

## **EEOC's New Strategic Enforcement Plan Highlights Emphasis on Systemic Discrimination Cases**

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Recently, the U.S. Equal Employment Opportunity Commission (EEOC) adopted a new Strategic Enforcement Plan (SEP) setting forth its priorities and methods of enforcement for the next 4 years.

A key focus of the SEP continues to be systemic discrimination cases, in which the EEOC, on its own initiative, investigates an employer's employment practices across its workforce. The EEOC is de-emphasizing charges of discrimination brought by individual employees in favor of agency-initiated class action-type cases. The SEP confirms that the EEOC will continue to coordinate among its offices to pursue systemic investigations and litigation against employers.

The SEP also identifies the below six target areas where the EEOC will focus its enforcement efforts.

**1) Eliminating Barriers in Recruitment and Hiring.** The EEOC believes that older workers, women, people with disabilities, and individuals in certain racial, ethnic, and religious groups continue to confront discriminatory policies at the recruitment and hiring stages. In particular, the EEOC intends to address exclusionary policies and practices, the channeling of individuals into specific jobs, restrictive application processes, and the use of screening tools such as pre-employment tests, background checks, and date-of-birth inquiries.

**2) Protecting Immigrant, Migrant and Other Vulnerable Workers.** Noting that immigrant, migrant, and other vulnerable workers are often unaware of or are unable to exercise their rights under the equal employment laws, the SEP states that the EEOC will target discriminatory practices and policies affecting these workers. Specifically, the EEOC will focus on disparate pay, job segregation, harassment, and trafficking.

**3) Addressing Emerging and Developing Issues.** The EEOC intends to prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law. The SEP has identified the following as emerging issues:

- ADA coverage, reasonable accommodation, qualification standards, undue hardship, and direct threats;
- accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act; and
- coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

**4) Enforcing Equal Pay Laws.** The EEOC will use directed investigations, among other strategies, to target compensation systems and practices that discriminate on the basis of gender.

**5) Preserving Access to the Legal System.** The EEOC will also combat practices that it perceives as preventing individuals from exercising their rights under employment discrimination statutes or impeding the EEOC's investigative or enforcement efforts. Such practices include: retaliatory actions, failure to retain records required by EEOC regulations, overly broad waivers, and settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of discrimination claims.

**6) Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** With respect to unlawful harassment, the EEOC will emphasize the use of systemic enforcement. The SEP observes that harassment claims based on race, ethnicity, religion, age, and disability combined significantly outnumber sexual harassment claims.

The EEOC's SEP presents a unique challenge for employers. The EEOC's focus on systemic investigations, rather than individual claimants, means that employers are effectively being subjected to a "discrimination audit." The EEOC conducts a broad investigation into the

employer's overall hiring and employment practices, rather than an individual incident. As the SEP highlights, certain policies that may give rise to a suspected systemic violation include background checks, automatic termination dates for persons out of work because of a disability, and pre-employment tests.

While it is impossible to predict whether an employer will be targeted by the EEOC, employers should review their EEO-1 reports for discrepancies that might be red flags and should assess whether charges brought by individual employees suggest that there is a larger pattern, such as multiple age discrimination claims relating to hiring or promotion.

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