

The EEOC's Systemic Initiative And High-Priority Enforcement Areas: Compliance Strategies For Employers

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Introduction

The Equal Employment Opportunity Commission (commonly referred to as the EEOC) is the agency charged with enforcing many of our federal laws prohibiting workplace discrimination. In recent years, the EEOC has pursued with vigor its "systemic initiative" – an agency-wide priority to strengthen its approach to investigating and litigating systemic cases. The EEOC has defined systemic cases as "pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic area." The systemic initiative has been gaining steam and will continue to do so – earlier this year, the EEOC said it anticipates filing at least 20 new systemic lawsuits in 2012 and again in 2013.

This means the EEOC is bringing bigger cases, addressing broader issues, affecting more people and getting more media attention. The EEOC's headline-grabbing initiative is raising the stakes for employers and heightening their interest in staying out of the EEOC's sights – defending systemic cases is costly, time-consuming, and often involves publicity. In this article, we will provide an overview of the EEOC, analyze its sweeping systemic initiative and current enforcement trends and, through that lens, provide employers with compliance strategies to help avoid garnering the attention of the EEOC.

What Is The EEOC?

The EEOC is the agency responsible for administering and enforcing many federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Equal Pay Act and the Genetic Information Non-Discrimination Act. These laws prohibit workplace discrimination on the basis of race, color, religion, sex, national origin, age, disability and genetic information, as well as retaliation.

The agency is headquartered in Washington, DC, has 15 enforcement districts and operates through a network of district, field, area and local offices. It has authority to investigate administrative charges made against covered employers, issue findings and pursue litigation if it finds reasonable cause to believe discrimination occurred. In addition to investigating charges brought by individuals, the EEOC may also issue what are called "Commissioner's charges" on its own. A Commissioner's charge is often more broad than an individual charge, and it may also be used as a basis for a lawsuit filing by the EEOC.

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Overview Of The EEOC's Systemic Initiative

The EEOC's systemic initiative was born in 2005 with the creation of a special task force convened to examine the EEOC's existing systemic program and recommend new strategies. The Task Force concluded that combating systemic discrimination should be a *top priority* for the EEOC and that the agency is *uniquely able and uniquely positioned* to do so.

The Task Force said the EEOC has a "unique ability" to identify systemic cases because it has access to substantial data, including information on employment trends and demographic changes. It found the EEOC to be "uniquely positioned" to litigate them because: (1) it does not have to meet the stringent requirements of Fed. R. Civ. P. 23 to maintain a class suit; (2) it may be able to bring certain systemic cases that the private bar is not likely to handle for financial reasons; and (3) its nationwide presence permits it to act as a "large yet highly specialized law firm with a unique role in civil rights enforcement."

Against this background, the systemic initiative was adopted in 2006, with some of the Task Force's most important recommendations put into action:

- Create incentives to encourage the field to identify, investigate and litigate systemic cases.
- Staff systemic cases based on experience and expertise, instead of by originating office.
- Use routinely collected data in a more strategic way to better identify systemic discrimination.
- Broaden the investigation of individual charges and educate investigators on initiating Commissioner's charges.

Since implementation of the initiative, the EEOC has become increasingly aggressive in its pursuit of systemic cases using a "national law firm model." At the end of fiscal year 2011, the agency maintained 580 active systemic investigations. In that same time period, 40 percent of its systemic investigations resulted in "reasonable cause" findings, and about one-third of lawsuits filed were "multiple victim" suits.

Strategies The EEOC Is Using To Pursue High-Profile Systemic Cases

The EEOC is using a variety of strategies to advance its systemic initiative and increase its inventory of systemic investigations and lawsuits. Those strategies include

- merging the investigation and litigation phases;
- transforming a single charge into a systemic action;
- making nationwide requests for data, including broad e-discovery and HR system data;
- using subpoenas and subpoena enforcement actions to obtain nationwide information from employers; and
- partnering with other agencies (like the OFCCP and DOL) to share information.

These strategies have been effective for the EEOC in many instances, but employ-

ers are more frequently challenging them and have had recent success in pushing back on the agency's expansive and often secretive investigative efforts. For example, in *EEOC v. Burlington Northern Santa Fe Railway Company*, the Tenth Circuit rejected the agency's use of its subpoena power to build a systemic case. No. 11-1121 (10th Cir. Feb. 27, 2012). The court found the subpoena for nationwide employment records was "not relevant" to a case that initially involved just two claims of disability discrimination, both from employees in Colorado.

