

EEOC'S EVOLVING PERSPECTIVE ON EMPLOYMENT DISCRIMINATION LAW

DirectEmployers Association

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HUMAN RESOURCES COMPLIANCE AND EMPLOYMENT DATA ANALYTICS

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MEET THE TEAM



ALISSA A. HORVITZ

MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

MEET THE TEAM



JOSHUA S. ROFFMAN

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

MEET THE TEAM



JAMES M. MCCAULEY

OF COUNSEL

James McCauley is Of Counsel with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

TOPICS

- National Enforcement Plan Fiscal Years 2025 - 2029
- Department of Justice Disparate Impact Legal Opinion
- Eliminating Employment Data Reporting Requirements
- Proposed FY27 Budget
- Regulatory Agenda

NATIONAL ENFORCEMENT PLAN

NATIONAL ENFORCEMENT PLAN (NEP) FISCAL YEARS 2025 - 2029

- Replaces the Biden Administration EEOC's Strategic Enforcement Plan (SEP) Fiscal Years 2024 -2028
 - SEP was a 25-page document
 - [NEP](#) is a 7-page document

NATIONAL ENFORCEMENT PLAN (NEP) FISCAL YEARS 2025 - 2029

- Sets out nine (9) guiding principles; highlighted ones likely to impact employers more so than the others
 - Prevention, Voluntary Resolution, and Litigation
 - Using Constrained Resources for Strategic Impact
 - National Enforcement Model
 - Executive Branch Agency and Administration Priorities
 - Prioritization of Disparate Treatment Liability
 - Individualized Assessment of Matters
 - Broad Enforcement of Laws in EEOC's Jurisdiction
 - Collaborating with Other Federal Agencies
 - Collaborating with State and Local Agencies

USING CONSTRAINED RESOURCES FOR STRATEGIC IMPACT

- The agency's resources are dependent upon the amount Congress allocates to it
- It wants to prioritize its resources to align with its enforcement priorities
- Consequence to employers: charges that allege facts consistent with the Agency's priorities are more likely to be allocated agency investigative resources
- EEOC wants to determine whether there is evidence of systemic or class discrimination (leverage for monetary remedies)
- Resolving these matters internally before the EEOC gets involved may be prudent

NATIONAL ENFORCEMENT MODEL

- The EEOC intends to deploy nationwide staffing in systemic or other priority investigation cases
- The EEOC may assign a priority matter to multiple EEOC districts or to select personnel in certain districts; reassign matters from the originating district to another district; or assign headquarter personnel to bolster field staff on a matter
- Consequence for employers: need to coordinate strategy if similar allegations are divided among multiple investigating districts; may have to re-inform and re-educate successive investigators

PRIORITIZE DISPARATE TREATMENT LIABILITY

- The EEOC will prioritize disparate treatment, including pattern or practice liability, and will not pursue disparate impact liability theories “to the maximum extent possible.”
- Consequences to employers: applicants or employees alleging disparate impact theories, including the impact that an employer’s artificial intelligence choices have during the hiring process, will be given right to sue letters more quickly, sending these matters into federal court sooner.

WHAT ARE THE AGENCY'S “SUBSTANTIVE PRIORITIES”?

- Job advertisements that exclude or discourage certain individuals from applying or encourage certain individuals to apply based on race or sex (“diverse candidates”), or national origin (“PERM applicants” or “guest worker visa holders”)
- Staffing agencies that exclude individuals from employment on account of a protected characteristic;
- Channeling, steering or segregating individuals into specific jobs based on job duties or protected characteristics;
- DEI-type discrimination
 - Practices labeled “aspirational goals” that encourage or incentivize race- and sex-based decision making
 - Limiting access to on-the-job training; internships; fellowships; mentorship; sponsorship; pre-apprenticeship or apprenticeship programs; temp-to-hire positions; other job training or advancement opportunities; employer-sponsored groups or events; bonuses; fringe benefits; perks; and other terms, conditions, or privileges of employment, because of race or sex

SUBSTANTIVE PRIORITIES (CONTINUED)

- DEI continued:
 - Diverse slate policies; diverse hiring panel policies; policies that require candidates to submit diversity statements; employee race or sex data shared with managers, the public, or other non-HR personnel or legal representatives; rubrics or other candidate evaluation methods that consider protected characteristics; and executive and other employee compensation or bonuses tied to employee race- or sex-based demographic goals or other diversity goals.
 - Employer accommodations for religious practices
 - Scope of Bostock v Clayton County
 - Subpoena enforcement proceedings against employers that withhold or refuse to provide information relevant to the EEOC's charge investigation

CRITICISM OF THE NEP

- Prioritizes bias towards white men by targeting lawful diversity, equity, and inclusions initiatives
- EEOC is abandoning disparate impact
- EEOC is de-prioritizing LGBTQ+ cases, charges involving mental health disabilities, and applicants with arrest and conviction records who are facing hiring hurdles

WHAT ARE THE EMPLOYER TAKE-AWAYS?

