

FOCUS

EEOC anticipates class-wide actions over discrimination

The agency is unfazed by a material Supreme Court ruling

What could be the “new” Equal Employment Opportunity Commission debuted on Sept. 7, when it published a draft of its plan for taking enforcement actions against employers in the future.

The draft Strategic Enforcement Plan outlines where the EEOC will concentrate its resources for conducting investigations and bringing charges through 2016.

Historically, most actions brought by the EEOC have been on behalf of one or a small number of employees. In 2011, the EEOC filed 300 lawsuits and obtained \$455.6 million in relief for private sector, state and local employees, as well as job applicants.

The draft plan makes it clear that, during the next three years, the agency intends to focus its resources on identifying “broad-based, systemic and class-wide” allegations of discrimination.

The goal of investigating and charging class-based claims appears heady, given the decision last year by the U.S. Supreme Court in *Wal-Mart Stores Inc. v. Dukes*. In that case the high court rejected the use of statistics and other generalized data to support a putative class. Nevertheless, the EEOC will clearly be stepping up its search for national, regional and even local entities vulnerable to class-wide claims of discrimination.

Entities within the EEOC’s sights will include employers who are initially the subject of a single employee claim. Once the EEOC adopts the new plan (likely by the end of the year), each of its 53 field offices may be expected to evaluate claims for an opportunity to initiate a broader inquiry about unlawful patterns or practices affecting other employees on a class-wide basis.

Further, without any claim at all, the EEOC can, on its own initiative, present to any employer of its choosing costly and time-consuming investigative inquiries.

What will the subject of those inquiries be? Highlights of the plan can be summarized as follows for both individual and class-based claim charges.

DISPARATE TREATMENT IN HIRING

The agency will target hiring practices that may be facially neutral but are intended to favor certain employees, and thus discriminate against other qualified, protected classes of employees.



**GUEST
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The EEOC recently filed a federal suit against Bass Pro Outdoor World, a retailer of sporting goods and products, claiming a systemic pattern of hiring Caucasian males, rather than hiring qualified Hispanics and African Americans, for positions that included cashier, sales associate and supervisor.

The draft plan also indicates that the agency will focus on applicant screening tools, including inquiries as to whether the applicant has ever been criminally convicted.

DISCRIMINATION AGAINST PREGNANT APPLICANTS AND EMPLOYEES

The agency will focus on employers who discriminate against pregnant women whose applications for employment are rejected. They will also focus on women in the workplace who lose their employment or suffer other adverse employment actions substantially due to being pregnant. Just after issuing the draft plan, the EEOC filed four lawsuits against employers charging them with pregnancy discrimination.

DISCRIMINATION BASED ON SEXUAL ORIENTATION

The agency identifies the protection of lesbian, gay, bisexual and transgendered workers as an “emerging issue” under Title VII of the Civil Rights Act.

The draft enforcement plan follows on the heels of the EEOC’s decision and opinion issued earlier this year stating that discrimination against an employee or applicant on the basis of the person’s gender identity violates Title VII.

That decision applies to all future EEOC enforcement and litigation activities in its 53 field offices, and is binding on all federal agencies and departments. The draft plan could certainly result in a class-based inquiry and charges against employer practices of screening applicants, and in retaining and promoting open LGBT employees.

THE ADA AMENDMENTS ACT AND UNDUE HARDSHIP

The ADA Amendments Act went into effect in 2009, giving employees broader

protections in the definition of a disability, including impairments that are periodic or recurring such as post traumatic stress disorder.

The EEOC has made clear in its draft plan that it will focus on whether employers are failing to provide reasonable accommodations to qualified individuals. It can be expected that the agency will focus on employer defenses, including defenses that it would be unduly difficult or expensive to provide the accommodation requested.

RETALIATORY AND HOSTILE WORK ENVIRONMENTS

The draft plan addresses the need to engage in additional education and outreach programs on a variety of issues.

These issues appear to include overly broad arbitration or settlement agreements that seek to bar the submission of a complaint to the EEOC; failures to implement and enforce document retention programs that preserve employment and demographic data; and failures to identify and remedy workplace conduct that is harassing or retaliatory due to race, color, sex, ethnicity, age, disability or religion.

DISPARATE PAY FOR MIGRANT AND IMMIGRANT WORKERS

The agency will be focusing on employers with immigrant and migrant workers whose compensation is less than other qualified workers in unprotected classes performing comparable job functions.

With the EEOC likely adopting the plan by the end of 2012, employers should be auditing many of their policies.

These include their data retention protocols; their hiring and screening tools; their policies of nondiscrimination in hiring, retaining and promoting LGBT workers; their responses to requests for accommodation by qualified workers; their hiring and leave policies granted pregnant female workers; and their compensation of protected workers as compared to unprotected workers performing substantially similar job functions, particularly immigrant and migrant workers.

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