



Webinar 15 – August 14, 2024

EEO/Discrimination – A Legal Overview

WEBINAR OUTLINE

INTRO/SETTING THE STAGE

- EEO Laws at a Glance and About the EEOC

COMPLIANCE WITH EEO LAWS

- Non-Discrimination Policy
- Posting Requirements

KEY UPDATES

- Artificial Intelligence in the Workplace – A New Legal Landscape
- EEOC Issues Additional Guidance on Workplace Harassment and Provides Additional Examples of Racial, Sex Based, and Religious Harassment
- EEOC Releases its Strategic Enforcement Plan for 2024-2028

BEST PRACTICES FOR EEO COMPLIANCE

- General
- Recruitment, Hiring and Promotion
- Terms, Conditions and Privileges of Employment
- Harassment

HRtelligence TIPS

INTRO/SETTING THE STAGE

EEO Laws at a Glance

- Equal employment opportunity (EEO) compliance laws forbid discriminating against employees and job applicants based on protected characteristics.
- The EEO laws businesses must follow depend on their size and number of employees.

About the EEOC

The EEOC was created in direct response to the historic 1963 March on Washington for Jobs and Freedom. The agency first opened its doors on July 2, 1965. The mandate and authority of the EEOC was set forth in Title VII of the Civil Rights Act of 1964 and expanded in later laws enacted by Congress. The EEOC's jurisdiction has grown and now includes the following statutes:

- **Title VII of the Civil Rights Act of 1964 (Title VII)**

Note:

Prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), and national origin.

- **The Age Discrimination in Employment Act of 1967 (ADEA)**

Note:

Prohibits employment discrimination against workers age 40 and older.

- **The Pregnancy Discrimination Act of 1978 (PDA)**

Note:

Amended Title VII to clarify that discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination and requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same as any other employees with temporary disabilities with respect to terms and conditions of employment, including health benefits.

- **The Equal Pay Act of 1963 (EPA)**

Note:

(included in the Fair Labor Standards Act), as amended, prohibits sex discrimination in the payment of wages to men and women performing substantially equal work in the same establishment.

- **Titles I and V of the Americans with Disabilities Act of 1990 (ADA)**

Note:

*Prohibits employment discrimination based on disability by private and state and local government employers. **Sections 501 and 505 of the Rehabilitation Act of 1973** provide the same protections for federal employees and applicants for federal employment.*

- **Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)**

Note:

Prohibits employment discrimination based on an applicant's or employee's genetic information (including family medical history).

- **The Pregnant Workers Fairness Act (PWFA)**

Note:

Requires covered employers to provide reasonable accommodations to a qualified applicant's or employee's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

- Together, these laws protect individuals from employment discrimination (including unlawful harassment) based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, disability, and genetic information.
- They also make it illegal to retaliate against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an employment discrimination proceeding.
- Most of these laws apply to private and state and local government employers with 15 or more employees, labor organizations, employment agencies, and the federal government ("covered entities").

- The ADEA applies to state and local governments and to private employers with 20 or more employees.
- There is no minimum employee requirement under the EPA.

COMPLIANCE WITH EEO LAWS

Non-Discrimination Policy

- Follow anti-discrimination and anti-harassment laws when recruiting, hiring, and managing your workforce.
- Beyond reducing the risk of penalties, businesses complying with EEO laws also creates a culture of equality and respect that fosters productivity and loyalty.
- To help create a workplace free of discrimination, the key is to develop strong policies, hold training for managers and supervisors, and ensure everyone understands and is accountable for the consequences of their actions.

Posting Requirements

- You'll need to post the "EEO is the Law" poster describing the federal laws that prohibit job discrimination.
- This poster summarizes the applicable laws and how an employee or job applicant can file a complaint.
- It should be placed in a conspicuous location where other notices are typically posted.
- In addition, you should disseminate an electronic version either via email or on your internal website.

Note:

You can [find a poster for downloading on the EEOC website](#).

KEY UPDATES

Artificial Intelligence in the Workplace – A New Legal Landscape

In May 2024, the White House issued new guidance titled Critical Steps to Protect Workers from Risks of Artificial Intelligence aimed at protecting workers from risks related to an employer's use of AI. The guidance outlines the White House's key principles for the development and deployment of AI in the workplace.

These principles include:

- giving employees input into the way that AI is used;
- supporting ethical development of AI systems; establishing clear governance systems, procedures, and human oversight;
- ensuring employers are transparent with employees and job seekers about when AI is used and how it impacts their employment;
- ensuring AI systems do not violate or undermine workers' rights to organize, health and safety rights, wage and hour rights, and anti-discrimination and anti-retaliation protections;
- using AI systems to assist, complement, and enable workers and improve job quality; supporting workers whose jobs are impacted by AI; and
- ensuring the responsible use of worker data.

