

*Happy Holidays* FROM THE VAB STAFF

## Legal Memorandum

**ONE WEEK Countdown: December 24**

### Deadline for “First Wave” Radio Stations to Upload Pre-June 24 Public Inspection File Materials

On June 24, 2016, the FCC launched its new online public inspection file (“OPIF”) database system, and certain radio stations were required to begin using it to upload newly-created public inspection file records. This memorandum is a reminder that radio stations who began using the OPIF on June 24 will be required to finish uploading pre-June 24, 2016, public file records by December 24, 2016. Given that the deadline for uploading pre-June 24 public file records to the OPIF is December 24, time is running out to accomplish this significant requirement. This memorandum is not intended to provide a complete review of the OPIF or an exhaustive discussion of the contents of radio public inspection files, and we have previously distributed a public inspection file “checklist” for radio stations.

### Definitions for Purposes of this Memorandum.

This memorandum uses the terms “First Wave Stations” and “Second Wave Stations” for convenience. These are not terms that are defined by the FCC; they are a shorthand way to discuss the online public file implementation dates and obligations for radio stations. “First Wave Stations” refers only to commercial AM and FM radio stations in the top 50 Nielsen Audio markets with 5 or more full-time employees. “Second Wave Stations” refers to all other AM and FM radio stations. FM translator stations, LPFMs (i.e., Low Power FM Stations), and FM booster stations do not have public inspection file requirements and are not subject to the FCC’s online public file requirements.

### Staggered Implementation Dates.

The June 24, 2016, and December 24, 2016, OPIF deadlines apply only to commercial radio stations in the top 50 Nielsen Audio markets with 5 or more full-time employees (“First Wave Stations”). As noted above, June 24, 2016, was the date that First Wave Stations were required to begin using the OPIF, at which time such stations were required to begin uploading newly-created public file documents into the OPIF. Public file documents that existed in a First Wave Station’s public inspection file as of June 23 were not required to be uploaded by June 24; those documents are subject to the December 24 upload deadline and, thus, must be uploaded to the OPIF no later than December 24, 2016.

Subsequently, by March 1, 2018, all other radio stations (“Second Wave Stations”) will be required to have their then-existing public file materials uploaded to the OPIF and to begin using the OPIF on a going-forward basis. (In addition, Second Wave Stations are allowed to begin voluntarily using the OPIF at any time prior to March 1, 2018, but if they do so, they must transition completely to the OPIF—more information about this option is below.)

### Beat the December 24 Deadline!

First Wave Stations need to upload their pre-June 24 public file documents now! The key, of course, will be to be sure that your existing public file is complete so that when you upload the pre-June 24 materials in time to meet the December 24 deadline, there are no “holes” or “gaps” that can cause compliance issues for the world to see.

### Political Files: Only Newly-Created Political File Records Need to Be Uploaded.

With respect to political file materials, radio stations are required to upload only newly-

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## Upcoming Events:

VAB/NAB State Leadership  
Conference  
February 27 - March 1, 2017  
Washington, DC

VAB Best of the Best  
Session #3  
April 27-28, 2017  
Omni Hotel  
Charlottesville, VA

VAB 80th Annual Summer  
Convention  
June 22-24, 2017  
Hilton Oceanfront  
Virginia Beach, VA

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created political file records (but may upload pre-June 24 political file records if they wish to do so).

Thus, First Wave Stations have been required to upload to the OPIF political file records created after June 23, 2016. With respect to pre-June 24 political file records, First Wave Stations have two options: (i) First Wave Stations must continue to maintain and make pre-June 24 political file records available for public inspection at the main studio until they have “timed out” by the lapse of two years’ time, or (ii) First Wave Stations may, if they wish, upload pre-June 24 political file records to the OPIF.

### Pre-June 24 Political File Records Will Never Be Required to Be Uploaded (But May Be Uploaded Voluntarily at the Station's Option).

As noted above, radio stations will never be required to upload political file records that were already in existence as of the day prior to the date the station commenced use of the OPIF, but the FCC’s rules allow each station to decide whether they would like to voluntarily upload such political file records.

