

The EEOC's Strategic Enforcement Plan for 2023 Through 2027: What Employers Need to Know

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The United States Equal Employment Opportunity Commission (the "EEOC" or "Commission") is responsible for enforcing federal laws which protect against discrimination based on race, color, religion, sex (including pregnancy and related conditions, gender identity and sexual orientation), national origin, age (40 or older), disability or genetic information. On January 10, 2023, the EEOC published its draft Strategic Enforcement Plan (SEP) for 2023 through 2027 in the Federal Register. The public comment period for the draft closed on February 9, 2023, but as of May 9, 2023, the EEOC has yet to finalize the document. Nevertheless, counsel representing employers of any size should pay particular attention to the EEOC's strategic enforcement priorities when developing internal workplace policies and dealing with compliance issues to ensure that their client's organization does not become a target of workplace discrimination claims.

What is the SEP?

The SEP — a multi-year plan periodically released by the EEOC — establishes the Commission's "substantive agency enforcement priorities to guide all aspects of its work to advance equal employment opportunity" and "remedy unlawful discrimination in employment." Given this focus, the SEP can provide employers real insight into certain issues the Commission intends to target over the next five years.

The current draft SEP is the EEOC's third iteration, the first of which the Commission implemented in 2013. During 2013 through 2016, the EEOC's substantive priorities included the following broad categories:

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Immigrant, Migrant and Other Vulnerable Workers
3. Addressing Emerging and Developing Issues
4. Enforcing Equal Pay Laws
5. Preserving Access to the Legal System
6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

After evaluating its progress, the EEOC refined the aforementioned categories for fiscal years 2017 through 2021. The SEP for 2017 through 2021 focused more closely on a number of issues, including the identification of vulnerable workers and underserved communities by the EEOC's district offices. The EEOC also added two areas to its emerging and developing issues priority to capture recent events impacting the workplace, including: (1) issues related to "complex employment relationships and structures in the 21st century workplace"; and (2) "backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups." Despite these refinements (and others), the broad enforcement priorities for 2017 through 2021 largely remained the same as prior years:

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination
3. Addressing Selected Emerging and Developing Issues
4. Ensuring Equal Pay Protections for All Workers
5. Preserving Access to the Legal System
6. Preventing Systemic Harassment

The EEOC's Enforcement Priorities for 2023 Through 2027

In 2022, the EEOC signaled a shift in the development of its substantive priorities by engaging in a "collaborative effort" to "help ensure the EEOC's future work will reflect the needs of all those who have a stake in its mission." Accordingly, the EEOC began soliciting input from its stakeholders and the public through a series of listening sessions and a "dedicated e-mail box." During those listening sessions, available on the EEOC's YouTube website, the EEOC elicited testimony from 35 witnesses, many of which were represented by plaintiffs' side advocates such as workers' rights groups and civil rights organizations. During those sessions, the witnesses provided their thoughts on how the EEOC should focus its resources and attention in developing its enforcement priorities. The 2023 through 2027 draft is the first SEP to be published in the Federal Register.



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The EEOC's subject matter priorities, though organized into six general categories, include a wide range of topics:

1. **Emerging and Developing Issues:** The EEOC intends to focus on addressing employment discrimination "influenced by or arising as backlash in response to local, national and global events," as well as issues stemming from potential violations of the Pregnancy Discrimination Act — a statute signed into law on December 29, 2022 that will go into effect on June 27, 2023. The EEOC also signaled that it will continue to enforce its priorities related to COVID-19 and other public health threats (e.g., accommodation requests, medical inquiries, disability and technology related discrimination).
2. **Recruitment and Hiring:** The EEOC will work to address its recruitment and hiring priority by targeting employer use of automated systems — including artificial intelligence and machine learning — to "target job advertisements, recruit applicants, or make or assist in hiring decisions which intentionally exclude or adversely impact protected groups." This priority is consistent with recent EEOC trends focusing on artificial intelligence. For instance, in 2021, the Commission announced the Artificial Intelligence and Algorithmic Fairness Initiative, an agency wide initiative aimed at ensuring that the use

of software, artificial intelligence and machine learning during employment decision-making is in compliance with civil rights laws.

Aside from artificial intelligence, the EEOC will aim to target employers which steer and segregate individuals into a specific job or job duty based on membership in a protected group, and take a hard look at restrictive application processes or systems difficult for individuals with disabilities or other protected groups to access. Other enforcement priorities include, but are not limited to, combating practices which systemically restrict access on the basis of arrest or conviction record or job requirements, such as language preferences, that disproportionately impact certain workers where there is no evidence that the requirement is tied to the employment position.

3. **Expansion of the Term "Vulnerable and Underserved Worker":** The EEOC will continue to focus on protecting vulnerable and underserved workers but has signaled an expansion of the category to include workers that may be unaware of their rights, such as those with intellectual disabilities, arrest or conviction records and those with limited literacy or English proficiency.
4. **Equal Pay:** The EEOC plans to address equal pay issues and states specifically that it will "continue to use directed investigations and Commissioner charges, as appropriate, to facilitate enforcement." This enforcement includes identifying employer practices which appear to impede equal pay or that may lead to violations of statutes related to pay enforced by the EEOC. Such investigations and charges might stem from allegations of retaliation against employees for seeking pay information; pay secrecy policies; and/or reliance on past salary history to set pay.
5. **Preservation of Access to the Legal System:** The SEP further indicates that the EEOC will continue to focus on access to the legal system and ensuring preservation of that access for all workers. With respect to this priority, the SEP discusses the prevention of policies and practices which limit substantive rights for employees, and those which discourage or prohibit individuals from exercising their rights under employment discrimination statutes and impede the EEOC's investigative or enforcement efforts. This might come in the form of challenges to overly broad waivers, releases and non-disparagement provisions.
6. **Preventing Systemic Harassment:** According to the EEOC, "[o]ver 34 percent of the charges of employment discrimination the EEOC received between FY 2017 and FY 2021 included an allegation of harassment." On this basis, the EEOC made clear that a claim by an individual or small group may very well fall within this priority if it is related to a "widespread pattern or practice of harassment."

The draft SEP for 2023 through 2027 can be found here: <https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan>.

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