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission is stepping up its enforcement efforts around AI and machine learning-driven hiring tools. The agency's efforts include the following:

- Designating the use of AI in employment as a top "subject matter priority"
- Issuing [guidance](#) on the application of the Americans with Disabilities Act to AI tools in employment
- Launching an initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws
- Appointing a chief AI officer
- Pursuing investigations and complaints against employers related to their use of AI in employment

State and Local Governments

This is a focus nationwide -- states such as California, Colorado, Georgia, Illinois, New York, and Washington have adopted, or are considering adopting, AI regulations.

New York City

One of the first to address AI use and employment decision-making, New York City's [AI Law](#), which took effect in July 2023, makes it unlawful for an employer to use an automated employment

decision tool (AEDT) to screen candidates for employment or promotion in New York City unless certain criteria are met, including:

- The AEDT has undergone an independent bias audit no more than one year prior to its use
- A summary of the most recent bias audit is made publicly available on the employer's or employment agency's website
- The employer must notify candidates living in New York City at least 10 business days before an interview that AI will be used, the job qualifications and characteristics that the tool will assess, and instructions for how to request an alternative selection process

New York

New York lawmakers are looking to police potential discrimination in automated employment decision tools, crafting statewide legislation that worker advocates say fills the gaps left open by New York City's bias audit law and other states' vendor-backed proposals.

A pair of bills pending in the state legislature ([S7623](#) and [A9315](#)) would require broader and more detailed bias audits and transparency notices for artificial intelligence tools than the New York City law. The tools covered could include software that screens job applicant resumes or ranks candidates it deems most qualified.

The New York bills also include a robust private right of action which would let workers sue for alleged violations—instead of relying on the state to enforce them—and would impose joint liability on employers and the AI technology developers and vendors for any damages awarded in court.

Note:

The legislation is part of a recent explosion of government proposals aimed at reducing the potential harms of AI tools in business, elections, criminal justice, litigation, and elsewhere.

Key Takeaways to Consider to Mitigate Legal Risk:

- **Be transparent:** Job candidates and employees should be informed of AI tools being used in their selection process or evaluations. On the flip side, employers may want to ask for confirmation that candidates did not use AI to produce application materials.
- **Prepare for accommodations:** Have accommodation plans in place should a candidate seek a disability accommodation, particularly recognizing that many laws and federal regulations instruct employers to provide an alternative to the AI tool.
- **Develop AI usage policies:** In crafting policies, employers should consider how their employees may use AI along with how employers want them to use the technology. Policies should have usage guidelines and best practices.

EEOC Issues Additional Guidance on Workplace Harassment and Provides Additional Examples of Racial, Sex Based, and Religious Harassment

On April 29, 2024, the Equal Employment Opportunity Commission (EEOC) issued its long anticipated final guidance on workplace harassment, and provided specific and timely examples of behavior that constitutes unlawful harassment in the workplace.

The guidance is organized by the three components of a harassment claim:

- 1) Covered Bases and Causation;
- 2) Discrimination with Respect to a Term, Condition, or Privilege of Employment; and
- 3) Liability.

The guidance includes 77 examples of various harassment scenarios that might arise in the workplace – many with citations to existing caselaw – and states how the EEOC would view each scenario.

Note:

The guidance also addresses current workplace concerns, including telework, intraclass discrimination (i.e. one member of a protected class discriminating or harassing another member of the same protected class on the basis of that class); guidance on the legal standard of liability (i.e. automatic, vicarious, or negligence) in harassment cases depending on the harasser's relationship to the employer; and guidance on establishing an affirmative defense to a claim of harassment.

Note:

*The guidance is intended to consolidate prior guidance documents so employers won't have to pick through six different documents to obtain guidance. The final guidance addresses a broad range of types of discrimination and includes topics such as remote work, the #MeToo movement and the U.S. Supreme Court's opinion in *Bostock v. Clayton County, Georgia*, which held that sex-based discrimination includes bias involving sexual orientation or gender identity. The EEOC also included a summary of key provisions: a document for employees to consult and a fact sheet targeted at small businesses that typically don't have legal departments and may not have a human resources division.*

Examples

Some of the detailed examples provided include the following:

- The EEOC confirmed that a single incident of harassment can amount to a hostile work environment if sufficiently severe.
- The EEOC emphasized that sex-based harassment under Title VII includes harassment based on pregnancy, childbirth or related medical conditions (including the decision to have, or not have, an abortion).

