



# EEOC Vote Approving Class-Based Initiatives: What Employers Need to Know

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After circulating a draft to the nation in September 2012, three of the four members of the Equal Employment Opportunity Commission (EEOC) voted to adopt the EEOC's Strategic Enforcement Plan ("SEP") on December 17, 2012. This plan is the most sweeping and significant development of the EEOC since its formation in 1965 under the Johnson administration. With the reelection of **President Obama** the previous month, the EEOC has now formally approved a plan for 2012 through 2016 that will rock the world of employers who have systemic, or class-wide practices that discriminate against protected workers.

Most significant is the EEOC's plan to initiate investigative inquiries — in addition to investigating claims brought to the agency by an employee or rejected job applicant. The targets of the EEOC will include employers who publicly display a preference for certain races, ethnicity, sexual orientation, gender or ability. The EEOC plans to trace these preferences to applicant screening and hiring practices; disparate pay and compensation practices; failures to accommodate the disabled; or work environments hostile to protected classes including (but not limited to) pregnant applicants and workers, migrant and immigrant workers, and members of the lesbian, gay, bisexual and transgender ("LGBT") community.

Here is a brief synopsis of the six stated areas of the agency's 2012-2016 SEP:

## 1. Protecting the Rejected Job Applicant.

Among the priorities of the final SEP is to find and charge employers whose application processes and screening tools — such as pre-employment tests, criminal background checks and date of birth requests — allow the employer to identify applicants it prefers over protected classes. In partial justification for taking on the task of finding and initiating charges is the EEOC's stated view that it is "better situated to address these issues than individuals or private attorneys, who have difficulties obtaining such information."

## 2. Protecting Immigrants and Migrants.

The agency will also target employers with migrant and immigrant workers, and will seek to identify job segregation and disparate pay, among other indications of discrimination.

## 3. Protecting Disabled, Pregnant and LGBT Employees.

The agency plans to follow recent federal circuit court interpretations of the scope of Title VII and the ADA in search of employers who are not fully complying with their obligations to provide reasonable accommodations to disabled workers and pregnant workers, including enforcement of the Pregnancy Discrimination Act. They are also looking for employers who discriminate in any unlawful way against LGBT employees.

## 4. Enforcing Equal Pay For All Protected Classes.

The EEOC will be focused on identifying employers whose pay and compensation programs discriminate against any category of protected classes.

## 5. Encouragement of Claims Before the EEOC and the Courts.

This aspect of the SEP involves, in part, a very broad probe of employers who are utilizing employment contracts and forms of releases, which the EEOC would view as unfairly restrictive or overly broad. An example, among many, would be language that bars an employee or separated employee from voluntarily providing information to the agency that could assist in the investigation or prosecution of other discrimination claims. Notably, the SEP also expressly encourages the agency's 15 District offices to partner with plaintiff's lawyers by providing referrals to local and state bar associations where the EEOC elects not to incur the expense of bringing suit following its investigation of the facts.

## 6. A Commitment to Initiating Charges on a Class-Wide Basis.

Historically, the majority of the EEOC's work has been in responding to charges filed by employees or job applicants. The EEOC announced that its highest priority will be to initiate investigations of systemic issues by conducting "a targeted outreach campaign."

Minding local human resource issues will always remain a high priority for employers. But, now more than ever, employers would do well to give their hiring, compensation, retention and promotion practices close scrutiny given the above six priorities. ■

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