

Understanding Your Responsibilities Under Employee Discrimination Laws



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Announcer:

Welcome to Paychex THRIVE, a Business Podcast, where you'll hear timely insights to help you navigate marketplace dynamics and propel your business forward. Here's your host, Gene Marks.

Gene Marks:

Hey, everybody, and welcome back. Thanks for joining us. I'm here with Jocelyn Samuels, who is Vice Chair at the U.S. Equal Employment Opportunity Commission. And for those of you guys listening and watching, I'm going to refer to it as the EEOC from now on so I don't screw up saying Equal Employment Opportunity Commission. Jocelyn, first of all, thank you so much for joining me.

Jocelyn Samuels:

Well, thank you so much, Gene, for having me. And I screw up on Equal Employment Opportunity Commission all the time, so EEOC works for me.

Gene Marks:

I appreciate that very much. So, Jocelyn, so you're Vice Chair. So, let's start with that, first of all. If you could just give us just an explanation of what that means and how the EEOC is organized.

Jocelyn Samuels:

Absolutely. So, the EEOC was created in 1964 by Title VII of the Civil Rights Act of 1964, and it's the primary federal agency that enforces the employment discrimination laws of the United States. We are an independent agency, which means we're not a cabinet department. We are comprised of five commissioners, no more than three of whom can be members of a single political party. So, the commissioners are nominated by the President and confirmed by the Senate for staggered terms of five years. I was initially confirmed in September of 2020 for a term that ended in July of 2021. I was lucky enough to be reconfirmed in July of 2021 for a term that lasts until July of 2026.

Gene Marks:

So Jocelyn, the EEOC, obviously, it represents workers, their interests, and their rights. But I think that's also important for employers, as well. And I wanted to get your thoughts on that. Why is what the EEOC does important for employers, particularly small employers, to know?

Jocelyn Samuels:

Sure. No, thank you so much for that question. And maybe I can back up for a minute to describe a little bit more about the laws that the EEOC enforces, and the tools that we have in order to be able to ensure compliance. So, as I mentioned earlier, the EEOC enforces federal laws that bar employment discrimination based on race, color, national origin, religion, sex, which includes pregnancy and related medical conditions, sexual orientation, and gender identity, disability, age, and genetic information. So, that's a full panoply of protections that we enforce, and we have multiple tools that we use in order to promote compliance. I think the employment discrimination laws themselves make clear that voluntary compliance is the preferred means of ensuring that employers run non-discriminatory workplaces. And so, we have a host of tools that we use to assist employers at the front end to ensure that they understand their responsibilities and can avoid getting challenged at the back end after problems have arisen.

Jocelyn Samuels:

So for example, we have lots of material on our website that provides information about the standards of the law and how to comply with them. We do educational presentations across our 53 different offices and employers who participate in many of our public events that provide additional information about how to comply with the law. We investigate charges of discrimination that are filed with us, and we have the authority to try to settle those where we find that discrimination has occurred and think that we can reach an amicable resolution between the parties. We issue regulations and guidance that provide information about how we interpret the standards of the law. And then ultimately, we have the authority to bring lawsuits to hold employers accountable for discrimination in cases where we found discrimination but cannot reach a voluntary resolution of the claims. But again, we'd much prefer to work with employers at the front end than to challenge them at the back end.

Jocelyn Samuels:

I'll note a couple of things. We do work to vindicate the rights of employees who have been subject to discrimination. But non-discriminatory, fair, and inclusive workforces are good for everyone, not just the workers, but the businesses as well. They help to ensure that workers will want to come to work for an entity and will stay once they've been hired. They improve morale, they improve a business's bottom line, and they ensure compliance with the law and adherence to goals that I am absolutely confident employees and employers share, which is to eliminate arbitrary and artificial barriers to ensuring that workers can be hired and can perform in accordance with their own potential and not based on their race, their national origin, their sex, or any other prohibited criterion.