- Review DEI programs focusing on ones that EEOC would view as unlawful
- Expect greater focus on intentional discrimination claims (shore up record keeping and ensure that employment decisions are documented, consistently applied, job-related)
- Scrutinize recruiting, hiring, and promotion practices (conduct process review along side data analysis)
- Maintain strong religious accommodation and harassment compliance (including re-training managers)
- Prepare for “high-impact” investigations

**DEPARTMENT OF
JUSTICE'S LEGAL
OPINION TO THE EEOC
REGARDING
DISPARATE IMPACT
LIABILITY**

BACKGROUND

- The authors of Project 2025 made no secret of their disdain for disparate impact liability theory, and the EEOC continues on a path to under-enforce it as well as look for a test case to take up to the Supreme Court.
- Because the Supreme Court interpreted Title VII to support disparate impact liability theory in its 1971 opinion, *Griggs v Duke Power Co.*, and Congress legislated disparate impact liability theory into Title VII when it amended it in 1991, the EEOC would need to latch onto a constitutional challenge in order to advance Project 2025's agenda.
- On June 9, 2026, the Department of Justice's Office of Legal Counsel issued a legal [opinion](#) to the EEOC challenging the constitutionality of Title VII's disparate-impact protections.

DIFFERENCE BETWEEN DISPARATE TREATMENT AND DISPARATE IMPACT

- Disparate Treatment - Intentional decision to treat people differently based on a protected characteristic
- Disparate Impact - Neutral policy that has a disproportionate impact
- What is the role of data and statistics in each type?

HIGHLIGHTS OF THE DOJ'S RATIONALE

- Title VII disparate-impact liability has raised serious equal-protection concerns. According to the DOJ, disparate impact liability tends to incent – and even coerce – employers to make race-based decisions to avoid liability or the threat of liability.
- Quoting Justice Scalia's dissent in *Ricci v DeStefano*, 557 U.S. 557 (2009), the DOJ believes that disparate impact liability places a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.
- The DOJ believes that nearly every job qualification or hiring process has a disparate impact on members of one protected group or another. It contends that disparate liability structurally compels the very racial discrimination that the constitution forbids.

TO PREVENT A “CONSTITUTIONAL COLLISION” BETWEEN TITLE VII AND THE EQUAL PROTECTION CLAUSE, DOJ IDENTIFIED THREE LIMITING PRINCIPLES

- The business necessity defense to liability must provide sufficient leeway to state and explain the valid interest served by their policies.
 - Workplace requirements and selection procedures – such as background checks, aptitude tests, knowledge-based tests, SAT scores, high-school graduation requirements, or blind auditions – are presumptively job-related.
 - Only practices that establish truly artificial, arbitrary, and unnecessary barriers (i.e., those that have no plausible job-relatedness) – can create liability.
- Any disparate impact claim must satisfy a robust causality.
 - The plaintiff must demonstrate that the particular policy actually causes a disparate impact.
 - Shielding businesses from litigation over racial disparities they did not create helps ensure that they will not resort to impermissible racial quotas to stave off lawsuits.
- The plaintiff must offer a viable alternative to the challenged practice that accomplishes the employer’s legitimate goals, as well, including with respect to the cost or other burdens.

WHAT ARE THE IMPLICATIONS, ACCORDING TO THE DOJ?

- The Uniform Guidelines on Employee Selection Procedures are unconstitutional
- The UGESP validation structure “radically deviates from Title VII’s burden-shifting structure”
- The EEOC’s Affirmative Action Guidelines should be rescinded because they “authorize and expressly encourage racial preferences”

ROFFMAN HORVITZ REMINDERS

- Disparate impact is in Title VII
- States have codified disparate impact into their laws
- Misuse of AI in the hiring process is a ripe area for legal challenges

ELIMINATING EMPLOYMENT DATA REPORTING REQUIREMENTS

- Status of the EEO-1s
- MD-715 (why is this relevant to anyone other than the federal government)
- Data points that the EEOC has decided not to track or report

EMPLOYER USE OF DATA METRICS

- Many employers, and particularly government contractor employers, have used data on race/ethnicity and gender to conduct impact ratio analyses of decisions to hire, promote, and terminate.
- They use data to evaluate patterns and practices of potential discrimination and based on those results, often decide how to allocate their limited resources to investigate areas that seemed disproportionate.
- The data was never proof of discrimination, but results that were statistically significant prompted further review.
- The EEOC appears determined to erode employers' ability to collect and use this data for lawful analytical purposes, but it is still lawful for employers to collect data on race/ethnicity and gender from applicants and employees voluntarily.

