

AI-Based Discrimination Top of the EEOC's Draft Enforcement Plan

Law and the Workplace on **January 17, 2023**

The Equal Employment Opportunity Commission (“EEOC”) has started 2023 with an announcement that it intends to increase enforcement efforts aimed at discrimination resulting from the use of Artificial Intelligence assisted employment related decision tools. On January 10, 2023, the EEOC published its [Draft Strategic Enforcement Plan](#) (“SEP”) in the Federal Register for the fiscal years 2023-2027. For the past decade, the EEOC has issued SEPs to establish “subject matter priorities and strategies to integrate the EEOC’s private, public, and federal sector activities.” For the first time, and at the top of the draft Enforcement Plan’s list for “Eliminating Barriers in Recruitment and Hiring Practices,” is a focus on “the use of automatic systems, including artificial intelligence or machine learning, to target advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups.” Through this prioritization, the EEOC hopes to remedy and prevent discrimination resulting from the application of screening tools used in hiring practices and employment decisions.

The EEOC's current SEP indicates that the agency will employ a targeted enforcement approach through "proactive efforts to address SEP priority issues, including using Commissioner Charges and directed investigations," as well as better integration of "its information and data policy into the agency's SEP priorities." Historically, the EEOC has been sparing in its use of Commissioner Charges, which have comprised less than 1% of the annual charge volume since 2015. Commissioner Charges, however, might prove crucial to the identification of potential discrimination due to use of AI based recruitment, hiring, and HR tools. While some state and local legislatures have stepped up activity in the regulation of AI employment related tools, there is no federal requirement that employers must disclose their use of AI technology in employment processes, meaning many affected parties may never realize that they were potentially adversely affected by this technology. Therefore, it is likely that the EEOC will seek to collect more employer data while also relying more heavily upon its Commissioner Charge authority to identify and investigate possible discrimination charges in this space.

While the newly published SEP draft clarifies the EEOC's future enforcement priorities, it does not expand upon the [EEOC's and Department of Justice's guidance issued in May 2022](#) for employers to avoid discrimination while using AI tools. Until the EEOC or local jurisdictions like [New York City](#) roll out more concrete compliance requirements and guidance for employers to avoid potentially discriminatory practices, employers may want to take advantage of the [Institute for Workplace Equality's October 2022 Technical Advisory Committee Report](#), which "provides analysis of and recommendations on how to address key compliance issues currently arising in relation to the use of AI in employment."

The EEOC will vote on a final version of the SEP. The public has until February 9, 2023, to submit comments through the Federal Register.

[View original.](#)