Jocelyn Samuels:

I'll also note that we follow facts where they lead. So, when we get complaints of discrimination, we investigate them, we make determinations about whether discrimination has occurred, and if we find that it has, we seek revenues on behalf of the worker. But if we find no reason to think that discrimination has occurred, we issue letters closing the case and informing the individual that they have the option to go to court, but we seek no further relief in those cases.

Gene Marks:

What are some of the hot buttons then this year, Jocelyn, that would like to make employers aware of that they need to be paying special attention to?

Jocelyn Samuels:

So, the first thing that I'd make your listeners aware of is that we do have a small business toolkit on our website. And I encourage small businesses to check it out because it is a suite of materials that is intended to help small businesses that don't necessarily have large internal HR departments or general counsels who are providing them daily advice on the law to understand their responsibility under the employment discrimination laws.

Gene Marks:

If you wouldn't mind me interrupting you.

Jocelyn Samuels:

Yeah.

Gene Marks:

One of the things that I find interesting about the EEOC is that you do not discriminate between big and small businesses. Sometimes small businesses are exempted from certain regulations or laws, but I think even the smallest of businesses could still have complaints filed against them, and the EEOC could still get involved. Correct?

Jocelyn Samuels:

Actually, the laws exempt in the case of race, national origin, color, sex, religion, disability, and genetic information employers with fewer than 15 employees are exempted. In the case of age discrimination employers with fewer than 20 employees are exempt. But small businesses should be aware that some state laws cover smaller employers. So, even if they are exempt under federal law, they may have responsibilities, depending on their location.

Gene Marks:

That's great, and I'm glad you qualified that for me. That was really important. And also, you said earlier it's good business practices to be able to run your business where there is no complaints of discrimination or harassments. You're looking to hire new employees and retain talent. And so, even following the small business toolkit that you make available, regardless of the size of your business, is important to you because that's how a good business is run. So, let's carry on. So, the small business toolkit is available for small businesses to learn from, which is great. But let's get back to some of those hot issues. I mean, things change over periods of time. So, what are you seeing now, or what are you paying special attention to at the commission, that you think that my listeners would want to know about?

Jocelyn Samuels:

For sure. And some of these things are bread and butter that have been part of the law for the decades that it's been in effect, but they are obligations that small businesses need to pay attention to. Title VII and the other employment discrimination laws that we enforce apply across the spectrum of employment activities from recruitment to apprenticeship programs to hiring to promotion to termination, to terms and conditions of employment, which include benefits and wages and vacation leave and treatment on the job. And so, one of the areas where we continue to see significant activity and lots of claims is with regard to harassment. And harassment can take place on a host of bases. So, I think people are most familiar with concepts of sexual harassment, but also the same standards apply when you're evaluating harassment based on race or national origin or the fact that someone has a disability or any other prohibited criterion.

Jocelyn Samuels:

What small businesses need to be aware of is that they should protect themselves by ensuring that they have anti-harassment policies in place that make clear that harassing conduct on a prohibited basis is not permissible in the workforce, and provide clear means for employees to complain and notify management if they feel that they have been subject to harassment in the workplace. We have a lengthy document explaining the standards of harassment on our website. We hope to be updating that in the near term future because it is, sadly, a growth industry in the employment discrimination field. Another area where businesses really need to be conscious of their responsibilities is with regard to retaliation. So, when someone makes a complaint that they have been subject to discrimination, whatever the basis, race, age, disability, genetic information, et cetera, even if that complaint is unfounded, an employer will get itself into trouble if it penalizes the worker for having raised the complaint in the first place.

Jocelyn Samuels:

So, that means even though it may be natural for employers, and us as individuals, to react negatively when we feel that we've been falsely accused, if you take action against an employee for having objected to a practice that the employee thinks is discriminatory or for having participated in an EEOC proceeding, that will be an independent violation of the employment discrimination laws and one that could create liability even if there is no basis for the underlying claim of discrimination. So, those are two long standing prohibitions in the law that employers really need to be conscious of because they form a significant basis for the complaints that we receive. There are also some newer issues that employers are confronting in the 21st century workplace that didn't exist back in the 1960s when these laws started being passed and then enforced. So for example, the use of artificial intelligence, or AI. We have an initiative that is focused on helping employers who want to take advantage of the benefits of technology to do so in ways that will not succumb to pitfalls of the use of technology.