The EEOC's Leading Enforcement Areas In 2012

In addition to its strategy of pursuing larger cases, the EEOC has given particular focus to certain enforcement areas in recent years, many of which lend themselves quite easily to the systemic initiative.

Disability Discrimination and Leave Policies: The EEOC has given special focus to leave-of-absence policies, particularly to "no fault" leave policies (where an employee is automatically dismissed after using a certain amount of leave). The EEOC's position is that such policies should be modified to account for reasonable accommodations that may be needed by an employee on leave.

Hiring Practices: The EEOC believes it is uniquely positioned to investigate and litigate discriminatory hiring cases on a large-scale basis. It is looking for industries where protected groups may be underrepresented in certain job categories, with reliance on data obtained during investigations, in EEO-1 reports and in census studies.

Arrest and Conviction Records: The EEOC has issued updated guidelines providing that criminal record information obtained during background checks cannot be used to screen out applicants, unless the information is related to the field of work in which the candidate is seeking employment. The EEOC's focus is on whether use of background checks has a disproportionate impact on certain protected groups.

Pay and Promotions: Again, the EEOC believes it is in a strong position to pursue disparate impact theories relating to pay and promotions, given its ability to obtain nationwide employee data through use of its subpoena power.

Gender Discrimination: The EEOC is giving greater focus to pursuing cases involving discriminatory treatment tied to gender-specific traits like pregnancy and breastfeeding, arguing that such differentiated treatment is gender discrimination.

Compliance Strategies To Stay Out Of The EEOC's Sights

The convergence of the EEOC's systemic initiative and its heightened focus on a limited set of enforcement priorities creates an opportunity for employers to be introspective in a few high-priority areas and assess existing policy and procedure for potential change. Below are compliance strategies for employers to consider in readying themselves for anticipated EEOC activity in the coming years.

Disability Discrimination and Leave Policies

- Amend leave policies calling for "automatic" dismissal after a certain amount of leave is used.
- Ensure that return to work and dismissal procedures involve an individualized assessment.

- Always engage in a meaningful interactive process and account for the ever-expanding definition of "reasonable accommodation."

Hiring Practices

- Undergo a privileged self-analysis of decision making and adverse action at every stage of the hiring process to determine any disparate impact areas to be addressed.
- Evaluate each step in the hiring process to ensure each is needed and consistently applied.
- Ensure job descriptions are current and accurately describe the required qualifications.

Arrest and Conviction Records

- Exercise caution in using criminal background information – use only when necessary based on the job position.
- Ensure that criminal history information used to bar an applicant from employment is strongly related to the job the applicant is seeking.
- Consider a privileged self-audit to determine whether use of criminal history information is having a disparate impact on individuals in protected categories.

Pay and Promotions

- Conduct a privileged self-audit to identify areas of potential concern or disparate impact and steps that might be taken to address those areas.
- Consider a hybrid approach to pay and promotions that incorporates both uniform and individualized standards.

Gender Discrimination

- Review policies relating to gender-specific activities like breastfeeding and pregnancy.
- Consider policy updates that ensure fair treatment for gender-specific activities.

What If The EEOC Focuses A Systemic Investigation On Your Company?

If your company should find itself facing the scrutiny of the EEOC in a systemic investigation, there are a few considerations to bear in mind. First, if you receive a broad request for information, attempt to gain an understanding of the reason for the request and cooperatively narrow it. Second, consider providing information to the EEOC in a phased manner and highlight information that may be important, but not requested. Third, if you receive a subpoena from the EEOC, remember there is a very short five-day response time. Fourth, be alert to preservation obligations and provide early notice of the need to maintain broad categories of information. Fifth, involve experienced legal counsel in responding to charges involving a systemic focus – information and documents provided at the outset will influence the course of the investigation and any litigation that may result.

Concluding Thoughts

The EEOC's systemic initiative is likely to grow and be with employers for many years to come. While the particular enforcement trends will surely evolve, the EEOC's interest in pursuing large cases is not likely to change, particularly in this time of economic challenge. The EEOC believes it is a wise use of its limited resources to pursue more systemic cases with a greater likelihood of having a broad, deterrent effect. Employers should remain mindful of the EEOC's intent to grow its systemic docket and be self-analytical in terms of potential areas for improvement that could be viewed through a "systemic" lens.

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