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EEOC Adopts Strategic Enforcement Plan and Outlines Its Priorities Through 2016

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On December 17, 2012, the Equal Employment Opportunity Commission ("Commission") approved its [Strategic Enforcement Plan \("SEP"\) for the Fiscal Years 2013-2016](#). The SEP outlines the goals and priorities of the Commission for the next four years in enforcing the various fair employment laws under its purview (e.g., Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, etc.). For employers, the SEP is particularly valuable because it outlines the Commission's six national priorities over the next four years, and employers should expect an increased focus in each of these areas:

- ***Eliminating barriers in recruitment and hiring.*** The Commission states that, along with targeting class-based intentional recruitment and hiring discrimination, it will focus on recruitment and hiring practices that appear facially neutral but that adversely impact particular groups. The SEP specifically mentioned the use of screening tools, such as background checks, pre-employment tests and date-of-birth inquiries, as measures that might disproportionately affect certain protected groups.
- ***Protecting immigrant, migrant, and "other vulnerable" workers.*** The Commission noted that it intended to target disparate pay, job segregation, harassment, trafficking, and other discriminatory practices and policies affecting immigrant, migrant, and "other vulnerable" workers. The Commission further noted that such workers are often unaware of, or are otherwise reluctant or unable to exercise, their rights.
- ***Addressing emerging and developing issues.*** The Commission maintained that it was responsible for monitoring trends and

developments in the law, workplace practices, and labor force demographics. The Commission expressed an intention to prevent the spread of emerging discriminatory practices by being aware of and tracking new legislation, major judicial decisions, demographic changes, and significant events. The Commission also provided examples of issues it currently considers to be "emerging or developing": (1) certain issues under the Americans with Disabilities Act, such as qualification standards, undue hardship, and direct threat; (2) accommodating pregnancy-related limitations; and (3) as applicable, Title VII's sex-discrimination provisions as they relate to lesbian, gay, bisexual, and transgendered individuals. However, the Commission cautioned that those issues are "illustrative and not exhaustive."

- **Enforcing equal pay laws.** While seemingly self-explanatory, it is notable that the Commission stated that it will target "compensation systems" that discriminate based on gender. The Commission further states that it would, in particular, encourage the use of Commission-directed investigations and Commissioner charges to facilitate enforcement of equal pay laws.
- **Preserving access to the legal system.** The SEP states that the Commission intends to target policies and practices that discourage or prohibit individuals from exercising their rights. The Commission considers policies and practices under this category to include retaliatory acts by employers, failure to retain records as required by Commission regulations, drafting and utilizing overly broad waivers, and settlement provisions that prohibit individuals from filing charges with the Commission or providing information to and assisting with agency investigations.
- **Preventing harassment through systemic enforcement and target outreach.** Finally, the SEP notes that harassment is one of the most frequent complaints raised in the workplace and that, when combined, harassment claims based on race, ethnicity, religion, age, and disability significantly outnumber sexual harassment claims. The Commission stated its belief that a targeted approach that focuses on enforcement at a systemic level, as well as an outreach campaign to increase education among employers and employees, will "greatly deter" future violations.

What should employers take away from these stated priorities? As [we noted previously](#) and as the six priorities discussed above demonstrate, the Commission intends to focus efforts on "systemic discrimination cases" in an effort to efficiently combat discrimination with a decreased budget and workforce. One area in which employers may want to pay special attention is the policies and procedures implemented in determining wages and wage increases, as the Commission re-affirmed an intention to focus on equal pay claims. For instance, lock-step wage increases of equal percentages can result in an even wider gap of pay between genders. [As we noted last year](#), this could result, or at least play a factor, in a determination of liability.

Employers should also consider re-evaluating their hiring and application

procedures and policies. For employers administering tests or conducting background checks as part of the application and hiring process, careful consideration should be given to determine whether the practices adequately serve their purpose as a valuable tool for evaluating applicants and whether they may be having a disproportionate impact on certain protected classes, such as minorities, women, or older workers.

Finally, given the Commission's focus on retaliation and other actions it considers to deter employees from exercising their rights under the law, employers should pay special attention to the language of any employee contract, separation and settlement agreement, or waiver being utilized to ensure they do not run afoul of Commission guidelines or otherwise serve as a potentially improper deterrent to assisting with an agency investigation. With the Commission's re-declared focus on claims of retaliation, now may also be a good time to revisit and re-educate supervisors and employees regarding retaliation and other federal and state anti-discrimination and anti-harassment laws.

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