Jocelyn Samuels:

So, we all know that technology can improve efficiency and speed and enable employers to deal with thousands of applicants in ways that will consume less time than going through paper resumes. And no one disputes that technology can add real benefits. But it can also create real problems under the employment discrimination laws to the extent that either the form of the technology or the substance of the tests that employers are using screen people out on the basis of race, national origin, sex, disability, or any other prohibited basis. So, if for example, you have an automated system that asks people about the date of their graduation from college, or their date of birth, that technology may automatically exclude people on the basis of age in a way that can get you into trouble under the employment discrimination laws.

Jocelyn Samuels:

Similarly, if you use an algorithm that sifts through hundreds of thousands of bits of data and identifies people who are most likely to be top performers as those who have graduated from women's colleges, your formula is going to screen out men. And so, it can get you into trouble under the Employment discrimination laws. We hope to put out various documents that identify best practices for harnessing the benefits or avoiding the pitfalls of this technology. And we've started with a document that provides technical assistance on ensuring that the technology you use doesn't screen out people with disabilities. That's available on our website, and I encourage you to check that out, as well.

Gene Marks:

Jocelyn, it's funny you bring this topic up. I was just reading about this that New York state, actually, is coming out with some rules about bias in the interviewing process and using AI technology in that. And I don't want to throw anything at you from left field. So, if you're not comfortable answering those questions, just tell me. But there's a bunch of new applications coming out, a lot of AI-based software made by companies that are trying to help employers with the hiring process. And a lot of big companies are making use of this. And they're kind of creepy. The employees get interviewed on video, and it's analyzing their facial expressions and their voice intonations and not only how they're answering the question, but just how they're behaving and gives those reports.

Gene Marks:

Now, those applications, one of the reasons why they're sold is, they're positioned to say they reduce the amount of bias in the hiring process. And you were just saying that you have to be careful with some of these AI applications because they can introduce bias into the process. So, I was just curious of what your thoughts are on some of those applications that are coming out. You must have bumped into some of them. Is that something you would recommend to a business to use? Or would you tell them right now you might want to avoid them in the near future?

Jocelyn Samuels:

Yeah. No, thank you for the question. And it's the wild west out there because there are new apps and tools being invented every day and the laws, typically we deal with lawyers and HR people. Not with technology vendors. And so, the people who are creating these things may not be aware of the ways in which the laws may constrain their use. I'll say a couple of things. The first thing is I do think technology can be helpful in limiting the possibility of biases creeping in. So for example, if you have a technological tool that hides an applicant's name until after an employer makes a determination about whether they're qualified for the job, that can help to reduce the bias that might creep in, even unconsciously, if people see names that are traditionally male or traditionally female or represent a different national origin or something like that.

Jocelyn Samuels:

That said, again, as you noted, bias can creep in unintended ways. And the cautionary thing that I would say to your audience is, as a general matter, employers are on the hook for using discriminatory tools, even if those tools were developed by a third party vendor and purchased by the employer. And so, it really behooves employers who are thinking about purchasing or investing in development of some of these new tools to work very closely with the vendor to understand the way in which the vendor is evaluating its tool for potential bias, the criteria that go into whatever the output is that the tool is supposed to predict or produce.

Jocelyn Samuels:

It's really important for employers to do due diligence when they are thinking about investing. And one of the things that your listeners should check into is what I am pretty sure will be available on our YouTube channel by the time this interview is broadcast, which is a hearing that we will be holding in the middle of September that goes to the ways that AI tools can be used to reduce and eliminate employment barriers, but at the same time, to be wary of the ways that they can result in disproportionate exclusion, as well.

