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The EEOC Rewrites the Rules: A New Era of Workplace Enforcement

Key Takeaways

- The Equal Employment Opportunity Commission's (EEOC) new National Enforcement Plan shifts enforcement toward intentional disparate treatment discrimination, including challenges to race- or sex-conscious diversity, equity and inclusion (DEI) programs, preferences for foreign national workers over U.S. workers, and discriminatory patterns or practices, while abandoning disparate impact enforcement.
- Religious liberty and transgender workplace issues are likely to become central enforcement focuses, increasing scrutiny of employers' religious accommodation processes and policies regarding single-sex spaces and gender expression.
- Given these shifting priorities, employers are encouraged to evaluate their employment practices and to consult with employment counsel to assess compliance.

On June 4, the EEOC rescinded the Biden-era [Strategic Enforcement Plan](#) and approved the [National Enforcement Plan](#) (NEP) to align its enforcement priorities with the current administration's policy objectives. The NEP prioritizes four key enforcement areas: (1) race and sex discrimination related to DEI programs, (2) "anti-American" hiring preferences for foreign national workers, (3) rights to access "single-sex spaces" or to "express the binary nature of sex," and (4) religious liberty.

The NEP formally abandons the EEOC's disparate impact enforcement, consistent with [Executive Order 14281](#) and a [Department of Justice opinion](#) declaring Title VII disparate impact liability unconstitutional. The EEOC will instead focus on "more egregious" forms of intentional discrimination, including pattern-or-practice claims and allegations of repeated or overt discrimination rather than on statistical disparities resulting from neutral employer policies. Cited examples include:

- Recruitment practices that exclude, encourage, or discourage applicants based on sex or race, including advertisements that signal race-based consideration, like references to "diverse candidates."
- Recruitment practices that exclude, encourage, or discourage applicants based on national origin, such as preferences for "guest worker visa holders" or "PERM applicants" over American workers.
- Policies and practices that signal systemic discrimination, like mass denial of disability, pregnancy-related and religious accommodations.
- Use of quotas or proxies that encourage race- and sex-based decision-making, like voluntary affirmative action programs, the adoption of "aspirational goals," diverse-slate policies, diverse-hiring panel policies, diversity statement requirements and distribution of race or sex data to non-HR personnel.

To advance the NEP's priorities, the EEOC will pursue high-impact actions with broad enforcement significance. For instance, the EEOC plans to:

- Prioritize cases that test whether DEI practices expressly considering race or sex, like those listed above, survive Title VII scrutiny after the U.S. Supreme Court's curtailment of race-based decision-making in [Students for Fair Admissions v. President and Fellows of Harvard College](#). Employers should expect EEOC investigations to target DEI-related

employment practices that could be alleged to disadvantage members of majority groups, particularly given recent Supreme Court precedent lowering barriers to Title VII claims for those groups.

- Clarify whether Title VII protections for transgender individuals extend to workspaces with unique privacy considerations, such as single-sex bathrooms, and whether employees and employers have the right to express sex as binary.
- Expand and clarify employers' obligations to accommodate sincerely held religious beliefs, moving in lockstep with recent Supreme Court precedent, [Groff v. DeJoy](#), which raised the bar for employers seeking to deny religious accommodation requests.
- Develop the scope of employer liability under the Pregnant Workers Fairness Act, which requires accommodations for pregnancy, childbirth, and related medical conditions. Employers should expect the EEOC to clarify whether elective abortions, in vitro fertilization, other fertility treatments or contraception-related needs are covered by this law.

Recent EEOC actions suggest the agency is already implementing the NEP's priorities.

- On June 29, the EEOC voted to [rescind its 1979 interpretive rule](#) on voluntary affirmative action under Title VII and the related Compliance Manual on Affirmative Action, narrowing prior EEOC guidance for employers using race-, sex-, or national origin-conscious remediation.
- On July 6, the EEOC revealed more detailed plans, including to revise existing rules interpreting "pregnancy, childbirth, or related medical conditions" under the Pregnant Workers Fairness Act, with a notice of proposed rulemaking expected around November of this year, and to rescind its 1980 Guidelines on Discrimination Because of National Origin, which the EEOC describes as outdated and inconsistent with legal developments.
- On July 21, the EEOC voted to approve a plan to eliminate the Form EEO-1 reporting requirement, which currently requires covered employers to submit annual workforce demographic data by race/ethnicity, sex, and job category. The EEOC is also seeking to eliminate the Forms EEO-2, EEO-3, EEO-4 and EEO-5 reporting requirements, which apply to unions, state and local government entities and public schools. The EEOC's plan will be published in the Federal Register to solicit public comment. If finalized, that change would further reflect the EEOC's shift away from disparate impact tools and toward enforcement focused on intentional discrimination and race- or sex-conscious decision-making.

Despite this shift in EEOC enforcement, employers should consider that state laws may provide broader employee protection and that courts may ultimately disagree with or limit the EEOC's positions. Employers are encouraged to consult with experienced employment counsel to assess their current practices and legal compliance with both federal and state laws.

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