EEOC Issues Its Year End Litigation Round Up and Strategic Enforcement Plan for the Next 5 Years

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ABSTRACT: In its 2023 year end litigation round up and strategic enforcement plan for fiscal years 2024-28, the EEOC highlights its increased enforcement activities over the past year, and new areas of emphasis for future enforcement.

In its Year End Litigation round up for Fiscal Year 2023, the EEOC reports that systemic lawsuits, defined as "pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location," have increased to 25, nearly doubling the number of filings from the previous year. The EEOC also filed 32 non-systemic class suits seeking relief for multiple harmed parties and 86 suits seeking relief for individuals. A full report of all applicable cases is not yet available as of November 2023, but will be posted on the EEOC website. That report should provide more insight into the specific types of cases pursued by the EEOC in this fiscal year.

Companies facing EEOC charges should be aware that the EEOC has significantly heightened its level of activity in all areas in recent years, which increases the likelihood that a seemingly isolated charge of discrimination may expand into something much more onerous. The agency notes in its press release that "the cases filed by the EEOC challenge workplace discrimination under all of the statutes enforced by the Commission and represent a broad array of issues, including barriers in recruitment and hiring, protecting vulnerable workers and persons from underserved communities, qualification standards and inflexible policies that discriminate against individuals with disabilities, the long-term effects of the COVID-19 pandemic, advancing equal pay, (and) combatting unlawful harassment." The EEOC's recent emphasis on COVID-19 issues means that employers should keep abreast of case law developments in this area, and prepare to adjust hiring and other employment practices around accommodating potential sufferers of Long COVID.

Additionally, the EEOC's multi-year Strategic Enforcement Plan for Fiscal Years 2024-2028 sheds some light on how EEOC challenges might look moving forward. The Plan contains six new or significantly broadened areas of strategic emphasis points.

1. Targeting discrimination, bias, and hate directed against religious minorities (including antisemitism and Islamophobia), racial or ethnic groups, and LGBTQI+ individuals.
2. Expanding the agency's vulnerable and underserved worker priority to include those with arrest records, LGBTQ+ workers, temporary and older workers, individuals in low wage jobs and individuals with limited English-speaking capabilities.
3. Additional emphasis on protecting workers affected by pregnancy, childbirth, or related medical conditions, including under the new Pregnant Workers Fairness Act (PWFA) and other EEO laws; employment discrimination associated with the long-term effects of COVID-19 symptoms; and technology-related employment discrimination.

4. Highlighting the continued underrepresentation of women and workers of color in certain industries and sectors, such as construction and manufacturing, finance, tech and other science, technology, engineering, and mathematics fields.

5. Recognizing employers’ increasing use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions.

6. Addressing overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements when they restrict workers’ ability to obtain remedies for civil rights violations. The first is expanding the vulnerable and underserved worker priority including those with arrest records, LGBTQ+ workers, temporary and older workers, individuals in low wage jobs and individuals with limited English-speaking capabilities.

By remaining compliant and staying abreast of the EEOC's strategies moving forward, employers can minimize their exposure to the broadening and expansion of EEOC enforcement actions. Employers should be sure to pay close attention to any practices that may indicate an exposure to systemic lawsuits, as the EEOC's doubling of these types of lawsuit claims in the past fiscal year may indicate a key point of EEOC policy moving forward. BSCR will continue to monitor EEOC activity in these areas and advise employers on how best to avoid running afoul of these heightened EEOC initiatives.

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