Gene Marks:

Great advice. And I guess my takeaway is you have to be careful of what you're using. And in the end, like you said, the liability is always going to be on the business owner, on the business themselves. And you and I, I'm sure, can bet that the software companies themselves have all their disclaimers about whatever their technology or processes they use. So, it's even more important for businesses to really be careful. All right. I'm going to switch a little bit and ask you about reporting issues. So, the EEOC has made it a lot easier for employees to report directly to the EEOC if they are encountering any type of an issue, harassment, discrimination, not having reasonable accommodation. So, can you talk a little bit about that? Because I think my audience, I think people running a business need to know that it's not a difficult process for an employee to report them if they feel that something wrong is going on. So, can you speak to what the EEOC offers?

Jocelyn Samuels:

Sure. Part of the silver lining of the pandemic, to the extent that there was any silver lining to it, is that we were forced to put more effort into developing online access for our stakeholders to access our resources. And so, we now have a portal through which individuals can manifest their intent to file a claim, schedule intake interviews with our investigators, and ultimately file a complaint of discrimination. I don't want the ease with which employees can do that to scare employers into thinking that they are more at risk. In fact, the number of charges that we've been receiving has been declining over time, although that may have been the result of the pandemic and people leaving the workforce. And so, it may be that those trends will be reversed in the months to come. But also, when we get a complaint of discrimination, we are obligated under the law to notify an employer about those complaints and to give the employer an opportunity to file, what we call, a position statement, which responds to those injuries or those complaints.

Jocelyn Samuels:

We evaluate the position statement and the complaint that's been filed, we make an assessment about what kind of investigation and how extensive an analysis we need to do, and then we take the steps that are necessary, whether it's requesting documents from the employer, interviewing witnesses, or potentially closing a complaint because we realize that it's asserting discrimination on a basis that we don't cover, for example. But the filing of the complaint is the first step in the investigative process, which then involves contact with the employer and opportunities, starting at the very beginning, to mediate or engage in alternative dispute resolution for those kinds of complaints where the employee and the employer have a disagreement, but it's one where they'd really like to get to resolution expeditiously.

Gene Marks:

Yeah, that's good. You raised the issue about employers feeling they're more at risk, and I hear that from my clients. They feel that they are more at risk that employees can just do that. So, it's good to hear the steps that you're taking to make sure that that risk is somewhat mitigated, and you encourage employers and employees to work out those issues themselves rather than taking up taxpayer dollars to get those issues resolved.

Jocelyn Samuels:

If I could just interrupt for one second, Gene. I'm so sorry. We do have a very robust alternative dispute resolution program where we facilitate the mediation and the conversation. So, we don't cast the employee and the employer out into the wilderness and say, "You guys just work this out." We have trained professionals who can facilitate the conversations in ways that will most likely lead to resolution. I'd also add, just as a side note, employers do need to keep abreast of the law because, while the number of charges may have declined over the course of the pandemic, the bases for potential discrimination get enhanced over time.

Jocelyn Samuels:

So, just two years ago, for example, the Supreme Court made absolutely clear that employers are barred from discriminating based on sexual orientation and gender identity. That was a position the EEOC had taken a decade earlier, but the Supreme Court has made it the law of the land. And so, employers who have not focused on the fact that, "Okay, it's not just sex discrimination. It's also discrimination based on sexual orientation and gender identity that you have to watch out for," would do well to evaluate their anti-discrimination policies and their procedures to make sure they get out in front of any problems.

Gene Marks:

You brought up an interesting point that I actually have to get your thoughts on, as well, when were talking about how the number of cases had actually gone down during the pandemic. And I don't know if you guys talk about this internally or not, but what are your thoughts on the impact? There's been such an enormous change in the workplace with so many more people working from home and working remotely than ever before. And I'm just interested in your thoughts. Do you think that those changes could actually help avoid having some of the issues that we've seen before with discrimination, or harassment in particular? The less that people are together in the office, maybe the lower the chances that somebody's going to say or do the wrong thing as opposed to just being remote. My question is what impact, the changing work from home workplace, do you think that will have on what the EEOC does and the types of cases that you're going to see? And this is just your personal thoughts.