### The Special Case of Second Wave Stations Electing to Begin Use of the OPIF Prior to March 1, 2018.

As noted above, Second Wave Stations are allowed to begin using the OPIF prior to the March 1, 2018, deadline. Such stations may choose any date they wish to begin using the OPIF, and when they make the choice, they must transition completely to the OPIF at that time. Thus, for a Second Wave Station that wishes to transition to the OPIF on the same schedule as First Wave Stations, the June 24 and December 24 deadlines discussed above would apply. For a Second Wave Station that opts to transition to the OPIF on a different date—for example January 1, 2017—the station would need to have its then-existing public file documents (except for then-existing political file records) uploaded to the OPIF by January 1, 2017, and would be required to begin, as of January 1, 2017, uploading all public file materials created on and after January 1, 2017 (including newly-created political file records). Any Second Wave Station that is considering transitioning “early” to the OPIF would be well-advised to consult with legal counsel prior to making the transition.

### After Uploading Pre-June 24 Public File Materials, Radio Stations Must Certify That

### They Have Done So.

First Wave Radio stations are required—at the appropriate time—to complete a certification indicating that they have uploaded all pre-June 24 public file materials. (Second Wave Radio stations are subject to the same requirement.) This certification should be made only after a station has uploaded all required public file materials that existed in the station’s public file prior to June 24, 2016. Because the deadline for First Wave Stations to upload such existing material one short week from now—December 24, 2016—many First Wave Stations have not yet completed this certification.

After a radio station has uploaded its pre-June 24 public file materials to the OPIF, it will be ready to make the certification. To access, review, and complete the certification, click on “settings” in your online public file (as shown below) and then select “certification” from the selections shown below.

The certification that will appear when you click on “certification” will resemble the image below:

The “certification” option will appear on the “settings” bar only after you have toggled the public view of your online public file from “OFF” to “ON.” Thus, it is important to remember that this certification is a separate, additional process from turning on the station’s file for public view, which, of course, all First Wave Stations should have done on June 24, 2016. ***Because this certification is an affirmative representation being made by the station to the FCC, stations may wish to consult with their FCC counsel to ensure their files are complete prior to submitting the certification.***

### Best Wishes!

The time is nigh. Seven short days stand between your station and the compliance deadline. Happy holidays—from the FCC to you!

### TWO WEEK COUNTDOWN REMINDER: Montages of “Straight Lift” Video Clips Must Be Closed Captioned Online as of January 1, 2017

As of January 1, 2017, so-called montages of “Straight Lift” video clips must be captioned on the web in accordance with the FCC’s closed captioning requirements. (Closed captioning of individual straight lift video clips has been

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required since January 1, 2016.) As we previously reported, the FCC released an Order in July 2014, requiring, on a staggered compliance basis, the closed captioning of IP-delivered video clips if those clips first appear on the television platform with closed captions. These requirements are consistent with the FCC's ongoing policy goals to assist people with disabilities in gaining the full benefits of online video programming.

### **Straight Lift Clip Montages.**

The upcoming January 1, 2017, deadline is specific to montages of Straight Lift video clips, i.e., aggregations of multiple video clips which contain excerpts of programming that aired on television with closed captioning with the same video and audio and are subsequently posted by the station on the web. (The rule applies only to video clips published or exhibited on television in the United States with captioning.)

### **Does the Length of the Clip Matter?**

These closed captioning requirements apply regardless of the length or content of the video clip and, additionally, even in instances where a brief introduction or advertisement to an otherwise covered video clip is included with the video clip—in other words, the addition of an introduction or advertisement does not fundamentally change the clip in a way that would exempt the clip, itself, from closed captioning in the web environment if it was captioned on the television platform.

### **On January 1, 2017, Will the Clip Montage Closed Captioning Requirements Apply in All Cases?**

No. These website closed captioning requirements will not apply to montages of the following clips:

- Video clips of video programming that was not shown on television with captions.
- Video clips posted online which contain an audio track that is substantially different from the audio track that aired on television.
- Video clips provided by third party video programmers and distributors, such as Hulu and other services, that may embed or host video programming on entertainment or news websites.

(The FCC currently has an open proceeding on this issue, and such programming may, in the future, become subject to the web closed captioning rules.)

