

How to avoid common mistakes with EEOC complaints



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Equal Employment Opportunity Commission (EEOC) complaints are a common challenge that employers face.

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- Long, complicated investigations
- Negative impact on company morale and culture
- Unwanted stress
- High legal bills
- An equally high settlement amount if a complaint is upheld
- Unfavorable PR
- Onerous, ongoing audits and monitoring of your company

You want to do everything in your power to avoid this scenario, right?

According to recent data, the [top five EEOC complaints](#) reported nationally are:

- Retaliation: 39,110
- Disability: 24,238
- Race: 23,976
- Sex (including pregnancy): 23,532
- Age: 15,573

Clearly, these aren't small numbers.

So how can you prevent EEOC complaints against your company?

What are the big mistakes you should avoid?

And, if your company finds itself facing a charge of discrimination, what should you do?

Top EEO mistakes that employers make

1. Not having an equal employment opportunity

It's harder to defend your company against a workplace discrimination complaint if you can't demonstrate that anti-discrimination is a priority and explain in detail what you do to stop discrimination when it's identified.

The solution: Your company should have an up-to-date equal employment opportunity (EEO) policy, or nondiscrimination policy.

It should include:

- Description of unacceptable behaviors
- Consequences of violating the policy
- Your company's commitment to complying with federal, state and local anti-discrimination laws
- Explanation of how and to whom employees can submit complaints internally
- Explanation of how the company will investigate internal complaints and take action
- If required in your state, explanation of how employees can file complaints with the EEOC

Your EEO or anti-discrimination policy should be written down in your company's [employee handbook](#). During the onboarding process, new hires should acknowledge receiving and reading the policy – with their signature – so it's provable that each employee is aware of the policy.

Furthermore, the policy should apply to everyone – including senior leadership. If anti-discrimination efforts aren't enforced and modeled from the top down, it sends the message that the policy isn't taken seriously.

2. Insufficient manager training

Your managers are the people who will receive and process discrimination complaints from employees. If they don't handle these issues appropriately and put preventative measures into practice, you won't be able to convince the EEOC that you've done all you can to prevent discrimination.

According to the EEOC, once an employee informs a manager of discrimination, it's the same thing as informing the company.

The solution: [Train managers on how to escalate discrimination issues](#) and promote a **discrimination-free workplace.**

This anti-discrimination training should be repeated annually.

If your company receives a complaint, the ability to demonstrate an ongoing commitment to nondiscrimination training may be crucial to your defense.

3. Inconsistent application of workplace policies

Treating employees differently – regardless of your intent – may increase the likelihood your company will be charged with discrimination.

The solution: **Treat all employees who are similarly situated the same.**

Similarly situated means the employees are on the same team, occupy the same role or have the same amount of tenure, for example.

Again, you may mitigate risks by writing down your HR policies, including them in your employee handbook, and providing proper, regular training.

If some employees are treated differently than others, however, you should have written workplace policies that detail when acceptable distinctions can be made.

For example: Let's say Employee A has been with your company for 10 years while Employee B has worked there for one year.

- You allow Employee A to work from home a few days each week, but not Employee B.
- To prevent Employee B from claiming discrimination, you should have a policy that explains the tenure required to be permitted to work from home.

Another example: Employee A and Employee B have both had attendance issues. Employee A feels as though he is being punished more harshly than Employee B.

- [A time and attendance policy](#) – with progressive disciplinary actions spelled out – can explain the disparity in their treatment.
- Perhaps Employee A, for instance, has garnered more offenses and thus deserves a stronger penalty. Your written policy should reflect that reality.

4. Insufficient documentation

From the perspective of the EEOC, if you fail to document an event it's as if it didn't happen.

You'll struggle to persuade the EEOC to see your side of the story without solid evidence in the form of good records.

The solution: Keep comprehensive files on each employee.

[Document everything](#) that happens during an employee's time with your company.

Personnel files should include:

- Performance issues
- Attendance issues
- [Behavioral issues](#)
- Communication issues
- Violation of company policies
- Monthly, quarterly or annual reviews
- Training or certifications completed

These records support your decisions related to terminations, promotions, appointments to special projects or changes in salary. It speaks objectively to the employee's performance, drive and productivity, and undercuts a charge of discrimination.

If you address an issue with an employee verbally, make notes afterward in the employee file to document that a conversation took place. You may also want to have a third-party witness present, such as an HR professional.

What about after an employee leaves your company? The EEOC requires you to keep all personnel records for one year.

Additional federal recordkeeping requirements:

- If an employee is terminated, keep their personnel records for one year from the date of termination.
- Retain all payroll records for three years.
- Maintain files on any employee benefit plans, such as pension and insurance plans, and any written seniority or merit system for the full period the plan or system is in effect, for at least one year after termination.
- Keep all records, including wage rates, job evaluations, seniority and merit systems and collective bargaining agreements that explain why employees in the same establishment were paid different wages.

These requirements apply to all employers covered by federal anti-discrimination laws, regardless of whether a complaint has been filed against the employer.

To learn more about federally required recordkeeping – including how long different types of records must be kept by different types of employers, please refer to the EOCC's [Summary of Selected Recordkeeping Obligations in 29 CFR Part 1602](#).

Note: Depending on where you operate, some states require employers to keep personnel records longer than what federal law mandates.

5. Problematic interview questions

Interviewers may think they're making innocent small talk with a job applicant when they [ask certain red-flag questions](#), such as:

- What year did you graduate from school?
- What does your spouse do?
- How many kids do you have?
- Do you want kids in the near future?

- What's the origin of your name?

