

# Management Alert



## The EEOC Targets Staffing And Recruitment Firms As It Seeks To Eliminate Barriers In Recruitment And Hiring

Eliminating barriers in recruitment and hiring is one of six national priorities identified by the U.S. Equal Employment Opportunity Commission (“EEOC”) under its Strategic Enforcement Plan (“SEP”). The SEP is a key driver of the EEOC’s enforcement and litigation activities over the next three fiscal years. While the EEOC has always pushed for equal opportunity in all aspects of the job application process, it has intensified its scrutiny of recruitment and hiring practices under the current SEP and, recently, it has aimed its enforcement gaze on the referral and outplacement practices of staffing companies, in particular.

Just within the last three months, the recruitment practices of two staffing firms have come under fire; and last year, a staffing firm paid millions of dollars to resolve EEOC charges. As the EEOC continues to target recruitment and hiring practices as a national priority, *staffing firms should take key steps to ensure their practices do not draw the EEOC’s ire.*

### 1997 EEOC Enforcement Guidance Forms Backdrop For Scrutiny Over The Staffing Industry

The EEOC’s guidance has long foreshadowed its position regarding potential liability of staffing firms when staffing firm workers are subjected to discriminatory practices. As early as 1997, the EEOC issued Guidance stating that staffing agencies are responsible for discrimination, retaliation, and harassment that their employees confront at clients’ work sites. The EEOC therefore made it clear that staffing firms must hire and make job assignments in a non-discriminatory manner. Under its guidance, staffing firm workers are considered “employees” of the staffing firm, the client to whom they are assigned, or both. The guidance also describes the allocation of remedies between a staffing firm and its client when the EEOC finds that both have engaged in unlawful discrimination.

While the 1997 Guidance explained how staffing firms could be liable when workers they place at client sites suffer discrimination, under the current SEP, the EEOC has shifted its scrutiny to staffing firms’ **own referral and candidate placement policies**. Indeed, the EEOC has renewed its focus on recruitment and hiring practices, targeting, in particular, “class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.” Thus, because the EEOC is looking more closely at all aspects of the recruitment and hiring process, staffing firms have increasingly been – and likely will continue to be – caught in the EEOC’s enforcement crosshairs.

### EEOC Fires Warning Shots, Targeting Staffing Firms’ Referral and Outplacement Practices

The EEOC’s recent enforcement activity signals a focus on staffing firms’ referral and outplacement practices. On October 22, 2013, the EEOC announced a settlement with a nationwide staffing firm under which the firm agreed to pay the EEOC a whopping \$920,000 and implement preventive measures to settle allegations that

it engaged in a pattern and practice of failing to refer job applicants for particular job opportunities based on their race, color, sex, national origin, age or disability. The settlement provides that the staffing agency does not admit any liability. However, in order to avoid litigation, the agency entered a five-year conciliation agreement, which provides for monetary and programmatic relief, including diversity training for recruiters and retaining an independent consultant to update the firm's recruitment and hiring procedures.

Mere weeks before the October 22, 2013 settlement, the EEOC fired another shot at a California-based staffing firm, alleging that the firm refused to refer or place qualified female applicants for laborer and warehouse positions because of their gender. According to the EEOC, the staffing firm only referred male applicants for these positions, some of whom the EEOC contends did not meet the stated job qualifications. The EEOC is seeking monetary relief in the form of back pay, compensatory and punitive damages, hiring relief, and an injunction against future discrimination.

## Recommendations

So how can staffing and recruitment firms shield themselves from the EEOC's aim?

A few things to consider:

- Ensure your agency has non-exclusionary referral and hiring policies. Avoid policies or practices that direct individuals towards specific jobs due to their status in a protected group.
- Be sure that employees are receiving *regular* diversity training and put a particular emphasis on non-discriminatory referral and hiring procedures.
- Staffing firms should examine whether restrictive application processes or screening tools such as pre-employment tests and background checks pass muster under the EEOC Guidance.
- Not only are staffing firms prohibited from discrimination in connection with hiring employees and referring them to clients, but they are also prohibited from adopting any unlawful referrals based on customer requests. The customer is not always right!
- Above all, staffing firms should pay specific attention to the groups of people that traditionally face barriers to employment. The EEOC's priority to eliminate barriers means a special focus on race, ethnicity, religion, age, women, and people with disabilities.

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