Jocelyn Samuels:

I don't know how it's going to affect the number of complaints. But I think it could affect the kinds of complaints we get. So for example, as people are in the workforce less, there may be fewer problems with sexual assaults or physical overtures of a sexual nature because people are just not together. On the other hand, employers have to guard against online harassment, as well. And if employees on Zoom calls or email systems are using epithets or inappropriate language or sharing inappropriate videos or suggestive comments, that's as much of our problem as if it had occurred in the physical workplace. The other thing that I would say is that I do think the pandemic will have an impact on thinking through what constitutes reasonable accommodation. And your audience probably knows that under the Americans with Disabilities Act, one of the obligations for people with disabilities is that employers consider the possibility of what's called amenable accommodation to their disability to enable them to perform the essential functions of the job and to enjoy equal terms and conditions in the workplace.

Jocelyn Samuels:

And so, one of the things that employers used to say, I think, quite frequently was that telework couldn't be a reasonable accommodation because all of their jobs had to be done in person. I think what we've seen over the course of the pandemic is really remarkable ingenuity in moving a lot of business functions that we used to think had to be done in person to an online approach. And I think that that realization is something that employers are going to have to keep in mind as they have people with disabilities, people who are immunocompromised, for example, or have other barriers that make coming into the workplace difficult as a result of their disability. Employers are going to have to think about whether remote work is a reasonable accommodation for people who can do the job, but simply can't for reasons of disability, come into the office on the schedule that the employer expects under typical circumstances.

Jocelyn Samuels:

But there also may be, of course, need for accommodations related to technology that people use for remote work. So, if a workplace encourages its workers to work from home, employers ought to be sure that employees with vision impairments or hearing impairments or other mobility issues that prevent them from using technological tools without an accommodation are accommodated. Now, the employer's obligation is to provide accommodation up to the level of, what's called, undue hardship, which means

in the disability context significant difficulty or expense. But there are lots of accommodations that can be provided well before an employer encounters undue hardship. And the law obligates employers to consider that or to implement those that are necessary under the standards.

Gene Marks:

Jocelyn, well, I can assure you that the vast, vast majority of my clients and my audience are not Michael Scott from the Office, which makes me laugh when I think that every episode, he's probably violating at least 10 of the rules of the EEOC. So, you can take comfort in that. But before I let you go, do you have any final words for this audience as to what they should be considering, and thoughts about the EEOC that they should just be aware of?

Jocelyn Samuels:

Absolutely. And thank you, again, for this opportunity to talk with you and with your audience. When I give speeches, I often say I'm from the government. I'm here to help. And everybody laughs. And I say, "Why are you laughing?" Because I truly mean it. It is really a core part of our mission to provide the support and information that employers need in order to comply with their responsibilities under the law. I really do encourage your audience to check out our website and to be in touch with any of our 53 offices across the country to solicit information about how they can ensure that they are complying with the legal requirements. Because I have real confidence that the vast majority of employers want to do the right thing.

Jocelyn Samuels:

And in fact, that the right thing under the law is the right thing for their businesses. And so, we really want to do what we can to facilitate that voluntary compliance and to move toward the goals of the law that I know we all share of creating true equality of opportunity in the workplace. So, I look forward to partnering with your listeners and working together to achieve the goals of the law today, tomorrow, and on into the future. And one thing I should have said at the outset, and I will make very clear now, is I am here today speaking just for myself. I do not, except where the Commission has established policy, I am not speaking either for the Commission as a whole or for any other commissioner.

Gene Marks:

Jocelyn Samuels is a Vice Chair at the US Equal Employment Opportunity Commission. Jocelyn, I want to thank you so much for this conversation. I really enjoyed it, and I appreciate you coming on.

Jocelyn Samuels:

I enjoyed it very much. Thanks for the invitation.

Gene Marks:

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Speaker 1:

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