### **Quality and Technical Requirements.**

The quality and technical standards required by the web closed captioning rules for full-length programming also apply to video clips. In other words, video programming owners must provide captions of at least the same quality as the televised captions for the same programming, and video programming distributors and providers must maintain the quality of captions provided by the video programming owner. So long as the same caption file accompanies the clips on the web as were associated with the programming when it aired on television, the requirements will be met. (In adopting the new rule, the FCC noted that if the video clip has to be recaptioned, de minimis differences will be permitted.) Furthermore, in order to be in compliance with existing rules, the video clips must also include the same consumer tools or "technical capabilities" (e.g., the ability to change caption font, size and color) as the captioned video programming clips.

### ***One Year Countdown: ELDs Required in Certain Satellite Trucks By December 18, 2017***

A new regulation from the U.S. DOT will require certain commercial motor vehicles to install and begin using—by December 18, 2017—ELDs (electronic logging devices). A year from now, vehicles used in interstate commerce that have a GVWR (Gross Vehicle Weight Rating) of more than 10,000 pounds must have ELDs (electronic logging devices) installed and in use. ELDs are intended to replace paper logging of hours of service records. Many broadcasters use satellite newsgathering trucks that fit this description and will become subject to the ELD requirement, unless a vehicle meets one of the exceptions to the requirement.

Among the exceptions to the new rule are (i) vehicles manufactured prior to 2000; (ii) the so-called "short haul" exception, which applies to drivers that do not drive beyond a 100-mile radius from the station; and (iii) the so-called 8/30 exception, which allows drivers to use paper logs if they do not drive

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the vehicle more than 8 days during a 30-day period. Whether or to what extent those exceptions might apply to any broadcaster's particular operations is something that should be examined with care before "assuming" that an exception does or does not apply.

ELDs are designed and certified to meet certain technical requirements to comply with the U.S. DOT's rules, and proper use of a certified ELD and maintenance of required records will put stations in straightforward compliance with the requirements. The good news is that the deadline is still a year off, and the U.S. DOT's FMCSA (Federal Motor Carrier Safety Administration) maintains a list on its website of certified ELDs with vendor names and contact info (here is the link: <https://3pdp.fmcsa.dot.gov/ELD/ELDLList.aspx>). Moreover, the U.S. DOT has estimated annualized costs of ELD compliance at a range of \$525-\$785 per vehicle and ELD unit costs (i.e., the initial cost of a new ELD device) at a range of \$0 - \$1,675 per unit (the \$0 figure is not a typo; it is apparently a model where the vendor provides the device for "free" initially but requires a contract with a monthly service charge, which, of course, means that it's not really \$0).

Stations with vehicles that meet the trigger for the December 2017 ELD requirements may wish to begin planning early in the year to ensure timely compliance.

### **FCC Solicits Comment on Petition to Allow Internet-Only Job Vacancy Recruitment for EEO Compliance Purposes**

As broadcasters are well aware, the FCC's EEO rules require stations with at least five full-time employees to engage in widespread recruitment for all full-time vacancies. Such recruitment must be reasonably expected to reach the station's entire community, and the FCC has made clear

that internet-only (and internet plus word-of-mouth) recruitment is insufficient to meet the requirements. In fact, the FCC has imposed thousands of dollars in fines on broadcasters who have engaged in recruitment that used only internet-based sources.

A couple of broadcasters recently **filed a petition** at the FCC seeking a relaxation of this recruitment limitation. More specifically, the petition asks the Commission to "modify its EEO policies in order to allow broadcasters, if they so choose, to rely on Internet recruitment sources, coupled with their on-air advertising, when conducting outreach for new job openings." Perhaps as a holiday present, the FCC has put the petition out for comment. Comments are due January 30, 2017, and reply comments are due February 14, 2017. Given the success that most broadcasters have with internet recruitment, this may be a petition that stations wish to support. With a Republican administration taking over in January, the proposed rule change may gain traction and result in a streamlined approach to recruitment for certain positions at stations.