- The EEOC clarified its view of the broad protections for LGBTQ+ workers based on the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). Significantly, the guidance notes that harassing conduct based on sexual orientation or gender identity includes “outing (disclosure of an individual’s sexual orientation or gender identity without permission); ... repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.”
- The EEOC explained how conduct within a “virtual” work environment, such as sexist comments or racist imagery in the background of a video meeting, can contribute to a hostile work environment. The guidance also explains that posts on social media generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees.
- The EEOC described key elements necessary to establish that an employer exercised reasonable care to prevent and correct harassment. These elements are: a broadly disseminated policy against harassment; a process for addressing harassment complaints; training to ensure employees understand their rights and responsibilities; and monitoring of the workplace to ensure adherence to the employer’s policy. The guidance also details the components and details of effective policies, implementation, complaint process, training and implementation of policies.

Note:

The EEOC also expressed its intent to overhaul the paperwork employers fill out in response to a Charge to give employers a chance to raise defenses earlier in the process and – hopefully – simplify the process and reduce all parties’ burdens.

EEOC Releases its Strategic Enforcement Plan for 2024 to 2028

The EEOC released its [Strategic Enforcement Plan Fiscal Years 2024 - 2028](#) (SEP). This report, published every several years, provides key insight on the EEOC’s priorities and objectives.

Note:

According to the EEOC, in implementing the SEP, the Commission can – and will – do more to combat employment discrimination, promote inclusive workplaces, and respond to the national call for racial and economic justice.

EEOC's Subject Matter Priorities for Fiscal Years 2024-2028

1. Eliminating Barriers in Recruitment and Hiring

The EEOC will focus on recruitment and hiring practices and policies that discriminate on any basis unlawful under the statutes EEOC enforces, including sex, race, national origin, color, religion, age, and disability. These include:

- the use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups;
- job advertisements that exclude or discourage certain protected groups from applying;
- channeling, steering or segregating individuals into specific jobs or job duties based on protected characteristics;
- policies and practices that limit access to on-the-job training, pre-apprenticeship or apprenticeship programs, temp-to-hire positions, internships, or other job training or advancement opportunities based on protected characteristics;
- policies and practices that limit employees exclusively to temporary work on a basis prohibited by federal employment laws when permanent positions are available for which they are qualified;
- reliance on restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access; and
- the use of screening tools or requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks.

Note:

The continued underrepresentation of women and workers of color in certain industries and sectors (for example, construction and manufacturing, high tech, STEM, and finance, among others), are also areas of particular concern, especially in industries that benefit from substantial federal investment.

2. Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

The EEOC will focus on harassment, retaliation, job segregation, labor trafficking, discriminatory pay, disparate working conditions, and other policies and practices that impact particularly vulnerable workers and persons from underserved communities.

Notes:

With respect to employment discrimination, the Commission views the category of vulnerable workers as including:

- *immigrant and migrant workers and workers on temporary visas;*
- *people with developmental or intellectual disabilities;*
- *workers with mental health related disabilities;*
- *individuals with arrest or conviction records;*
- *LGBTQI+ individuals;*
- *temporary workers;*
- *older workers;*
- *individuals employed in low wage jobs, including teenage workers employed in such jobs;*
- *survivors of gender-based violence;*
- *Native Americans/Alaska Natives; and*
- *persons with limited literacy or English proficiency.*

Notes:

These workers may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, and/or have historically been underserved by federal employment discrimination protections. Factors such as immigration status, language barriers, education level, poverty and/or economic circumstances, geographic location, isolated work conditions, age, disability status, societal stigma, or lack of employment experience can make these workers particularly vulnerable to discriminatory practices or policies.

To implement this priority, district offices and the agency's federal sector program will identify vulnerable workers and underserved communities in their districts or within the federal sector for focused attention, based on their assessment of how the EEOC can most effectively utilize its resources to address issues of concern for these groups. For example, employment discrimination against Native Americans/Alaska Natives, indigenous people from Latin America, agricultural workers, workers on temporary visas, or individuals with arrest or conviction records might be areas of focus as part of this priority.

3. Addressing Selected Emerging and Developing Issues

The EEOC will continue to prioritize issues that may be emerging or developing, including issues that involve new or developing legal concepts or topics that are difficult or complex.

Because of the nature of this priority category, the Commission may add or remove issues through interim amendments to the SEP. The following issues currently fall within this category:

- a) Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities
- b) Protecting workers affected by pregnancy, childbirth, or related medical conditions under the Pregnancy Discrimination Act (PDA) and the Pregnant Workers Fairness Act (PWFA), as well as pregnancy-related disabilities under the Americans with Disabilities Act (ADA)
- c) Addressing discrimination influenced by or arising as backlash in response to local, national, or global events, including discriminatory bias arising as a result of recurring historical prejudices

Note:

For example, discrimination, bias, and hate directed against religious minorities (including antisemitism and Islamophobia), racial or ethnic groups, and LGBTQI+ individuals may fall within this subcategory. The discriminatory practices or affected groups or individuals may change during the time period covered by this SEP.

- d) discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID
- e) Technology-related employment discrimination

Note:

The EEOC will focus on employment decisions, practices, or policies in which covered entities' use of technology contributes to discrimination based on a protected characteristic. These may include, for example, the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions.

