

# EEOC's Focus on Diversity in Construction

By Michael R. Hatcher & Lisa B. Marsh

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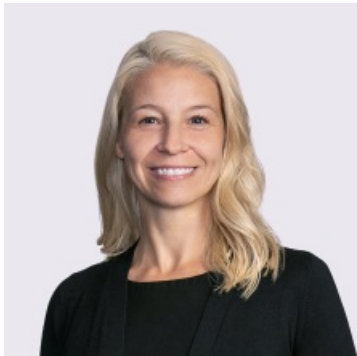


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Despite the potential growth due to the Infrastructure Investment and Jobs Act of 2021 and the CHIPS and Science Act of 2022, the U.S. Equal Employment Opportunity Commission has identified discrimination, harassment, and the lack of gender and racial diversity in the construction industry as challenges to diversity and inclusion efforts in the industry.

Jackson Lewis P.C. - EEOC's Focus on Diversity in Construction



## Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted. Despite the potential growth due to the Infrastructure Investment and Jobs Act of 2021 and the Chips and Science Act of 2022, the US Equal Employment Opportunity Commission has identified discrimination, harassment, and the lack of gender and racial diversity in the construction industry as challenges to diversity and inclusion efforts in the industry. On this episode of We Get Work™, we discuss how key industry stakeholders can take action to enhance diversity and inclusion in their workforces, and to help mitigate the risk of EEOC scrutiny.

Our host today are Lisa Marsh and Mike Hatcher, principles in the Denver and Washington DC region offices of Jackson Lewis. Both are members of the firm's affirmative action, OFCCP, Government Contract Compliance and Corporate Diversity Counseling Practice groups, as well as the construction industry group. Lisa represents government and non-government contractors in OFCCP matters, preparing for and defending audits and counseling employers on issues stemming from OFCCP regulations. Michael assists companies in developing and implementing comprehensive diversity, equity and inclusion enhancement plans, ensuring compliance with federal, state, and local non-discrimination requirements, and conducting EEOC and DEI audits

and investigations. Mike and Lisa, the question on everyone's mind today is how do federal contractors take action to enhance diversity and inclusion in their workplaces, and how does that impact my business?

Lisa Marsh:

Thanks, Alitia. Mike, thanks so much for sitting with me today. I saw that EEOC published a report in June this year focused on the construction industry and equal employment opportunity. What prompted EEOC's report and why now?

Michael Hatcher:

Now is explicitly because of the Investment and Infrastructure Jobs Act, IIJA, and as well, the Chips and Science Act, two recent acts in the last couple of years that commit the federal government to spending a lot of money, millions of dollars on things like physical infrastructure, but also manufacturing projects. Those are expected to increase construction jobs enormously in the next couple of years. And the EEOC chair saw that as an opportunity to, maybe we should start looking at this. Construction is already one of the largest industries in the country, employing almost 12 million people, and there have been a series of investigations by EEOC that have turned up some egregious acts, still fairly common use of the N word, finding nooses on job sites. So combined with the amount of federal investment and the extra federal power that comes with it, the EEOC chair determined that this was a good time to address these issues.

Lisa Marsh:

And EEOC identified some challenges to diversity, you had just mentioned. What does EEOC think are the driving factors behind these challenges to diversity and inclusion in the industry?

Michael Hatcher:

Well, it was interesting to me in reading the report, because they started with historical biases against women and minorities in the industry, that it's a white male dominated industry. Interesting to me was they didn't just lay the blame for that at the employer side. They included the employers and the unions of having a preference in the past for men and particularly white men, but they also pointed out to some more specific things. So continuing discrimination in apprenticeships, which is an entry point, particularly to the better jobs in construction, that there's ongoing hostile work environment, particularly for minorities and women, which generates a lack of trust, which EEOC tags as a safety issue, not just an EEO compliance issue, but they say it is detrimental to safety. If people don't feel or they don't jump in to help a minority or woman as fast, you're going to have more workplace injuries and other problems.

They also talked about discrimination in things that weren't quite as apparent. Everybody thinks about discrimination in terms of recruiting, hiring promotions, but EEOC also flagged other things that aren't quite as on the radar, like work assignments, hours, because you find in construction, people know not everybody gets to work the same amount, depends on who gets assigned to a

task, and those kind of task assignments can make a big difference. In one example the EEOC provides, the women were complaining they were given very basic assignments, where less experienced men were given higher skilled tasks. And what that did was prepare the men for the next step to promotion. And when the women came up, they didn't have the right experience, "Oh, we can't promote you. You don't have the experience." That's purely objective. But it was because the women weren't being given those opportunities.

EEOC also said retaliation has been and still is common in the industry. And interestingly to me, they also said that there was a lack of policies, anti-discrimination policies, and poor implementation, which didn't surprise me so much. But according to their study, there are a lot of companies that just don't have appropriate anti-discrimination and harassment policies.

Lisa Marsh:

Yeah. You mentioned before the apprenticeship programs. Why is that a focus? Why does EEOC want to focus on that?

