

The EEOC Plots Its Course Through 2016

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BY: LAURA D. WINDSOR

The U.S. Equal Employment Opportunity Commission (?EEOC?), the federal agency responsible for the enforcement of federal laws prohibiting discrimination in the workplace, recently approved its 2013-2016 Strategic Enforcement Plan (?SEP?). The SEP is a component of the EEOC?s 2012-2016 Strategic Plan that was approved earlier in 2012. The SEP outlines the key priorities for the EEOC?s investigation and enforcement efforts, with the stated intent of targeting specific areas in which the EEOC has determined that discriminatory practices in the workplace are more prevalent.

In the SEP, the EEOC identified six ?national priorities? on which it will focus its attention and resources through 2016:

1. Eliminating Barriers in Recruitment and Training.

Over the past few years, employers have seen a marked increase in the number of lawsuits brought by the EEOC that allege discriminatory recruitment and hiring practices. In the SEP, the EEOC has stated that it will target its enforcement efforts on ?class-based recruitment and hiring practices? that discriminate against job applicants. More specifically, the EEOC will closely investigate employers? use of criminal and credit background checks as a screening tool for hiring applicants.

The EEOC has determined that the use of criminal and credit background checks to screen applicants may have a disparate impact on certain races and ethnicities. The EEOC has reasoned that, statistically, African Americans and Hispanics are more likely to be incarcerated than Caucasians. Therefore, the EEOC posits, even an employer?s facially neutral policy to conduct criminal background checks will screen out more African-Americans and Hispanics than Caucasians, which may constitute unlawful race or national origin discrimination.

The EEOC noted in guidance issued earlier in 2012 that, in order to avoid liability for a disparate impact claim based on the use of criminal or credit background checks, employers must show that the decision to refuse employment based on criminal history information was ?job-related and consistent with business necessity.? The EEOC also noted that employers should not use blanket disqualification

standards; and instead, employers should specify or give examples of the types of potentially disqualifying crimes, limit conviction inquiries to a specified length of time from the conviction (or release from prison) to the date of application, and limit use of conviction records only for employees in certain types of jobs that carry risk. Finally, the EEOC recommended that employers conduct individualized assessments, rather than automatically disqualify the applicant based on the criminal background check.

The EEOC's increased scrutiny of background check screening tools has placed employers in a Catch-22. If employers do not perform the pre-hire screening and hire an individual who later harms a co-worker, the employer could be subject to state tort liability, such as negligent hiring. If the employer conducts the background screening, it steps into the EEOC's crosshairs. Because of the challenging issues presented in this first SEP priority item, employers should ensure that their background screening processes comport with current law.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

The EEOC has identified as a priority for the next three years to eliminate disparate pay, job segregation, harassment and other discriminatory employment practices that target immigrants, migrant workers, or "vulnerable workers who may be unaware of their rights" or reluctant or unable to exercise them.

3. Addressing Emerging and Developing Issues

Under this priority item, the EEOC has committed itself to stay abreast of changes in the law. The SEP states that the EEOC will devote particular attention to developments in disability discrimination laws; pregnancy, religious, and disability accommodation issues; and the potential future coverage of lesbian, gay, bisexual, and transgendered individuals under Title VII of the Civil Rights Act.

4. Enforcing Equal Pay Laws

The EEOC has stated that it will continue to investigate and file suit to remedy compensation systems that discriminate against employees based on gender. This priority item likely arises out of the increased interest in disparate pay issues that came to light several years ago, and which led to the passage of The Lilly Ledbetter Fair Pay Act of 2009. The Fair Pay Act provided that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action.

5. Preserving Access to the Legal System

The EEOC will investigate employers' policies and practices to determine if they discourage employees from exercising their rights under the employment discrimination statutes. The EEOC will also carefully investigate claims that an employee was retaliated against for having exercised his or her rights under the federal anti-discrimination laws. Retaliation remains one of the largest categories of Charges of Discrimination that the EEOC investigates.

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

Prevention of harassment in the workplace, whether based on gender, race, national origin, religion, age or disability, remains one of the key priorities of the EEOC. The EEOC is committed not only to investigate and enforce claims of harassment, but also to deter harassment through additional education and training programs.

In addition to these national priorities, the SEP also requires EEOC regional offices to identify any particular areas of concern for their geographic regions.

The EEOC's identification of these six priority issues was not merely a statement of aspirational goals. To the contrary, it is the EEOC's call to action for the next three years. If, after initial screening, a Charge is determined to fall under one of the SEP priority areas, it will be fast-tracked for investigation, and will be given precedence over all other non-priority matters. The EEOC has stated that Charges falling under the SEP "shall receive greater investigatory attention and resources to ensure timely and quality enforcement action." Moreover, "where appropriate, SEP priorities should also be considered in selecting cases for amicus curiae participation."

Employers should review the SEP priorities and evaluate their existing company policies and procedures to ensure that they comport with the law. Employers also should conduct annual training of supervisory, management, and human resources personnel on federal and state employment laws. Finally, if an employer receives notice that a Charge of Discrimination was filed against it, particularly a Charge in which the claim of discrimination falls within one of the SEP priorities, it should take immediate action.

The full SEP can be found at www.eeoc.gov.

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- Laura D. Windsor ? 804.420.6466 ? lwindsor@williamsmullen.com

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