

EEOC Takes More Aggressive Stance on Discrimination Lawsuits

Labor & Employment Law Update

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On September 29 the EEOC issued a press release declaring it filed “143 new employment discrimination lawsuits in fiscal year 2023, noting that is more than a 50% increase over fiscal year 2022 suit filings.” The release also emphasized that 25 of the cases were systemic prosecutions, more than double the number of such cases in the past 3 years.

The aggressive tendencies and mindset of the EEOC is further demonstrated by its adoption of “*EEOC Strategic Plan 2022-26*” expressing a desire to expand its capacity to deal with systemic case investigation, enhance its ability to process complaints, leverage technology to expand the agency’s reach and promote promising practices for employers to adopt. The EEOC further announced its intent to willingly pursue investigation and enforcement, publishing, “*Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier*”; “*The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*”; “*Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*”, and “*Proposed Enforcement Guidance on Harassment in the Workplace*”. Well, at least we can’t say we don’t have fair warning.

How to prepare? Based on the publications listed above and the cases the EEOC has brought to date, it makes sense to concentrate efforts on the new AI concerns (the focus of their most recent publications) and harassment (58 of the cases the EEOC brought were harassment based).

In 2017, the EEOC published “*Promising Practices for Preventing Harassment*” and that advice was and still is helpful. The guidance suggests that the employer engage and get commitments from its leadership to create a culture in which harassment is not tolerated giving several examples of practical manners in which that culture can be developed and maintained. Comprehensive, effective, and enforced policies that include an accessible complaint system are essential. Finally, firmwide training assists in gaining the buy-in necessary to make the culture thrive.

As to the AI issues, both publications cited above have lists of “Promising Practices” that, while stated in general terms, help identify and suggest actions to deter potential violations. The first step however is educating yourselves and management of the potential for inadvertent violations of the ADA and Title VII when using AI resources.

As the EEOC and the courts have recognized theories that expand the scope of the protected classes, and more types of discrimination are being recognized (New York recently made height and weight protected classes). The best preparation and defense for an employer is promoting a tolerant, inclusive environment that requires accountability and respect, and deals with any discriminatory employment practices promptly and effectively.

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