STATUS OF EEO-1s

- EEOC is proposing to [rescind](#) the EEO-1s, EEO-2s, EEO-3s, EEO-4s, EEO-5s, and other data reporting requirements under Title VII, the Americans with Disabilities Act, the Genetic Information and Nondiscrimination Act (GINA), and the Pregnant Workers Fairness Act because those reports “impose financial and administrative burdens on those reporting.”

EMPLOYER BURDEN TO REMIT EEO-1 DATA

- When the EEOC last sought approval of the EEO-1 in 2023, for comparison, it estimated that there were 110,000 filers (businesses with 100 or more employees and federal contractors with 50 or more employees).
 - Employers filing just the single-establishment report were predicted to spend 45 minutes per year to file.
 - Multi-establishment employers were predicted to spend 50 minutes on the headquarters report and 150 minutes (2.5 hours) per year on their establishment-level reports.

ROFFMAN HORVITZ'S TAKE

- Spending between 45 and 200 minutes per year on reporting data to the federal government, so that all of us can benefit from the aggregated data reports that helped us to benchmark outreach and recruitment efforts was worthwhile.
- If the EEOC decides not to collect this data from employers, we hope it remains lawful for employers to collect the data voluntarily so that they can use it to analyze and prevent discrimination in the design of employment systems or to identify potential barriers to discrimination.
- We agree with the EEO Leaders that “data provides a uniquely effective means to enhance compliance with the law, not a trigger to violate it.”
 - The EEO Leaders also [noted](#) that “[d]emographic data collection benefits multiple stakeholders. Enforcement agencies rely on it to detect patterns warranting further inquiry and to target outreach and education. Employers use aggregated data to evaluate their workforce composition and identify areas for improvement. Researchers and the public benefit from insights into workforce trends across industries and regions.”

MD-715

- Under Title VII of the Civil Rights Act of 1964, the EEOC is required to regularly obtain and review “equal opportunity plan[s]” and “progress reports” from federal agency employers. 42 U.S.C. § 2000e-16(b).
- [Management Directive 715](#) was issued in 2003, but according to the EEOC, it “no longer meets the needs of the modern federal government.”
- EEOC intends to update it, but until it does that, EEOC announced that agency responses are not required to address “diversity and inclusion” principles, “barrier analysis,” “triggers,” “gender identity,” or any other element in conflict with Executive Orders 14151, 14168, and 14281.

ISN'T A BARRIER ANALYSIS LAWFUL?

- The purpose of the barrier analysis was to “eradicate every form of prejudice or discrimination from personnel policies, practices, and working conditions.”

ROFFMAN HORVITZ'S TAKE ON MD-715

- This annual data analysis in the federal government is completely consistent with Title VII and does not endorse the use of race/ethnicity or gender in any employment decisions
- The EEOC's initiative to excuse the federal agencies from performing this proactive analysis will mask disparate treatment discrimination

OTHER EEOC DATA POINTS ARE DISAPPEARING

- Sometime between May 2026 and June 2026, the EEOC removed data regarding LGBTQ+ discrimination charges from its web page that tracks such data.
- The table “Title VII Sex-Sexual Orientation and/or Transgender Status,” has been removed.
 - The EEOC began tracking information on charges alleging discrimination related to transgender status and sexual orientation during the Obama Administration in 2013.
- As part of the same website revisions, the EEOC eliminated other data points, including for example information on issues and job actions underlying the bias claim, English language only rule, layoff, maternity, paternity, recordkeeping violations, union representation and benefits.

ROFFMAN HORVITZ'S TAKE ON THESE DATA CHANGES

- Although the dropping of the LGBTQ+ table is consistent with the EEOC's decision to discontinue pursuing charges and lawsuits alleging transgender discrimination, the decision to remove these other data points will mask other data that was useful to employers and compliance professionals in making year-over-year comparisons.

PROPOSED FY27 BUDGET

EEOC'S PROPOSED FY27 BUDGET

- FY 2027 proposes a larger, better-staffed EEOC with increased resources for investigations, litigation, state-partner activity, and technology.
- The most consequential change is the roughly \$20 million increase focused primarily on private-sector enforcement capacity.

