data*

*than the general data that the EEO-1 form might produce if it is, in fact, implemented in 2018 as the collection of the federal EEO data has been suspended.*

6. EO 162 will place confidential employee compensation data at risk of disclosure.

*Agencies and public authorities have significant power to withhold confidential compensation data pursuant to § 87(2)(d) of the Public Officers Law. Furthermore, data reported by contractors pursuant to EO 162 represents only compensation that must be reported in Box 1 of IRS Form W2 during the reporting period for work performed on a state contract and is not a complete accounting of an employer's compensation structure.*

7. New York State should adopt different categories for identifying the race and ethnicity of employees.

*The racial and ethnic groups set forth in reports collected pursuant to EO 162 are those defined in § 310(8) of the Executive Law.*

8. New York State should exempt specific transactions in which my organization engages from reporting under EO 162.

*NYS cannot exhaustively list each type of transaction which is and is not subject to reporting under EO 162. The EO 162 implementation guidance provides state agencies with instruction on when to collect reports under EO 162. Contractors should refer to the terms of state contracts to determine whether any particular engagement is subject to reporting under EO 162.*

9. Employees who perform work on a state contract from both within the state of New York and from other states should not be included in reports.

*Omitting individuals who perform work remotely from nearby states would significantly reduce the volume of information collected through this initiative, particularly among classes of employers who provide specialized professional consulting services. Accordingly, the proposed change will not be reflected in the final guidelines.*

10. Financial institutions should receive broader exemptions from EO 162.

*The EO 162 implementation guidance is intended to provide generally applicable information, including classes of activity that categorically do not involve a specific workforce performing tasks exclusively in furtherance of state contracts. While state contracts involving only the processing of financial transactions are excluded under the EO 162 implementation guidance, state agencies may encounter other types of activity that do not involve a specific workforce performing tasks exclusively in furtherance of state contracts and exclude such contracts accordingly.*

11. NYS should collect gross wage data rather than compensation that must be included in Box 1 of an IRS Form W2?

*The State will be collecting gross wage data which are reported by employers to employees on their wage statements and as defined more specifically by 20 NYCRR §2380.4 and typically include every form of compensation for employment paid by an employer to his, her or its employees, whether paid directly or indirectly by the employer, including salaries, commissions, bonuses, tips and the reasonable value of board, rent, housing, lodging or similar advantage received.*

## **EO 162 Questions and Responses**

1. Will SOC Job Titles reflect apprentices for construction trades?

*No, the SOC Codes do not establish codes specifically for apprentices.*

2. What does it mean to perform work “directly” on a state contract?

*Employees performing work directly on a state contract are those who perform one or more tasks for the exclusive purpose of satisfying their employer’s obligations under a state contract.*

3. What is a grant, and are grants subject to reporting under EO 162?

*Agencies are responsible for identifying the nature of their awards and the applicability of EO 162.*

4. How does the geographic location of the workforce used to perform work on a state contract affect reporting obligations?

*Only employees physically performing some or all of their work on a state contract in the state of New York must be included in reports. Contractors should omit any employees performing work entirely outside of the state of New York from their reports.*

5. What if a supplier of goods provides minor services in connection with supplying goods to a prime contractor on a state contract?

*If the employee(s) of the subcontractor providing the services can be identified, then the employee(s) should be included in the subcontractor’s report.*

6. I employ project managers, safety compliance personnel, and other individuals who perform work on two or more projects during each day, not all of which are state contracts. Must I include these individuals in my workforce utilization report?

*Yes. Any individual who performs “one or more tasks” on a state contract must be included in a report, even if working on a state contract is not the only task the employee performs on any given day. Prime and subcontractors should omit employees performing work on a state contract only in cases where it is impossible to reasonably estimate the number of hours worked on the state contract (e.g., back office staff, call center staff, etc.).*

7. I am a prime contractor. What if I refuse to comply with the reporting obligations set forth in EO 162?

*A state agency may determine that you have breached a state contract. The remedy for a breach of contract is set forth in the terms of each individual contract.*

8. I employ four employees performing work on a state contract. I can identify the number of hours work by three of the employees on the state contract, but the fourth employee is a secretary who performs general support functions for all of my projects. Do I need to complete a report?

*Yes, you should complete a report for the three individuals whose work on the state contract can reasonably be identified, but not for the secretary who does not perform identifiable work for the exclusive purpose of satisfying your obligations under the state contract.*

9. Are financial institutions assigned a contractor's rights under a state contract required to ensure submissions of reports pursuant to EO 162?

*No. Only a signatory to a prime contract and its subcontractors are obliged to ensure the submission of reports.*

10. What is a state contract?

*A state contract is defined in § 310(13) of the Executive Law. All state contracts defined as such in the Executive Law are state contracts for the purpose of EO 162 except as otherwise specified in the EO 162 implementation guidance and herein. The specific language is as follows:*

*"State contract" shall mean: (a) a written agreement or purchase order instrument, providing for a total expenditure in excess of twenty-five thousand dollars, whereby a contracting agency is committed to expend or does expend funds in return for labor, services including but not limited to legal, financial and other professional services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; (b) a written agreement in excess of one hundred thousand dollars whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; and (c) a written agreement in excess of one hundred thousand dollars whereby the owner of a state assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project.*

11. What is a subcontract?

*A subcontract defined in § 310(14) of the Executive Law. The specific language is as follows:*

*"Subcontract" shall mean an agreement providing for a total expenditure in excess of twenty-five thousand dollars for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon between a contractor and any*

*individual or business enterprise, including a sole proprietorship, partnership, corporation, or not-for-profit corporation, in which a portion of a contractor's obligation under a state contract is undertaken or assumed, but shall not include any construction, demolition, replacement, major repair, renovation, planning or design of real property or improvements thereon for the beneficial use of the contractor.*

12. How will the EO 162 reporting requirements affect medical practitioners who are reimbursed for services by Medicaid managed care plans?

*Contractors should consult each state contract for the applicability of EO 162 reporting requirements. In most cases, medical practitioners will not constitute an identifiable workforce performing tasks exclusively in furtherance of state contracts, and therefore will not be obliged to complete EO 162 reports. Furthermore, insurance contracts themselves do not call for an identifiable workforce performing a scope of work distinguishable from other work of the insurers. Therefore, we do not anticipate we will collect EO 162 data concerning the workforce deployed by insurers on the NYSHIP and Medicaid contracts.*