*If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.*

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## How to Submit to the VAB Job Bank

Jobs that are printed in the newsletter are pulled directly from the online Job Bank. To include your listing:

- ▶ Go to [www.vabonline.com](http://www.vabonline.com). Login with your user name and password.
- ▶ Be sure to include your station ID or company name, information on how the applicant can apply and where to send the applications materials.

Position	Locations	Type	Department	Organization	
Station Engineering Director	Lynchburg	Full Time	Engineering	Sinclair Television Stations, LLC	12/13/2016
Sales and Marketing Coordinator	Lynchburg	Full Time	Sales	Sinclair Television Stations, LLC	12/9/2016
Digital Sales Manager	WHSV	Full Time	Sales	WHSV-TV	12/6/2016
Receptionist	Roanoke, VA	Full Time	Business / Admin	Mel Wheeler Inc.	12/6/2016
Morning Announcer	Kilmarnock, Va	Full Time	On Air	Two Rivers Communications Inc.	12/2/2016
Account Executive	WDBJ - Roanoke, VA	Full Time	Sales	WDBJ Television, Inc.	11/29/2016
Morning News Anchor	Roanoke, VA	Full Time	On Air	Mel Wheeler Inc.	11/28/2016
Technical News Director	Roanoke	Full Time	Production	Nexstar Broadcasting	11/22/2016
IT Specialist	Richmond, VA	Full Time	Engineering	WWBT, Inc.	11/22/2016
Creative Producer & Photographer	Hampton, VA	Full Time	Production	SKY4 / WSKY-TV	11/21/2016
Senior Digital Sales Specialist	Richmond, VA	Full Time	Sales	WWBT, Inc.	11/21/2016
Media Manager	WHSV	Full Time	Business / Admin	WHSV-TV	11/18/2016
Digital Media Manager	Norfolk/Portsmouth/Virginia Beach	Full Time	(Other)	WAVY-TV 10 Media General	11/18/2016
News Photographer	Lynchburg	Full Time	News	Sinclair Television Stations, LLC	11/16/2016

To learn more about these jobs and to see new postings, please visit

[www.vabonline.com/careers](http://www.vabonline.com/careers)

# VAB Best of the Best Featured Q & A

4-What are you most looking forward to learning/taking away from the Best of the Best Leadership program?

5-What do you like to do in your free time?

6-If you could have dinner with somebody from the past, present or future who would it be & why?

1-Where did you grow up/go to school?

2-What was your first job in broadcasting?

3-What is your career goal?



## Olivia Palfi

1- I was born in Richmond, but I grew up in Colonial Heights, VA. After attending one year of college at Richard Bland College, I transferred to JMU in Harrisonburg.

2- I got my first/only broadcasting job at iHeartMedia (well, it was Clear Channel at the time) in Harrisonburg, VA. It was the week I was graduating with my Bachelors in Business Management – perfect timing

3- I'd like to enjoy what I do even on the tougher days. I'd love to be a manager, and help other people achieve their goals and dreams. Wherever my career path takes me, I just want to know that I'm helping people.

4- I'm still fairly new to the broadcast industry (since May 2014), so I appreciate every bit of learning I can absorb. I want to learn more about myself, other people, how to properly lead, and learn more about the industry itself.

5- I enjoy going to events with my fiancé, family, and friends; I'm always looking for something fun going on around town. I also enjoy time at home, with my cat & dog, just hanging out... maybe with a glass of wine. I love the beach too.

6- This is really really hard. There are so many. I think I'll pick Justin Timberlake because my fiancé and I both would really enjoy that!



## Stacey Trexler

1- Richmond Virginia and went to Virginia Tech

2- Marketing Assistant at Fox 35 in Richmond

3- Market Manager

4- New ideas and approaches to management. The first session was amazing and I have already been able to implement the techniques and have seen good success.

5- Spend time with my three children

6- Peyton Manning – not only is he very funny and charismatic he has also been a successful leader of different teams for years. I would love to learn about his approach and hear about his successes and failures.



## Lauren Heilman

1- I grew up in Richmond, VA. I went to Virginia Tech for my undergrad – Go Hokies!

2- I worked at another television station down the road in Richmond – WRIC – for 4 years as an Account Executive.

