What to Expect from the EEOC

A Workplace Policy Institute Briefing
Agenda

• EEOC Membership & Staffing
• EEO-1 & Pay Equity
• Workplace Wellness Plans
• Harassment
• LGBT Coverage
• Conciliation
• Strategic Enforcement Priorities
EEOC
Membership & Staffing
Quorum Restored!

Current Commission

• Janet Dhillon, Chair (Term Ends: July 1, 2022)
• Victoria A. Lipnic (R), Commissioner (Term Ends: July 1, 2020)
• Charlotte A. Burrows (D), Commissioner (Term Ends: July 1, 2019)

Pending Nominations

• Sharon Fast Gustafson (R) (Re-Nominated for General Counsel January 17, 2019; Four-Year Term)
  – Deputy General Counsel Jim Lee serving in Acting Capacity since December 2016

Open for Consideration:

• Vacant Republican Nominee – Term Ending July 1, 2021
• Vacant Democrat Nominee – Term Ending July 1, 2023
An Agency in Transition

**Decreased Staff Levels at end of FY 2018**

- Net Decrease of 114 FTEs (representing 5% of agency’s staff)
- Total of 1,968 FTEs - Decrease from 2,400 FTEs in FY 2010 (and 3,400 in 1980)
- More than 500 members of EEOC staff are currently retirement eligible; more than 600 more eligible to retire in the next 10 years
- EEOC reports that nearly 20% of agency staff are new to their positions

**New Leadership in Field**

- New District Directors in Birmingham (Bradley Anderson), Dallas (Belinda McAlister), Philadelphia (Jamie Williamson) and Indianapolis (Michelle Eisele)
- Newer Regional Attorneys in Chicago (Greg Gochanaur) and Atlanta (Antonette Sewell)
- New Chief Human Capital Officer – Kevin Richardson
- Creation of New Office of Enterprise Data and Analytics & First Ever Chief Data Officer - Samuel Christopher (Chris) Haffer
Improved Technology

Continued Focus on Technology:

• **EEOC Portal for Respondents** - Operational for All Offices

• **EEOC's Online Charge Status System** - Allows both individuals who have filed a charge of discrimination with EEOC and respondents, and their respective representatives, to track the progress of the charge. These are the only users of the system authorized by EEOC.

• **EEOC Public Portal** - Allows individuals to submit online initial inquiries and requests for intake interviews with the agency. Also enables individuals to digitally sign and file a charge prepared by the EEOC for them. The EEOC received more than 200,000 inquiries in field offices, including 110,464 inquiries through the new online inquiry and appointment scheduling system, resulting in 76,418 charges being filed. EEOC Acting Chair Lipnic attributes early stage communications having contributed to major reduction in charge activity and enabled agency to focus on reducing charge inventory.

• **Inventory (“Backlog”) Reduction**. In FY2018, reduction of 19.5% in private-sector charge inventory to 49,607 charges – lowest level in twelve years.
EEO-1 Reports & Pay Equity
EEO-1: Demographic Data

• Demographic Data (“Component 1”)
  - Required by EEOC for many years
  - Requires employer to report a “snapshot” of its workforce using a single pay period in the fourth quarter
  - Must break out employees by one of ten job categories, and by race, gender, and ethnicity
  - 140 data fields required to be reported
  - Was scheduled to be due March 31, 2019; extended to May 31, 2019 because of government shutdown

• Unaffected by litigation – due to be filed by May 31, 2019; EEO-1 filing portal open since mid-March

• Who’s required to file?
  - Employers with 100 or more employees who are subject to Title VII; federal contractors subject to Title VII with 50 or more employees and sufficient $$$ ($50K or more) of government contracts
EEO-1: Compensation Data

- Employee Compensation Data
  - September 2016 - EEOC proposed and Office of Management and Budget (OMB) approves expanded EEO-1 reporting of compensation data (“Component 2”) – first filing due March 31, 2018
  - February 2017 – Employer groups seek stay or repeal of OMB approval
  - August 2017 - OMB stays prior approval of Component 2
  - November 2017 - Plaintiffs sue OMB and EEOC
  - March 2019 - Court vacated OMB’s stay of Component 2; orders EEOC to collect compensation data
EEO-1 “Component 2”

- **Compensation Data (“Component 2”)**
  - Requires employer to report *annual* compensation data (W-2 Box 1 information) broken out by ten job categories, twelve “salary bands,” and race, gender, and ethnicity
  - Requires *annual* hours worked broken out by job categories, “salary bands,” and race, gender, and ethnicity
  - 3,360 data fields required to be reported

- **EEOC announced May 2: calendar year 2017 and 2018 data due by September 30, 2019**

- **Who’s required to file?**
  - Employers and federal contractors with 100 or more employees who are subject to Title VII
    - Covered federal contractors with more than 50 but fewer than 100 employees *not* required to file Component 2 – must file Component 1 only
EEO-1 Component 2: Compensation

For each employee in the “snapshot” period, report annual W-2 “Box 1” year-end earnings:

- Wages, tips, overtime, bonuses, certain fringe benefits, employer contributions to health savings account and other compensation

- Does not include elective deferrals (such as employee contributions to a section 401(k) or 403(b) plan)
EEO-1 Component 2: Hours Worked

For each employee in the “snapshot” period, report annual hours worked (using FLSA definition):

− Non-Exempt Employees: Use actual hours worked

− Exempt Employees: If employer maintains accurate hours worked, may use those; else, may use a proxy of 40 hours per week (full-time) or 20 hours per week (part time) multiplied times the number of weeks worked
EEO-1: Where Do We Stand and Where Are We Going?

