

THE EEOC'S 2013-2016 STRATEGIC ENFORCEMENT PLAN

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Most federal employment anti-discrimination statutes, including Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act, are administered by the U.S. Equal Employment Opportunity Commission (EEOC). In that capacity, the EEOC has the discretion to define those statutes' requirements through regulations and determine its enforcement priorities.

The EEOC recently promulgated and approved a Strategic Enforcement Plan for Fiscal Years 2013-2016. The plan casts a significant amount of light on the commission's agenda. See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016 (SEP), available online at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

The stated goal of the Strategic Enforcement Plan, which was approved by the EEOC on December 17, 2012, is to “focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.” *Id.* To that end, the commission identified six priorities:

1. Eliminating barriers in recruitment and hiring;
2. Protecting immigrant, migrant, and other vulnerable workers;
3. Addressing emerging and developing issues;
4. Enforcing equal pay laws;
5. Preserving access to the legal system; and
6. Preventing harassment through systemic enforcement and targeted outreach.

Although the priorities are quite broad, they do provide employers with at least some insight into the EEOC’s goals and key concerns, giving employers important information that can be used to assess whether their employment practices and policies are vulnerable to scrutiny and how they should respond to charges of discrimination and requests for information.

Eliminating Barriers in Recruitment and Hiring

The EEOC’s focus on hiring and recruitment discrimination claims is keyed on “class-based intentional recruitment and hiring discrimination” as well as “facially neutral” hiring practices that have an adverse impact on particular groups. *Id.* at 9. According to the EEOC, racial and ethnic

minorities, members of religious groups, older workers, women and individuals with disabilities “continue to confront discriminatory policies and practices at the recruitment and hiring stages.” *Id.* The EEOC sees itself as better situated to address this type of discrimination than individual or private attorneys, because of its access to data, documents and potential evidence. *Id.* Employers who have not recently audited their hiring protocols should consider reviewing job applications and interviewing practices to confirm that those documents and procedures do not screen out applicants for impermissible reasons or have a disproportionate impact on certain classes of individuals.

Protecting Immigrant, Migrant and Other Vulnerable Workers

The EEOC also plans to target “disparate pay, job segregation, harassment, trafficking, and other discriminatory practices and policies affecting immigrant, migrant and other vulnerable workers.” *Id.* at 9. This is considered a priority because, in the commission’s view, such individuals can be “unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.” *Id.* Companies that employ immigrant or itinerant workers should review their immigration recordkeeping practices and make sure that they do not maintain any policies or practices that disparately impact these individuals.

Addressing Emerging and Developing Issues

The EEOC monitors trends and developments in the law, workplace practices and labor force demographics in hopes that “swift and responsive attention” to emerging issues can prevent the spread of discrimination by promoting greater awareness and facilitating compliance with the law. *Id.* at 9. The SEP mentioned three specific emerging issues, which are now priorities to the EEOC:

1. Disability accommodations under the ADA;
2. Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and
3. Coverage of lesbian, gay, bisexual and transgender individuals under Title VII. *Id.* at 9-10.

Enforcing Equal Pay Laws

In accordance with the relatively recent enactment of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, S. 181, which amended Title VII of the Civil Rights Act of 1964, the EEOC also announced its intention to target compensation policies and practices that discriminate based on gender (SEP at 10). In order to address equal pay issues, the commission has specifically encouraged the use of directed investigations and Commissioner Charges to facilitate enforcement. *Id.*

Preserving Access to the Legal System

The EEOC plans to target policies and practices that “discourage or prohibit individuals from exercising their rights under employment discrimination statutes,” or that impede investigative or enforcement efforts. *Id.* These practices include retaliation, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in an investigation, and failure to retain records required by EEOC regulations. *Id.* To the same end, the commission has confirmed its intention to continue connecting individual charging parties with private attorneys who can file suit on their behalf.

Preventing Harassment Through Systemic Enforcement and Targeted Outreach

According to the EEOC, harassment is one of the most frequent complaints raised in the workplace. *Id.* at 10. Despite the probable perception, sexual harassment claims are significantly outnumbered by combined discrimination claims based on race, ethnicity, religion, age and disability. *Id.* While individual investigations and litigation into these matters are common, in hopes of deterring future violations, the EEOC plans to take a more targeted approach that focuses on systemic enforcement

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and targeted outreach. *Id.* At both the national and local level, “meritorious systemic charges and cases that raise SEP or district priority issues [will] be given precedence over individual priority matters and over all non-priority matters, whether individual or systemic.” Systemic litigation suits can have a devastating impact on employers, regardless of whether they are based on disability, race, gender or other forms of discrimination. The cost and difficulty of defending such litigation can be high. As such, employers should be mindful that an EEOC investigation into one of the six national priorities, or yet to be determined local priorities, could turn into “example-setting” litigation.

What Does This Mean for Employers and Their Attorneys?

The underlying theme of the EEOC’s Strategic Enforcement Plan is this: the commission intends to devote its increasingly limited resources to uncovering and eliminating

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policies and practices which have resulted in systemic inequality, rather than individual cases of discrimination. All of this information should be considered when consulting with clients about the employment-related issues they are facing and, when appropriate, attorneys should re-examine what information the company gathers from its employees, how the company’s data is stored, and what information is contained in their client’s policies and employee handbooks.

Because the EEOC will continue to increase the amount of systemic harassment and discrimination cases it is pursuing, employers should also be cognizant about how they respond to EEOC charges of discrimination and requests for information. Every charge of discrimination should be evaluated with respect to the possibility that further investigation of that charge could lead to allegations that the employer has unwittingly adopted employment policies which result in systemic discrimination. Information provided in response to a request for information, including information often provided as a matter of course, such as information about how the

employer has treated similarly situated individuals, could become the basis for expanding an investigation. Technology has also played a big part in this expansion of systemic investigations. Robust tracking systems allow ready access to huge amounts of electronic data – some of which is even in the hands of third parties. The EEOC knows the data is now readily available at many companies, which makes it hard for employers to argue that it is too burdensome to gather. Databases make analysis of the numbers simple, allowing the easy discovery of hidden trends. How employers and their legal counsel respond to these emerging issues in a manner which complies with legal and ethical responsibilities will be important going forward. ■

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