EEOC BUDGET PRIORITIES

- From an employment-law perspective, the FY 2027 budget indicates that the EEOC intends to prioritize:
 - DEI-related discrimination investigations
 - National-origin discrimination affecting U.S. workers
 - Women's sex-based workplace rights
 - Pregnancy accommodations and discrimination enforcement
 - Religious accommodation and religious discrimination claims
 - Core enforcement and litigation functions
 - Technology and AI modernization

BUDGET PRIORITY: CHALLENGING DEI-RELATED EMPLOYMENT PRACTICES

- The most prominent new enforcement priority is scrutiny of workplace diversity, equity, and inclusion (DEI) programs that the EEOC believes may result in race- or sex-based employment decisions.
 - EEOC will continue "confronting race-based discrimination in all its forms, including employment practices tied to DEI initiatives and programs."
- What this suggests:
 - Increased investigations of hiring, promotion, internship, mentorship, and training programs that are perceived as favoring particular racial or demographic groups.
 - Greater attention to so-called "reverse discrimination" claims.

BUDGET PRIORITY: PROTECTING U.S. WORKERS FROM NATIONAL ORIGIN DISCRIMINATION

- What this suggests:
 - More scrutiny of employment practices involving visa holders and foreign labor programs.
 - Focus on whether employers are preferring foreign workers over U.S. workers in violation of anti-discrimination laws.
- *See also, Regulatory Agenda. Seeking to revise the national origin regulations to re-allow English only policies.*

BUDGET PRIORITY: WOMEN'S RIGHTS AND SEX-BASED PROTECTIONS

- The EEOC intends to defend women's rights to single-sex workplace spaces involving privacy and safety concerns and support "language which reflects science and reality."
- What this suggests:
 - Increased EEOC attention to sex-based workplace policies.
 - Potentially significant activity involving transgender-related workplace issues and competing rights claims

BUDGET PRIORITY: PREGNANCY DISCRIMINATION AND ACCOMMODATIONS

The budget specifically highlights strong enforcement of:

- The Pregnant Workers Fairness Act (PWFA)
- The Pregnancy Discrimination Act (PDA)
- What this suggests:
 - Continued focus on reasonable accommodations for pregnancy-related conditions.
 - Increased employer scrutiny regarding pregnancy leave, accommodations, and workplace protections.

BUDGET PRIORITY: RELIGIOUS LIBERTY PROTECTIONS

- What this suggests:
 - Greater emphasis on religious accommodation cases.
 - Enforcement involving religious expression in the workplace and conflicts between religious and other workplace policies.

BUDGET PRIORITIES: OPERATIONAL AND TECHNOLOGICAL

- Most of the requested funding increase goes to enforcement activities. The budget seeks:
 - \$455.45 million total funding, up about \$20 million from FY 2026.
 - Additional staffing to backfill key enforcement and litigation positions.
 - Increased funding for investigations and litigation.
- The budget requests increased investment in:
 - Information technology modernization
 - Digital transformation
 - AI development
 - Mission systems improvements
- The agency frames these investments as tools to improve efficiency and enforcement effectiveness.

REGULATORY AGENDA

THE EEOC'S PORTION OF THE UNIFIED AGENDA

- Revisions to the Pregnant Workers Fairness Act Regulations, Proposed Rule Stage, 3046-AB36
- Rescission of EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and Reporting Requirement under Title VII, the ADA, GINA, and the PWFA, Proposed Rule Stage, 3046-AB37
- Revisions to the Availability of Records, Proposed Rule Stage, 3046-AB38
- Rescission of Uniform Guidelines on Employee Selection Procedures – Recordkeeping, Proposed Rule Stage, 3046-AB45
- Rescission of 1979 Interpretive Rule “Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964,” Final Rule Stage, 3046-AB39
- Rescission of Interpretive Rule “The Guidelines on Discrimination Because of National Origin,” Final Rule Stage, 3046-AB40
- Revisions to Procedural Regulations Subpart G – FEP Agency Designation Procedures, Final Rule Stage, 3046-AB41
- 2026 Amendment of the Penalty for Violation of Notice Posting Requirement, Final Rule Stage, 3046-AB42
- Rescission of Uniform Guidelines on Employee Selection Procedures, Final Rule Stage, 3046-AB43
- Rescission of Appendix to Guidelines on Discrimination Because of Sex, Final Rule Stage, 3046-AB44

UNIFIED AGENDA

- Why are there two separate proposals for the Uniform Guidelines on Employee Selection Procedures?
- What does this mean for the EEO-1s?

FINAL THOUGHTS

- Employers are well aware that shifts in the political party in the White House mean shifts in executive agency enforcement priorities.
- While it is important to be aware of these shifts, employers who remain dedicated to nondiscrimination, merit-based decisions, and sound record-keeping policies are the ones who will navigate these shifts the best.

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