

What HR Needs to Know About the EEOC's New Enforcement Plan

HR Executive | September 25, 2023 | Stephen Paskoff

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The EEOC's newly adopted strategic enforcement plan aims to increase the public's access to the EEOC and increase investigation training and resources. The plan describes the EEOC's vision of fair and inclusive workplaces and details expanded efforts to reduce systemic barriers to equal opportunity, including an enhanced focus on identifying offenses and additional staff and resources for enforcement.

In assessing the impact of this new enforcement guidance from EEOC, one must also consider other recent, potentially contradictory regulatory developments that impact how organizations approach efforts to prevent discrimination, starting with the Supreme Court.

The language used in the majority opinion of its June 2023 decision striking down affirmative action in college admissions has caused many organizations to consider whether workplace affirmative action is next in line to be weakened or struck down.

On a similar note, a recent letter from the attorneys general from multiple states references the SCOTUS decision in suggesting DE&I programs could also create legal risk in the context of workplace employment practices; other attorneys general quickly spoke out, pledging support for employers to develop and continue their DE&I initiatives. Recent suits against law firms regarding elements of their DE&I programs have increased anxiety and uncertainty, highlighting the delicate balancing act that HR leaders must achieve in aligning business practices with these developments.

Taking a closer look at DE&I initiatives

Organizations and HR professionals should focus on finding the best talent drawn from protected classes—such as race, sex, religion, age, national origin, disability, sexual orientation, etc.—and provide opportunities that enable them to do their best work individually and in teams.

To accomplish this, employers must recognize and avoid the behaviors and practices that can create the risk of workplace discrimination. These are three core ways resulting liability can arise:

Direct evidence of discrimination occurs when there is unmistakable evidence of intent—caused by things people say, communicate, post or otherwise clearly demonstrate—to choose or fail to choose persons from one protected group.

Disparate treatment occurs when one individual or group is treated one way and others who were equivalently selected receive different treatment, which cannot be justified and is also considered illegal.

Disparate impact occurs when employment processes are fair in structure, but their application causes one group to be advantaged and another disadvantaged for reasons that are not job-related yet validated. For the past 50 years or so, disparate impact has been recognized as an invasive form of discrimination. As evident through the new plan, this is an area the EEOC will look to crack down on more heavily, especially given the fewer concrete means of enforcement historically in employment law.

Upon review of policies, it should be a core element of any organization's practice to eliminate behaviors and practices that overtly or inadvertently favor one group over another and that are not based on legitimate, nondiscriminatory criteria or day-to-day conduct.

Beyond the surface: equal employment opportunity in practice

As the EEOC focuses more on patterns of systemic discrimination, HR should review existing policies to ensure their current practices look fair on the surface and are nondiscriminatory in application. For example, this should involve undertaking a formal review of representation in their workforce and measuring it against the availability of those from diverse groups compared to the available pool of workers.

Employers need to take steps to make sure that recruitment, selection, hiring, promotion, daily treatment, advancement and compensation practices are applied fairly and are not discriminatorily. Allowing such practices to occur will eventually limit the pool of workers employers have and impact their utilization, retention and job satisfaction.

Is there a risk that these kinds of practices could be seen as illegal in some instances? Perhaps.

There is also a risk that failing to have fair processes in place will expose organizations to potential legal claims. The EEOC has clarified that it will continue investigating episodes of disparate impact that might reflect potentially discriminatory policies or practices. Additionally, failing to build diverse and inclusive workplaces, which includes maximizing talent acquisition opportunities, can create business risks affecting performance, innovations, safety and other operational results.

To avoid illegality and improve operational performance, organizations should work to build cultures that welcome applicants from different backgrounds to seek opportunities as well as provide equal opportunities for advancement to all employees. In addition to the recommendations above, this can be achieved by implementing the same elements that organizations use to change their culture or business practices for commercial or other reasons.

A key element includes taking organizational values, which are often stated but not actively applied, and bringing them to life through regular forms and standards of cultural behavior

committed to by leaders, regularly communicated, reinforced with appropriate consequences and applied as continuous elements of operation.

Here are four specific steps that, when executed properly, can help organizations build cultures that legally support core DE&I principles:

1. Set clear goals and expectations: HR and leadership should ensure that they value diversity and are committed to creating an inclusive workplace that focuses on getting and retaining the best talent from the widest pool possible.
2. Clearly communicate organizational values: In practice, most workplace values statements make it clear they are tied to qualities such as fairness, results, collaboration and inclusion. In practice, this should involve hiring and fair treatment of people from all backgrounds, regardless of protected class, and creating a workplace where everyone feels welcome and respected in a clear and consistent manner. This requires ongoing actions such as training and communication, including on-the-job reinforcement from HR and leadership.
3. Encourage and model open communication: Organizations should create cultures where employees feel safe, respected and heard by HR and leadership and encouraged to speak up about ideas and concerns. As a key step, they should lead by example, modeling desired behavior and creating policies/procedures that support diversity and inclusion.
4. Finally, there also must be enforced consequences when standards are not followed so individuals realize that it is to their benefit to follow them in terms of selection, treatment and other HR-related initiatives.
5. By having these elements in place, HR executives can ensure there is a continuous focus on creating a fair and equitable workplace that also supports the organization's operational and strategic objectives. Employers should view the EEOC's plan as an opportunity to get other organizational leaders involved to achieve the best business results.