



WEBINAR OVERVIEW

EEO/Discrimination Laws: Review and Compliance

November 8, 2023

Intro/Setting the Stage

- EEO Laws at a Glance
- About the EEOC

Compliance With EEO Laws

- Non-Discrimination Policy
- Posting Requirements
- EEO-1 Reporting Requirement

Key Updates

- EEOC Releases its Strategic Enforcement Plan for 2024-2028
- EEOC: Proposed Enforcement Guidance on Harassment in the Workplace
- EEOC Discrimination Lawsuits on the Rise
- WHD and EEOC Collaborate on Fair Pay
- EEOC Publishes Disability Accommodation Resource Guide for Federal Contractors and Other Recipients of Federal Funding

Best Practices for EEO Compliance

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

HRtelligence TIPS

WEBINAR OUTLINE

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.
- To maintain your company's EEO compliance, you must identify and correct your biases, provide accessibility accommodations, determine your business's reporting requirements, and consider enacting an affirmative action plan.

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 post an electronic version on your internal website.

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

EEO-1 Reporting Requirement

On October 31, 2023, the EEOC opened the 2022 EEO-1 Component 1 Report for employers to report the race, ethnicity and gender of their employees (by job category) with a due date on December 5, 2023. Of note, the relevant data should be gathered based on an employer's workforce from October 1, 2022 to December 31, 2022.

- This reporting is mandatory for private sector employees with 100 or more employees, employers with less than 100 employees who are related to other entities so there is a combined employee count over 100 employees may be required to report and certain federal contractors with 50 or more employees.
- The EEOC urges filing employers to begin the filing process as soon as possible to meet the Tuesday, December 5, 2023, deadline.
- The EEOC advises filers to consult the new [2022 EEO-1 Component 1 Instruction Booklet](#), prepared by the EEOC's Office of Enterprise Data and Analytics (OEDA), to better understand their reporting requirements and changes to the filing process.

Notably, some of the changes include:

- Federal contractors will now have to answer a series of questions regarding their federal contracts. Contractors may also need to include their [Unique Entity Identification Number\(s\)](#), which replaced the DUNS number, on their filings. The EEOC has published some FAQs related to UEIs and EEO-1 filings [here](#).
- Filers must use their updated 2022 NAICS codes, which can be retrieved [here](#).
- Employers must file establishment reports for all establishments, regardless of establishment size.

- Any filer who went through a merger, acquisition, or spinoff since their last EEO-1 report filing must use the specific module on the Online Filing System to report these changes following the instructions provided in the instruction booklet and [the acquisition, spinoff, or merger factsheet](#).

Note: The EEOC has also release two additional volumes of [FAQs](#) (Volumes 2 and 3) to correspond with the opening of the collection.

Penalties for Violations

Employers that fail to comply with EEO laws may be faced with a penalty as part of a settlement with the EEOC.

- For failure to post the “EEO is the Law” notice, the fine in 2021 was \$576.
- Failure to file the EEO-1 report, the EEOC may compel you to file it by obtaining an order from the US District Court; penalties for failure of a federal contractor or subcontractor may include termination of the contract and debarment from future contracts.

The larger risk for companies is when the EEOC takes legal action following the filing of a charge of discrimination.

- When the EEOC determines discrimination has occurred, the goal of the law is to put the victim in the same position that they would have been if it hadn’t happened. Victims may also be able to recover attorney’s fees and court costs. In addition, compensatory and punitive damages may be awarded if the discrimination was intentional up to a certain amount. The limits for damages a person can recover depend on your size:
 - For employers with 15-100 employees, the limit is \$50,000.
 - For employers with 101-200 employees, the limit is \$100,000.
 - For employers with 201-500 employees, the limit is \$200,000.
 - For employers with more than 500 employees, the limit is \$300,000.

KEY UPDATES

EEOC Releases its Strategic Enforcement Plan for 2024 to 2028

On Sept. 21, 2023, 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.

