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EEOC FOCUSES ON HIRING BIAS CLAIMS: A 5-STEP COMPLIANCE PLAN FOR STAFFING FIRMS

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Employers faced unprecedented challenges over the last few years when it comes to attracting and retaining skilled workers — and many turned to staffing firms to help fill critical roles. In turn, the Equal Employment Opportunity Commission (EEOC) ramped up its enforcement of federal anti-discrimination laws by targeting staffing firms for alleged workplace bias. In fact, according to a recent report from Bloomberg Law, the agency filed at least 10 lawsuits against staffing agencies alleging hiring discrimination in the fiscal year that just ended on September 30. What are five steps staffing companies can take to avoid costly litigation in the year ahead?

How Did We Get Here?

The EEOC has made it a priority in recent years to eliminate recruitment and hiring barriers, including bias hiring practices that unlawfully consider a job applicant's protected characteristics — such as age, disability, gender, genetic information, national origin, race, or religion. The agency has also focused on ensuring equal pay protections and preventing systemic harassment.

So, what does this mean for staffing firms? As Bloomberg Law [reported](#), the EEOC appears to be following through on its commitment to target “non-traditional” employment arrangements — and will likely continue this effort as the agency develops its priorities for the next five-year plan.

Notably, we've seen an uptick in EEOC discrimination lawsuits against staffing firms at a time when businesses are

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seeking more contingency workers to fill critical roles in a tight labor market. Consider [these statistics](#) from the American Staffing Association (ASA):

- Staffing firms provided opportunities for about 16 million workers in the years leading up to the pandemic and 13.6 million during the pandemic.
- While temporary and contract staffing sales dipped in 2020 due to the pandemic, such sales increased nearly 18% in 2021, reaching \$144.2 billion as the economy continued to recover.

In 2023, we expect the talent pool of workers to continue to gravitate towards contingent work arrangements — which means now is the time to ensure your practices can withstand the scrutiny of the EEOC and other workplace watchdogs.

Your 5-Step Compliance Plan

What can you do to prepare? Consider taking the following five steps:

1. Focus on Prevention

Although we highlighted the EEOC's litigation efforts, your first priority should be to avoid having to deal with a legal claim altogether. Be sure your workplace anti-discrimination and anti-harassment policies are up-to-date; communicated to your internal personnel, your staffing workers, and your clients; and consistently followed. Additionally, you'll want to ensure you have a robust internal system in place to investigate and resolve harassment and discrimination claims. In the staffing context, such procedures will require cooperation from your client companies. Consider working with counsel to develop strategies to help minimize the risk of litigation.

2. Develop Consistent and Neutral Hiring Criteria

You should review your hiring and interviewing resources — including job descriptions, job ads, interview questions, employment tests, and selection criteria — to ensure they aren't unintentionally screening out qualified candidates based on a protected characteristic. For example, be sure to use gender-neutral terms in job postings and ask job-related questions during interviews.

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You'll also want to take appropriate steps to handle unlawful requests from clients. For example, bids for workers of a specific gender or race are illegal and staffing firms can be held liable for complying with such requests. "The law is clear that complying with a client's discriminatory request is illegal," according to an EEOC regional attorney. "Staffing companies cannot prioritize clients' discriminatory preferences over following the law."

Staffing companies that operate in California have to navigate the further complication of complying with revised pay data reporting requirements (SB 1162) that will soon require clients that hire 100 or more employees from "labor contractors" to submit pay data reports regarding those employees as well. To the extent these pay data reports may include demographic information, some California staffing firms may face statutory requirements to collect data they have not traditionally tracked – and will need to be careful how such information is maintained and used in order to avoid any potential discrimination claims.

3. Provide Training on Unconscious Bias and DEI Best Practices

You'll want to ensure your managers and human resources staff stay updated on the ever-changing legal landscape and best practices. Additionally, providing training on unconscious or implicit bias and offering these resources to your client companies may help eliminate hiring decisions that are based on stereotypes or preconceived notions about particular groups of job candidates.

Consider reviewing your diversity, equity, and inclusion (DEI) programs, too. Employers that embrace diversity on their executive teams and publicly commit to supporting DEI efforts are more likely to attract and retain a diverse workforce.

4. Update Your Service Agreements and Contract Review Checklists

As the legal landscape changes, staffing companies should review and potentially update service agreement templates, with a particular focus on provisions that assign contractual responsibility for legal compliance with respect to employment terms and conditions and provisions that impose indemnification and insurance obligations. Similarly, staffing companies should review and potentially update

their checklists for reviewing and negotiating service contracts with vendor management service companies and procurement centers to ensure that the negotiated contract provisions reflect an appropriate allocation of responsibility and protection for each particular situation.

5. Audit AI and Algorithms for Potential Bias

Software programs might use *algorithms* – which are rule sets for computers based on patterns – and *artificial intelligence* (AI) – which means a computer is doing task that are typically performed by an employee. While these are excellent tools for streamlining the hiring process, [federal agencies have warned](#) that relying on such technology to make staffing decisions might unintentionally lead to discriminatory employment practices. Therefore, you should consider conducting an independent audit of your AI and algorithm-based tools to help eliminate any bias.

Conclusion

We will continue to monitor developments related to hiring practices and EEOC enforcement, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [PEO and Staffing Team](#).