

EEOC You Soon?

Under Investigation by the EEOC: *Prevention and Defense Strategies to Avoid Claims of Systemic Discrimination*

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The U.S. Equal Employment Opportunity Commission

“Tackling systemic discrimination -- where a discriminatory pattern or practice or policy has a broad impact on an industry, company or geographic area -- is central to the mission of EEOC.”

-Jenny R. Yang, Chair of the Commission from September 1, 2014 to January 22, 2017

The U.S. Equal Employment Opportunity Commission

◆ July 2016 EEOC report

- 250 percent increase in systemic investigations in the past five years
- Tripled the success rate for conciliation of systemic matters from 21 percent to 64 percent over the past decade
- 94 percent success rate in its systemic cases over the past 10 years

The U.S. Equal Employment Opportunity Commission

- ◆ Victoria A. Lipnic was named Acting Chair of the U.S. Equal Employment Opportunity Commission by President Donald J. Trump on January 25, 2017.



The U.S. Equal Employment Opportunity Commission

- ◆ Performance and Accountability Report (Fiscal Year 2016) major conciliations:
 - \$5 Million– allegation that employer with 40,000 employees failed to accommodate requests to sit during their shifts- 86 individuals plus unidentified class members.
 - \$1.7 Million – allegation for class of individuals with disabilities who were denied reasonable accommodations due to attendance and leave of absence policies (did not allow for intermittent leave).
 - Required revision by large assessment test provider to make online tests accessible to vision impaired applicants via screen reading software, affected thousands of test takers.
 - \$525,000– allegation that employer segregated women into administrative occupations.

A Formidable Plaintiff

- ◆ The EEOC versus a private litigant
 - Not required to satisfy the arduous requirements of Rule 23 in order to sue on behalf of a class
 - Pursuant to “public guardian” role, expansive authority to investigate suspected discrimination beyond the specific allegations asserted by the charging party
 - More robust subpoena authority
 - Different motivations than a private plaintiff, can be less likely to accept an early financial settlement

“High-Value Successes”

- ◆ Title VII disparate treatment hiring
- ◆ Hostile work environment
- ◆ ADA accommodations
- ◆ Terms and conditions of employment
- ◆ Staffing firms

Looking Forward

- ◆ Pay discrimination
- ◆ Background checks
- ◆ Tests
- ◆ Systemic goals

Trump Administration

- ◆ Effect of the Trump Administration on the EEOC
- ◆ New EEO-1 pay equity reporting requirements
- ◆ Initiatives regarding Title VII coverage for LGBT individuals
- ◆ Recommendations

Defense Strategies

- ◆ Keep a narrow scope
 - Potential to become a “class” investigation
- ◆ Drafting the position statement
 - Best practices
- ◆ Work the numbers
 - Statistical analysis of data prior to submission
- ◆ Investigate the charge
 - Best practices

Responding to Information Requests

- ◆ Where appropriate, object to disclosure
 - Privileged
 - Not relevant
 - Too burdensome
- ◆ Narrow the scope of the requests
- ◆ Do not provide extra or unnecessary information
 - Too much information can lead to an expanded investigation
 - Inconsistent response strategies can raise red flags

Responding to Information Requests

- ◆ Be careful about handing over:
 - Employee handbooks and other Company manuals
 - Personnel files
 - Employee medical information
 - Home contact information
 - Raw data
 - Privileged communications
 - Confidential financial, business, and/or trade secret information

Prevention Pointers

- ◆ Training
- ◆ Regular review of written policies
- ◆ Regular review of hiring, promotional, and compensation practices
- ◆ Consistent enforcement
- ◆ Documentation
- ◆ Feedback from employees

View from the Inside

- ◆ In-house experience
- ◆ Preventive measures and best practices to minimize class and/or collective issues