Michael Hatcher:

Well, the apprenticeship programs are pretty important from EEOCs perspective for a couple of reasons. One is it's an entry point to the industry. So somebody who has never been in construction can come in through an apprenticeship program, kind of learn on the job, they get paid, and people that have jobs, they can't quit their job and go work in an unpaid internship generally for a year to get the experience. They come in through an apprenticeship program, it's understood they don't have the experience, and they get paid for learning on the job. So just as a general entry point. But also the apprenticeship programs are usually geared towards higher level jobs. It's what they call the skilled trades. So when you're working on a construction project, there are helpers, that's a job title or laborers. And then there are the more skilled trades, the mill workers, the people that work with the carpenters, the iron workers, the welders, all of those require more training, and a lot of that training comes through apprenticeship programs.

So if you come in through an apprenticeship program, you're more likely to get those higher skilled jobs, which also then lead to promotions and further job advancement. And one of the things that EEOC flagged was most minorities are still heavily underrepresented in the industry. They point out that women make up now about 11% of the construction overall workforce, everything, compared to women are 47% of the entire US workforce. And some people are really happy because a few years ago it was only 7%. Now they've made it to 11. Isn't that great? And EEOC is saying, "Yeah, but we got a long way to go." And even within that advance and that progress, most of the women are still stuck at the lower levels.

And that holds true, that's also true for African Americans and Asians. They're way below their representation in the overall workforce, in construction in general, and even more underrepresented in the higher levels. Interestingly, Hispanics are over indexed overall in the industry, almost twice as much as the representation of the overall workforce. But they're mostly

concentrated at the bottom layers, that helper and laborer category where they're making less money, they're not getting advanced. And the thing that I think people miss, and they didn't call this out directly, is as people advance, they make more of the hiring and promotion decisions, or at least have more influence on it, and that also impedes the advancement of women and minorities.

Lisa Marsh:

Yeah. So it sounds like they're not just looking at overall representation, but distribution of those folks within the higher and lower paying jobs. And how does EEOC intend to address these challenges that they've identified?

Michael Hatcher:

Well, they've come up with a couple of things. One, they say they're going to continue vigorous enforcement, and that's a quote from the report. But what they're trying to push on the report is the non-enforcement things that they can do. They said they're going to come out with some industry specific technical assistance. I'd like to talk about it, the progression of an employee. What are best practices in recruitment, hiring, retention, development, promotion? How do you get people prepared to be promoted? You don't want to just promote people because, oh, we don't have enough minorities or women, let's promote them. That doesn't do anybody any good because you set them up for failure, but how do you get people prepared to. So they're going to come up with some technical assistance geared towards the construction industry. They're going to try and, as they say, collaborate. So they're going to try and put together meetings of the employers, the unions, workers, worker advocacy groups, civil rights groups, and other federal and state enforcement agencies, which shouldn't be missed.

But they're going to try and bring people together and try to get people working together on what are the solutions, what are the problems, what are the barriers to getting where we want to be? They're going to come up with a list and share best practices, as I said, including gathering them from these meetings. They're going to partner with employers and unions and try to help upgrade anti-harassment training, both sexual harassment and harassment based on other personal characteristics and compliance level training so that managers on the job sites know what to do, what not to do, how to report, how to address concerns. And as I said, they're going to work with other agencies, which could be a good thing. But it's also a trap that's sitting out there that as they're coordinating with other enforcement agencies and sharing information, companies that aren't doing so well or have problems are more likely to be switched to the compliance side.

Lisa Marsh:

Yeah. And do you expect the enforcement actions to look different now that we know that this is a priority for EEOC?

Michael Hatcher:

I don't know that they're going to look different, but I think they're going to be more intense. And

even at the investigator level, they know they're being watched. The chair of the EEOC came out and signed her name to this. And for those that don't know, she's at the end, in fact, her second five-year term just ended. She'd been renominated by President Biden for a third, five-year term. And at the moment though, she's a holdover, she can hold over until the end of the year, but she's likely to get the Senate confirmation before then, it'd be fine. She's going to be around another five years, and she's making this one of her signature programs, which means there's going to be scrutiny from her all the way down to the investigator levels. So there are going to be questions, she's going to ask questions, people are going to have to report. It's the old what gets measured gets done, she stated a marker that this is going to get measured.

Lisa Marsh:

Yeah. Last time we talked we talked about OFCCPs increased focus on construction contractors, so Office of Federal Contract Compliance Programs that oversees construction contractors and other contractors as well. Do you expect EEOC to reach out to and try to collaborate with OFCCP on these types of enforcement efforts?

Michael Hatcher:

Yes. Employers should just definitely expect that. So if you're a federal contractor, you're going to have not only two agencies you have to respond to, but they're going to be talking to each other. So if you have two complaints that OFCCP hears about, and seven complaints that EEOC hears about that are different, all of a sudden they're going to get together and share and say, "Oh, there are nine complaints." So that's one way that this is going to impact. I think this is something you generally see more in democratic administrations, which is what we have, that the enforcement agencies work together more closely. That's not saying that any of the agencies don't enforce the law in Republican administrations, they just don't seem to coordinate as much. And in this particular administration, they have talked about it, they're doing it. In January, 2022, OFCCP and EEOC announced something called the HIRE program, the hiring initiative to reimagine equity. So they're already working together, and in this report, she says, "We're going to continue to do that, not just with OFCCP, but other federal, state, and local enforcement agencies." So you got to be prepared.