The problem with these types of questions is that they could lead an applicant to believe they're being targeted, or they weren't hired because of personal characteristics protected against discrimination by federal law.

The solution: Train interviewers to understand which questions are “safe” and which questions could trigger a hiring discrimination complaint with the EEOC.

Learn more about interview questions you should never ask.

You should also make sure that [job descriptions](#) don't contain any discriminatory language.

6. Engaging with former employees after their termination or after they submit an EEOC complaint

Perhaps you just let an employee go. Sometime later, you receive an email, phone call or LinkedIn message from that employee, asking what they could've done better or seeking clarification for the reasons behind their termination.

It's okay to talk to them, right?

Wrong.

By engaging with this former employee, you could unintentionally expose your company to liability. You may not be well-versed in the subtleties of the law and, when your guard is down and you're speaking casually, it can be easy to say something that could be construed the wrong way – even if your reasons for firing that employee were valid.

Furthermore, don't provide a LinkedIn recommendation if requested – no matter how much you feel guilty and want to help out. It negates the reason for that employee's termination and raises questions. If a complaint is submitted by this employee, the EEOC may view your recommendation as contradictory to the reasons cited for the termination.

The solution: Refer all communication from terminated employees to your HR

If a former employee submits a complaint to the EEOC, all communication between your company and the complainant needs to go through the agency.

7. Not following EEOC guidelines closely when you receive a complaint

When a complaint is filed with the EEOC against your company, the agency will notify you and provide you with basic information about the nature of the complaint, as well as options for how you can respond.

In many cases, you'll be able to resolve a complaint early through mediation or settlement. If you elect not to engage in early mediation, the EEOC will ask you to provide information that explains why your business took the employment action at the root of the complaint, as well as legitimate business reasons for those actions.

This includes:

- A statement of position. This is your opportunity to tell your side of the story.
- A request for information (RFI) that may include:
 - Copies of personnel policies
 - The employee's personnel file
 - Personnel files of other individuals, if relevant
- Employee contact information for witness interviews

The EEOC encourages you to present any facts that you believe show that the allegations are incorrect or don't amount to a violation of the law. Of course, without any of the documentation or policies referenced earlier in place, responding to these requests will be much more difficult and time consuming.

As part of the process, the EEOC may conduct its own interviews of relevant parties.

Failure to comply with or facilitate any part of this process means risking an unfavorable outcome.

The solution: Follow the EEOC's instructions precisely to demonstrate that your company takes discrimination and harassment seriously, and is making a good-faith effort to cooperate with an investigation.

8. Treating complainants differently, or behaving in a retaliatory way toward them.

Adventures in HR Outsourcing



This could include:

- Ignoring them
- Passing them over for promotions or special assignments
- Not allowing them privileges or rights that they were allowed prior to their complaint

The solution: Managers at your company shouldn't behave in any way that could be construed as negative or retaliatory toward an employee after they've filed a complaint.

Remember, [retaliation is by far the number-one complaint that the EEOC receives](#).

Consequences of discrimination

If the EEOC determines that an employee has been the target of discrimination or harassment, the agency's objective is to put the victim of discrimination in as close to the same position – in terms of the job and salary – as they would have been if the discrimination had never occurred.

Depending on the type of discrimination and its severity, the victim may receive a job placement, back pay and benefits. A victim of discrimination also may be able to recover attorney's fees, expert witness fees and court costs.

Other costs your company may be required to pay include out-of-pocket expenses caused by the discrimination, such as:

- Costs associated with a job search
- Medical expenses
- Emotional harm suffered (mental anguish, inconvenience or loss of enjoyment of life)

Additionally, punitive damages may be awarded to punish an employer who has been particularly malicious or reckless. The limits to these damages varies by company size.

It should be noted, too, that while this article is focused on EEOC complaints, discrimination charges may also be filed with state or local [Fair Employment Practices Agencies \(FEPAs\)](#). Often the laws these non-federal agencies enforce are similar to those the EEOC enforces. In some cases, however, FEPAs enforce laws offering greater worker protections.

Finally, your business will be required to comply with training obligations and notifications to employees. You must also verify that your company has remained in compliance with these mandates. The EEOC will perform an audit of your company and monitor your activities.

Anticipated upcoming EEOC enforcement priorities

According to the federal government, employers can expect the EEOC to [pay special attention to cases that fall within these categories through 2021](#):

- Eliminating barriers in recruitment and hiring
- Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
- Ensuring equal pay protections for all workers
- Preserving access to the legal system
- Preventing systemic harassment

Furthermore, the EEOC is devoting extra attention to what it calls “emerging and developing issues,” including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

Emerging issues cited by the EEOC pertain to the Americans with Disabilities Act (ADA), pregnancy and sexual orientation and transgender (LGBTQ) concerns..

Finally, just as [the COVID-19 pandemic](#) has impacted our culture in so many ways, the disease may shape the federal government’s response to workplace discrimination. Guidance along those lines can be found on the EEOC website and [in a special publication](#).

Summing it all up

You can take proven steps now to protect your company and prevent discrimination complaints by:

- Having written, equally applied policies
- Training managers regularly
- Maintaining comprehensive personnel files

This should all be done in keeping with relevant state and federal laws.

Should a complaint be filed against you, however, follow the EEOC’s instructions carefully. Be cooperative and forthcoming in providing all requested information.

If you’ve put the necessary preventative measures in place, you’ll likely have greater peace of mind going through the process – and potentially avoid adverse action, too.

To learn more about taking a proactive approach to HR at your company, download our free e-book: [7 most frequent HR mistakes and how to avoid them](#).

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