Among many other initiatives, the EEOC will prioritize combating discrimination against religious minorities (including antisemitism and Islamophobia); expanding resources to educate vulnerable workers of their rights; and updating approaches to protect workers affected by pregnancy, childbirth or related conditions (in light of the Pregnant Workers Fairness Act).

Note: The SEP also reflects the EEOC's continued support of diversity, equity and inclusion initiatives. In its press release, the EEOC stated that the "new SEP also commits the EEOC to supporting employer efforts to proactively identify and address barriers to equal employment opportunity, cultivate a diverse pool of qualified workers and foster inclusive workplaces."

Proposed Enforcement Guidance on Harassment in the Workplace

- The EEOC has issued proposed Guidance on Harassment in the Workplace – the comment period closed on November 1, 2023. The proposed guidance follows the EEOC's 2024-2028 enforcement priorities, which include preventing and remedying systemic harassment.
- In addition to reiterating the EEOC's position on what constitutes unlawful harassment (including causation and liability standards) and providing well-worn examples of workplace harassment, the EEOC's newest proposed guidance also "reflects notable changes in law, including the Supreme Court's decision in *Bostock v. Clayton County*, the #MeToo movement, and emerging issues such as virtual or online harassment." The following are notable topics addressed in the draft enforcement guidance:

- **Sexual Orientation and Gender Identity**

Notes: Referencing the Bostock decision, 140 S. Ct. 1731 (2020), the proposed guidance explains that the decision itself "concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision logically extends to claims of harassment. Indeed, courts have readily found post-Bostock that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII." As a result, the EEOC specifically identifies: 1) intentional and repeated use of a name or pronoun inconsistent with an individual's gender identity (i.e. misgendering); and 2) the denial of access to sex-segregated facilities like bathrooms and locker rooms that are consistent with an individual's gender identity as examples of sex-based harassment.

- **Abortion**

Notes: Consistent with the EEOC's proposed regulations to implement the Pregnant Workers Fairness Act, which contemplates reasonable accommodation in the form of leave for abortion-related care, the EEOC's proposed guidance states that sex-based harassment also includes harassment based on "pregnancy, childbirth, or related medical conditions," which can include "harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion."

- **Religious Expression**

Notes: With respect to religious expression, the EEOC's stated position on when such expression rises to the level of harassment is as follows: "If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile. If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile." Acknowledging the need for "special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression," the EEOC states that "employers are not required to

accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment” and that employers “should take corrective action before the conduct becomes sufficiently severe or pervasive...”

○ Social Media

Notes: The EEOC also specifically addresses an employers’ obligation to address private social media activity if such conduct begins to seep into and affect the workplace: “Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace.” The EEOC specifically notes that social media posts on personal social media pages can contribute to a hostile work environment if “an employee learns about the post directly or other coworkers see the comment and discuss it at work.” The EEOC also addresses revenge porn: “Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace.”

- Employers should ensure policies and procedures are updated before this guidance is finalized.

Notes: While it is clear from this proposed guidance that employee comments on social media regarding, abortion, marriage, gender identity or sexual orientation may “impact the workplace,” the EEOC is silent as to how an employer should reconcile its obligation to address potential sexual harassment with the First Amendment ministerial exemption, Title VII’s religious organization exemption, or free speech protections. See e.g., Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)(allowing challenge by a devout Christian professor at Shawnee State University to discipline awarded to him by the University for refusing to use a student’s preferred pronoun based on free-speech and free-exercise grounds). Employers should also exercise caution when addressing out-of-work conduct in light of the August 2023 National Labor Relations Board’s Stericycle decision, which promises heightened scrutiny of workplace policies that impose restrictions on employee speech, including private social media speech. Stericycle, Inc. v. Teamsters Local 628, 372 NLRB No. 113 (2023).

While the proposed guidance does not “have the force and effect of law” and is “not meant to bind the public in any way,” it is clear that the current proposed guidance is another step in the EEOC’s coordinated effort to expand growth and enforcement under the Biden administration.

