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Labor and Employment Alert: What's in Store for Employers Under the EEOC's New Strategic Enforcement Plan

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This month the U.S. Equal Employment Opportunity Commission (EEOC) issued its Strategic Enforcement Plan (SEP) for 2017-2021 setting forth “its continued commitment to focus efforts on those activities likely to have strategic impact.” As we’ve seen from the EEOC’s activities under it prior SEP, strategic impact means enforcement action having significant effect on the development of the law or on promoting compliance across a large organization, community, or industry. Typically, this comes from systemic investigations and lawsuits in high-profile, high-impact cases (such as recent EEOC cases involving religious discrimination, transgender rights, and severance agreements).

In the SEP, the EEOC outlines six substantive area priorities:

1. Eliminating Barriers in Recruitment and Hiring. This involves class-based recruitment and hiring practices, including exclusionary policies and practices, steering individuals into specific jobs, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities). Of “particular concern” to the EEOC are the growth of the temporary workforce, the increasing use of data-driven selection devices (Big Data), and the lack of diversity in certain industries and workplaces such as technology and policing.

2. Protecting Vulnerable Workers. The EEOC intends to focus on job segregation, harassment, trafficking, pay, and retaliation against “vulnerable workers,” including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of “underserved communities.”

3. Addressing Selected Emerging and Developing Issues. Continuing its efforts to “develop” the law and “promote compliance,” the EEOC intends to focus on (a) qualification standards and inflexible leave policies that discriminate against individuals with disabilities; (b) accommodating pregnancy-related limitations; (c) protecting lesbians, gay men, bisexuals, and transgender people from discrimination based on sex; (d) “clarifying” the employment relationship and the application of civil rights protections in cases involving temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and (e) addressing discriminatory practices against Muslims, Sikhs, and those of Arab, Middle Eastern, or South Asian descent “arising from backlash against them from tragic events in the United States and abroad.”

4. Ensuring Equal Pay Protections for All Workers. The EEOC will expand its focus on sex-based discriminatory pay systems under Equal Pay Act and Title VII to include pay systems that discriminate on the basis of any protected characteristic, “including the intersection of protected bases.”

5. Preserving Access to the Legal System. In recent years, the EEOC has become more concerned with policies and practices that limit substantive rights, that discourage individuals from exercising their rights under employment discrimination statutes, or that impede EEOC’s investigative or enforcement efforts. Under the SEP, the EEOC will focus on overly broad waivers, releases, and mandatory arbitration provisions. This includes waivers or releases that limit substantive rights, deter or prohibit filing EEOC charges, or deter or prohibit employees from providing information or assistance to the EEOC. The EEOC notes that overly broad waivers, releases, and arbitration clauses typically involve systemic cases. Relatedly, the EEOC also will concentrate on “significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights.” Finally, employers will need to review their recordkeeping procedures because the EEOC intends to also focus on the failure to maintain and retain required applicant and employee data and records.

6. Preventing Systemic Harassment. According to the EEOC, over 30% of charges allege harassment, with sex, race, disability, age, national origin, and religion in descending order of frequency. “This priority typically involves systemic cases” and “strong enforcement with appropriate monetary relief and effective injunctive relief” is “critical.” In addition to enforcement efforts, the EEOC will make a concerted effort to promote “holistic prevention programs.”

In focusing on its priorities, the EEOC has promised to take both a targeted approach and an integrated approach as its positions itself as “a national law enforcement agency.” A targeted approach includes “the careful use of Commissioner Charges and directed investigations as effective tools to investigate practices and policies that may be more widespread or of a different nature than the allegations in an individual charge.” An integrated approach involves collaboration, coordination and sharing of information within the EEOC and implementing “consistent procedures in dealing with the public among offices across the country.” The SEP shows the EEOC’s likely enforcement priorities in the coming years, and employers can expect the EEOC to closely scrutinize their practices in light of them. As a result, employers should consider reviewing their employment policies and practices (including recruiting, training, employment agreements, severance agreements, and recordkeeping). Contact your Vorys lawyer if you have questions about conducting such an audit.