Lisa Marsh:

Yeah. Well, what can construction employers start doing now to prepare for this increased EEOC scrutiny?

Michael Hatcher:

One thing they should do is they might want to just read the executive summary of the report, but they should start looking at the things the EEOC said they're going to look at. The EEOC has highlighted the lack of clear policies on anti-harassment and non-discrimination. So you ought to look at, review your policies, make sure you have them, and then take that second step and make

sure they're being implemented correctly and somebody's monitoring that. Related to that is training. Train your managers what to do if they get a complaint that even sounds like an EEO complaint. I always tell our clients when I do the training is over report inside the company. If you think it might be related, call HR, get some help from your internal experts and avoid the situation where, well, I didn't think it rose to the level of a claim because then you as the frontline manager are making that decision and you own it. So I put it in those terms, get some help from the experts and let them decide what to do.

Make sure that employees know what those processes are. With my lawyer hat on, that's an affirmative defense that the courts have recognized to Title VII complaints. That you have a policy, that the employees could have used that policy to address their grievance, or if they brought it to you, you took appropriate action that can at least lessen the severity of a compliance action. But if the employees don't know about it, you've just taken that defense off the table. And it's one of the things that EEOC has highlighted in this report that employees don't know how to complain, or they're being discouraged from complaining.

It seems counterintuitive, but I tell employers, you should try to get as many people to complain to you as possible because if they complain to you and you address it, then they're less likely to go to EEOC or the state and local enforcement agencies. I would also check your compliance, check your implementation, make sure the policies are being implemented. And at this point, I would say, if you haven't done anything recently, do an assessment, just high level issue spotting where in our programs might things fall apart. And I'd look at everything through the employee cycle, it's recruitment, addressing complaints, retention. Are we losing any protected class at a higher rate than other groups? So look at all those things, do your own kind of self-evaluation before EEOC comes.

Lisa Marsh:

Yeah. And so we've talked about increased scrutiny by EEOC on construction contractors around equal employment opportunity. How does the recent Supreme Court decision in the college admissions case impact employers in light of this increased scrutiny, if at all?

Michael Hatcher:

Well, directly, there's no impact on the law. The Supreme Court case dealt with Title VI of the Civil Rights Act, which deals with programs that use federal financial assistance and the equal protection clause of the 14th Amendment. Employer actions are governed by Title VII, which hopefully people are familiar with the Civil Rights Act, which prohibits discrimination based on race, sex, color, religion, and the other acts like the Age Discrimination Employment Act, the other so-called protected classes. All those statutes already prohibit the kind of race conscious decision making that was going on in the colleges and universities. They were looking and giving bonus points or making decisions based on race and admitted that some people that wouldn't have got admitted were admitted to the schools because of their race. That's been prohibited in

employment since Title VII came out. You should be compliant with that.

So it hasn't changed the rules, but it has strongly changed the scrutiny that companies will receive. There are a lot of cases out there, people looking for problems. And what employers need to do is look and make sure that their policies and programs are actually compliant with Title VII. Because with the increased scrutiny, if you are doing something that doesn't comply with Title VII, you're more likely to get called out for it, you're more likely to get sued, you're more likely to get an enforcement action.

Lisa Marsh:

Yeah. Well, anything else employers need to be thinking of?

Michael Hatcher:

I think in general, just pay heed to the fact that the chairwoman of the EEOC has put a stake in the ground and said, "I am going to focus on construction, we as an organization." And she's been in charge 10 years, mind you, or she's been on the EEOC, she wasn't the chair for most of that, but she's been around for a while and she's saying, "We as an organization have not focused on this industry, and I am going to do that." And part of it's because this industry is getting a lot of federal money that it wasn't getting before. Between the Infrastructure Act, the Chips and Science Act, there's a lot of construction going on. It's federal money, it's the people's money, and that's the way they look at it. This is taxpayer money, taxpayers ought to be treated fairly.

And in looking at it, she's gone back and said, "Construction is a particularly bad environment for a lot of people." And that's not to say it's everybody. It's not even to say it's a worse compliant industry, but some of the problems are just really horrendous, really egregious that you don't see even so much in an office environment. Now, I've investigated nooses in an office environment, but I've heard of and seen a lot more in construction sites. And that's the kind of thing, this report also gives a lot of examples. And there's N word and nooses and unconsented touching of women and people saying, "Oh, you don't belong here." And I think it's interesting, as I said before, the chair tied that into safety. I wouldn't be surprised if she starts talking to OSHA about this discrimination and retaliation is creating health and safety problems. So it's not just the employment agency enforcement you need to worry about, it's a lot of things.

Lisa Marsh:

Yeah. Yeah. Great. Well, thank you so much. You've given us so much to think about and appreciate your time.

Michael Hatcher:

Okay, thanks. It was great chatting with you.

Lisa Marsh:

You too.

Alitia Faccone:

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