4. Advancing Equal Pay for All Workers

The EEOC will continue to focus on combatting pay discrimination in all its forms—on the basis of sex under the Equal Pay Act and Title VII, on other protected bases covered by federal anti-discrimination laws, including race, national origin, disability, and age, and at the intersection of protected bases.

The Commission will also focus on employer practices that may impede equal pay or contribute to pay disparities and may lead to violations of statutes the Commission enforces, such as pay secrecy policies, discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers, and reliance on past salary history or applicants' salary expectations to set pay.

5. Preserving Access to the Legal System

The EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede the EEOC's investigative or enforcement efforts.

Note:

For example, this priority includes policies or practices that deter or prohibit filing charges with the EEOC or cooperating freely in EEOC investigations or litigation.

Specifically, the EEOC will focus on:

- a) overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements;
- b) unlawful, unenforceable, or otherwise improper mandatory arbitration provisions;
- c) employers' failure to keep applicant and employee data and records required by statute or EEOC regulations; and
- d) retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws. This subcategory focuses on retaliatory practices that detrimentally impact or otherwise affect employees beyond those engaging in protected activity.

6. Preventing and Remediating Systemic Harassment

The EEOC will continue to focus on combatting systemic harassment in all forms and on all bases—including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, childbirth, or related medical conditions, gender identity, and sexual orientation) or a combination or intersection of any of these. With respect to charges and litigation, a claim by an individual or small group may fall within this priority if it is related to a widespread pattern or practice of harassment.

To combat this persistent problem, the EEOC will continue to focus on strong enforcement with appropriate monetary relief and targeted equitable relief to prevent future harassment. The EEOC will also focus on promoting comprehensive anti-harassment programs and practices, including training tailored to the employer’s workplace and workforce, using all available agency tools, including outreach, education, technical assistance, and policy guidance.

BEST PRACTICES FOR EEO COMPLIANCE

General

- Train Human Resources managers and all employees on EEO laws. Implement a strong EEO policy that is embraced at the top levels of the organization. Train managers, supervisors and employees on its contents, enforce it, and hold them accountable.
- Promote an inclusive culture in the workplace by encouraging an environment of professionalism and respect for personal differences.
- Foster open communication and early dispute resolution. This may minimize the chance of misunderstandings escalating into legally actionable EEO problems.
- Establish neutral and objective criteria to avoid subjective employment decisions based on personal stereotypes or hidden biases.

Recruitment, Hiring, and Promotion

- Recruit, hire, and promote with EEO principles in mind, by implementing practices designed to widen and diversify the pool of candidates considered for employment openings, including openings in upper-level management.
- Monitor for EEO compliance by conducting self-analyses to determine whether current employment practices disadvantage people of color, treat them differently, or leave uncorrected the effects of historical discrimination in the company.

- Analyze the duties, functions, and competencies relevant to jobs. Then create objective, job-related qualification standards related to those duties, functions, and competencies. Make sure they are consistently applied when choosing among candidates.
- Ensure selection criteria do not disproportionately exclude certain racial groups unless the criteria are valid predictors of successful job performance and meet the employer's business needs.
- Make sure promotion criteria are made known, and that job openings are communicated to all eligible employees.
- When using an outside agency for recruitment, make sure the agency does not search for candidates of a particular race or color.

Terms, Conditions, and Privileges of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination.

Note:

Make sure performance appraisals are based on employees' actual job performance. Ensure consistency, i.e., that comparable job performances receive comparable ratings regardless of the evaluator, and that appraisals are neither artificially low nor artificially high.

- Develop the potential of employees, supervisors, and managers with EEO in mind, by providing training and mentoring that provides workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well.
- Protect against retaliation. Provide clear and credible assurances that if employees make complaints or provide information related to complaints, the employer will protect employees from retaliation, and consistently follow through on this guarantee.

Harassment

Adopt a strong anti-harassment policy, periodically train each employee on its contents, and vigorously follow and enforce it.



Implement and Adhere to Policies

- Employers should tailor their policies and practices in consideration of the EEOC’s recently released strategic objectives.

Training and Accountability

- Ensure that management—specifically HR managers—and all employees know EEO laws. Implement a strong EEO policy with executive level support. Hold leaders accountable. Also: If using an outside agency for recruitment, make sure agency employees know and adhere to relevant laws.

Evaluate Practices and Audit Selection Criteria

- Monitor compensation and evaluation practices for patterns of potential discrimination and ensure that performance appraisals are based on job performance and accurate across evaluators and roles.
- Ensure that selection criteria do not disproportionately exclude protected groups unless the criteria are valid predictors of successful job performance and meet the employer’s business needs. Additionally, make sure that employment decisions are based on objective criteria rather than stereotypes or unconscious bias.