3- I look forward to the opportunity to move into a management role in the coming years. I want to grow and take on new challenges over time, while working with people I can really learn from and help lead successfully.

4- Ultimately, I just want to enjoy going to work every day. In order to do that, I need to learn to communicate better with managers, colleagues and clients, while exuding qualities of a true leader.

5- In my free time, I maintain a very busy schedule. I enjoy staying fit – whether that's playing golf, running with my dog or taking Pilates. I'm also a huge sports buff – I follow Virginia Tech football and basketball religiously and try to attend games in person as much as I can. I also love to learn about different cultures, so I travel as much as possible.

6- Rather than some famous person from the past or present – who in all likelihood would have little interest in my company – I would love to have dinner with my grandfather who is no longer with us, just to see him once again and thank him for the tremendous impact he had on my life.

## LEGAL REVIEW

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# Federal Court Says ADA Does Not Require Reassignment of Employee Without Competition

## Executive Summary

If an employee can no longer perform the essential functions of his or her position due to a disability, one common form of reasonable accommodation under the Americans with Disabilities Act (ADA) is reassignment to a vacant position. Last week, in *U.S. Equal Employment Opportunity Commission v. St. Joseph's Hospital*, 2016 WL 7131479 (11th Cir. 2016), the Eleventh Circuit (the federal appeals court over Florida, Georgia and Alabama) rejected a long-standing position of the U.S. Equal Employment Opportunity (EEOC) that as long as the disabled employee is qualified for the position the employer must place the employee in the vacant position and cannot require the employee to compete for it.

## Background

A nurse at St. Joseph's Hospital suffered from spinal stenosis, which required her to use a cane for support. The nurse worked in the hospital's psychiatric ward, and the hospital became concerned about her placement in that department because of the possibility that patients could use the cane as a weapon. The hospital offered the nurse the opportunity to remain employed at the hospital and gave her 30 days to apply for other positions for which she was qualified. The hospital also waived its requirement that internal candidates be in their current position for more than six months before applying for a new position and have no final written warnings in their record. The nurse had recently been demoted for failing to follow hospital procedures and had a final written warning in her file, but in an effort to further accommodate her, the hospital waived these requirements. The nurse, however, was required to compete with other applicants for any position for which she applied. The nurse was qualified for three of seven positions for which she applied, but the hospital hired better-qualified applicants. Because the nurse was not able to secure employment within the 30-day period provided to her, she was terminated.

## Court Decision

The ADA requires an employer to reasonably accommodate a disabled employee. 42 U.S.C. § 12112(a). Among the list of accommodations that may be reasonable is reassignment

to a vacant position. In this case, consistent with its long-standing guidelines, the EEOC argued that the hospital violated the ADA by requiring the nurse to compete for a vacant position she was qualified to perform. The Eleventh Circuit disagreed. Relying upon a Supreme Court decision that reassignment is not required when it would violate the rules of an employer's established seniority system, the Eleventh Circuit found that requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable. Notably, the court stated, "[p]assing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficient or good performance." The court further noted that "the ADA was never intended to turn nondiscrimination into discrimination against the non-disabled." According to the court, the ADA does not require an employer to turn away a superior applicant in favor of a disabled employee.

## Bottom Line

When employers have hiring or transfer policies in place, such as a seniority system or a best-qualified applicant provision, the ADA does not require a reassignment that violates the company policies. This case may have turned out differently had St. Joseph's Hospital not had a best-qualified applicant policy in place. Because it did, the court found the ADA only requires that an employer allow the disabled employee to compete equally for a vacant position. Just as the hospital did here, employers can find other ways to accommodate the disabled employee when they require the employee to compete for positions. For example, here, the hospital waived the requirements that the employee have been in her current position for six months and that she have no final warnings on file. When it comes to reassignments and the ADA, employers should look at their policies to determine whether any requirements can be waived to accommodate the disabled employee or whether any other measures can be taken to further assist the employee in finding reassignment within the workforce. Note that the Eleventh Circuit's decision is a split from other circuits – including the Fourth Circuit, the relevant circuit court for Virginia. Thus, employers in Virginia should still be cautious when considering placing the disabled individual in the open position.

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