EEOC Discrimination Lawsuits on the Rise

The Equal Employment Opportunity Commission (EEOC) filed over 50 percent more discrimination lawsuits this year than it did in fiscal year 2022. A preliminary report by the agency on its fiscal year 2023 said, “[t]he EEOC filed 143 discrimination or harassment lawsuits in fiscal year 2023,” which began on Oct. 1, 2022, and ended Sept. 30, 2023.

EEOC and WHD Collaborate on Fair Pay

On Sept. 14, 2023, the EEOC and the U.S. Department of Labor’s Wage and Hour Division (WHD) published a joint Memorandum of Understanding (MOU) on their collaboration to combat fair pay issues, including but not limited to, issues arising from the newly-enacted Pregnant Workers Fairness Act and PUMP Act. WHD enforces the Fair Labor Standards Act, including its minimum wage, overtime, recordkeeping and nursing mother provisions. The EEOC enforces federal anti-discrimination laws, including the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

Note: The MOU is focused on the intersection of these laws. According to the MOU, its purpose “is to maximize and improve the enforcement of the federal laws administered by DOL/WHd and by the EEOC. This MOU will encourage enhanced law enforcement and greater coordination between the agencies through information sharing, joint investigations, training, and outreach.” In other words, if the EEOC determines that an employer has engaged in unfair pay practices, you likely should expect a call from the WHd and vice versa.

EEOC Publishes Disability Accommodation Resource Guide for Federal Contractors and Other Recipients of Federal Funding

On Sept. 26, 2023, in commemoration of 50 years of the Rehabilitation Act, the EEOC and U.S. Department of Labor published a resource guide entitled, “[Employment Protections Under the Rehabilitation Act of 1973: 50 Years of Protecting Americans with Disabilities in the Workplace.](#)”

Note: Enacted more than two decades before the Americans with Disabilities Act, the Rehabilitation Act prohibits federal contractors and recipients of federal funds (e.g., state and local government employers) from discriminating against disabled employees and requires them to provide disability accommodations. According to the EEOC’s press release, the “resource guide includes important information about the Rehabilitation Act for workers and employers, where to turn for help, examples of best practices, links to relevant agency publications, and additional resources.”

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 fostering 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. An alternative dispute-resolution (ADR) program can help resolve EEO problems without the acrimony associated with an adversarial process.
- 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. For example, if educational requirements disproportionately exclude certain minority or racial groups, they may be illegal if not important for job performance or 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. Both the employer that made the request and the employment agency that honored it would be liable.

Terms, Conditions, and Privileges of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination. 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, and to ascend to upper-level jobs. In addition, employees of all backgrounds should have equal access to workplace networks.
- 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. The policy should include:

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints will be protected against retaliation;

- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

HRtelligence TIPS

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; both an agency and hiring organization is liable for violations.

Promote an Inclusive Culture

- It's not just enough to talk about diversity and inclusion – it takes work to foster a professional environment with respect for individual differences. Make sure that differences are welcomed. Being the “only” of anything can get tiring, so make sure you're not putting further pressure on people by surrounding them in a culture that encourages conformity. A great way to promote an inclusive culture is to make sure your leadership is diverse and to listen to the voices of minorities.

Develop Communication

- Fostering open communication and developing an alternative dispute-resolution program may reduce the chance that a miscommunication escalates into a legally actionable EEO claim. If you're not providing a path for employees to have issues resolved, they'll look elsewhere. Additionally, it's essential to protect

employees from retaliation. If people think reporting an issue will only make the situation worse, they won't bring it up, which will cause the issue to fester and lead to something worse than it once was.

Evaluate Practices

- 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.

Audit Selection Criteria

- 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.

Make HR Decisions with EEO in Mind

- Implement practices that diversify the candidate pool and leadership pipeline. Provide training and mentoring to help employees thrive. All employees should have equal access to workplace networks.