

LEGAL + REGULATORY

New Priorities by Equal Employment Opportunity Commission Warrant Attention (1/2)

Last month, the Equal Employment Opportunity Commission (EEOC) unveiled its latest [Strategic Enforcement Plan](#), outlining the areas in which the Commission will focus its litigation and investigation resources for the next four years. RANE recently spoke to expert Jennifer Goldman of Alignment Strategies Group for insight on the implications that this plan has for businesses.

The EEOC's new plan pledges to prioritize three new and noteworthy pieces: tackling nontraditional employment, protecting Muslims and Sikhs, and ensuring the fairness of data-driven employment screening tools.

- To address today's "complex employment relationships," i.e. temporary workers, independent contractors, and on-demand economy workers, the Commission will be cracking down on companies seeking to avoid liability under the employment laws by misclassifying workers as independent contractors rather than employees. **Goldman** emphasizes that companies will need be vigilant about the line between reducing company costs and compensating people appropriately.
- The Commission's focus on "backlash discrimination" stems from a recent increase in the discrimination of Muslims, Sikhs, and those who are or are perceived to be Arab, Middle Eastern, or South Asian.
- Big data and its potentially discriminatory role in the hiring and recruitment process is at the forefront of the EEOC's concerns, as selection tools like algorithms and internet data scraping may be having an adverse impact on protected classes and invade employee privacy. "The main idea is really to take the long path," **Goldman** says. "Think ahead about the potential unintended consequences of your actions. For example, when we talk about mining data, think about mining the data specifically for those types of questions and what unintended consequences might be related to it."

Employers should pay close attention to the new strategic plan, as past plans have proven the EEOC does well on keeping its promises.

New overtime regulations, if fully implemented, give employers even more of a reason to adjust costs and reclassify employee statuses now so that they can ensure compliance for later.

Under the Fair Labor Standards Act's "White-Collar Exemptions," originally scheduled to take effect December 1, 2016, the minimum salary necessary for an employee to qualify for an exemption from overtime would be \$47,476 per year, and would increase every three years. Ongoing legal challenges to the regulations may slow down or alter implementation.

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- The Commission may be interested in bringing more cases under a joint employer theory, which would link temporary, staffing, and other partner agencies to the companies they serve—giving both liability for a labor violation committed by one.
- Companies should reevaluate their use of individual independent contractor relationships to determine the extent to which an individual may properly be considered an employee rather than a contractor. **Goldman** advises that this regulation will end up costing companies no matter which way they go.
- Those indirectly using independent contractors would be well-served by reevaluating their agreements with these agencies to ensure that they contain appropriate safeguards to protect against the potential risk of finding a “joint employer status.”

With regards to potentially discriminatory big data applications, employers need to understand the selection products they are using and determine whether they have an adverse impact on particular demographic groups.

- While some algorithms may be neutral and do not adversely affect any protected groups, others unintentionally rely on correlations that are not neutral in their effects. **Goldman** notes, “Your company should be asking itself, ‘Are there possible ways that the data we’re collecting could be used subversively?’”
- According to a [recent article](#) published by The Guardian, “Few of the algorithms and scoring systems currently in use have been vetted with scientific rigor, and there are good reasons to suspect they would not pass such tests.”
- A product with no adverse impact in test trials or when it is used by other businesses might adversely impact your workforce if, [for example](#), the workforce differs educationally or socially from the groups on which the algorithm was tested.
- Employers cannot defend their use of a tool with how the algorithm performed elsewhere.
- There is no sure way to assess this other than to monitor outcomes among employees and applicants. Employers can determine whether the algorithm has a disproportionate impact on an applicant pool by comparing the representation of protected groups among those selected by the algorithm to the demographics of those who were rejected.