• EEOC filed notice of its appeal on May 3, 2019 – no stay requested as yet
• Penalties for Non-Filers
• ??????
ADA/GINA: Workplace Wellness Plans
Workplace Wellness Plans

Background

• Extensively regulated under HIPAA – DOL/HHS/IRS (“Tri-Agency Regs”)

• Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA): Under ADA and GINA, *medical examinations/disability-related inquiries are GENERALLY PROHIBITED*

  But...

  – Exception for workplace wellness plans that include inquiries/examinations so long as they are **VOLUNTARY**
Wellness Plans: EEOC 2016 Regulations: What is “Voluntary” under ADA/GINA?

Health-related inquiries and medical examinations that are part of a wellness program are voluntary if:

- They are not required, or used to limit access to health insurance;
- Employees are not coerced, intimidated, or harassed into participating, or threatened or retaliated against for not participating;
- A notice is given describing what information will be collected, how it will be used, who will receive it, and confidentiality protections; and
- Incentives are within certain limits.
Workplace Wellness Plans

Wellness Plans

• In the fall of 2016, the American Association of Retired Persons (AARP) sued the EEOC in federal district court to enjoin the wellness regulations, arguing that they were insufficiently protective, and allowed employers to offer wellness plan incentives that rendered participation involuntary.

• The court granted summary judgment in AARP's favor in August 2017 and court vacated those portions of the regulations setting permissible incentive limits effective January 1, 2019.
Workplace Wellness Plans

• On December 20, 2018, the EEOC published regulations in the Federal Register removing only those portions of the regulations that were stricken by the court, effective January 1, 2019

• New Regulations – December 2019???
Harassment
EEOC Harassment Task Force

• **January 2015:** EEOC announces formation of Select Task Force on the Study of Harassment in the Workplace

• **June 20, 2016:** Select Task Force Co-Chairs Report on the Study of Harassment in the Workplace (See EEOC Press Release dated June 20, 2016)

• **June 11, 2018:** EEOC Reconvened Select Task Force on Harassment – Discussed non-disclosure and arbitration agreements and revisiting harassment training. (See EEOC Press Release dated June 11, 2018)
Key Statistics Involving Harassment Claims: FY 2018

**Significant Increase of EEOC Harassment Litigation and Increased Charges**

- 66 harassment lawsuits filed by EEOC in FY 2018.
- 50% increase over prior year, and represented almost one third of all EEOC lawsuits filed in FY 2018 (66 out of 199 lawsuits filed by EEOC).
- 41 lawsuits involved allegations of sexual harassment.
- 34 of the 41 sexual harassment lawsuits were class cases (i.e. multiple claimants), and 5 were “systemic lawsuits, i.e. impacting 20 or more individuals).
- Individual filed charges alleging sexual harassment increased by 13% this year.
EEOC Recent Focus on Harassment

- **June 14, 2018:** EEOC Announced Filing of Seven Harassment Lawsuits. (See EEOC Press Release dated June 14, 2018)
  - Lawsuits filed by EEOC in Birmingham, Albuquerque, Dallas, St. Louis, Los Angeles, San Diego, Cincinnati
  - Lawsuits included claims against shipbuilder, staffing company, trucking company, software company, hospitality operation and commercial cleaning service

- **August 9, 2018:** EEOC Announced Filing of Seven Harassment Lawsuits. (See EEOC Press Release dated August 9, 2018)
  - Lawsuits filed by EEOC in San Diego, Albuquerque, Denver, Atlanta, San Antonio, Chicago, New Orleans
  - Lawsuits included claims against country club, restaurant, senior care facility, grocery store, airline, oil and gas company, and cleaner
LGBT Coverage
Since 2012, EEOC has taken position that gender identity is prohibited “sex” discrimination under Title VII (the *Macy* decision).

In 2015, EEOC held that sexual orientation is likewise protected (*Baldwin*)
## LGBT-Based Sex Discrimination Charges at EEOC

<table>
<thead>
<tr>
<th></th>
<th>FY 2013</th>
<th>FY 2014</th>
<th>FY 2015</th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>FY 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Receipts</td>
<td>808</td>
<td>1,100</td>
<td>1,412</td>
<td>1,798</td>
<td>1,762</td>
<td>1,811</td>
</tr>
<tr>
<td>Resolutions</td>
<td>337</td>
<td>846</td>
<td>1,135</td>
<td>1,649</td>
<td>2,016</td>
<td>2,101</td>
</tr>
<tr>
<td>Monetary Benefits (Millions)</td>
<td>$0.9</td>
<td>$2.2</td>
<td>$3.3</td>
<td>$4.4</td>
<td>$5.3</td>
<td>$6.1</td>
</tr>
</tbody>
</table>
EEOC: LGBT Coverage Under Title VII

• Circuit Split:
  - 11th Circuit (2018) = no LGBT coverage

• Conflict within Administration: EEOC v. DOJ

• Cert. petitions granted, April 22, 2019
  - Sexual Orientation: Zarda v. Altitude Express; Bostock v. Clayton County, GA
  - Gender Identity: R.G. & G.R. Harris Funeral Homes v. EEOC
Conciliation
Impact of Mach Mining LLC v. EEOC, 135 S.Ct. 1645 (2015). U.S Supreme Court concluded that courts are merely to conduct a “barebones review" of the conciliation process and a court is not to examine positions the EEOC takes during the conciliation process, since the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."
Strategic Enforcement Priorities
Strategic Enforcement Priorities

FY 2017-2021 Strategic Enforcement Plan

• Eliminating Barriers in Recruitment and Hiring
• Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination
• Addressing Selected Emerging and Developing Issues
• Ensuring Equal Pay Protections for All Workers
• Preserving Access to the Legal System
• Preventing Systemic Harassment
This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.