JANUARY 19, 2023 | DISCRIMINATION, HARASSMENT & RETALIATION

The EEOC's Request for Information and Comment on its Draft Strategic Enforcement Plan

While the Supreme Court is weighing the legality of universities' race-conscious admissions processes, the Equal Employment Opportunity Commission ("EEOC") views acts like the tragic killing of Black and brown people and high-profile incidents of bias and violence based on protected categories, like race, outside the workplace as a "painful reminder of systemic racism." Within the workplace, the disproportionate economic impact of the COVID-19 pandemic on people of color and other vulnerable workers magnifies continued inequalities. It is against this backdrop that on January 10, 2023, the Equal Employment Opportunity Commission ("EEOC") published a request for comment in the Federal Register on the EEOC's Strategic Enforcement Plan for 2023—2027.

The EEOC's Strategic Enforcement Plan:

The EEOC adopted its first Strategic Enforcement Plan ("SEP") for FY 2013—2016. The enforcement subject matter priorities, addressed in greater detail below, for SEP for 2023—2027 are meant to ensure that the agency's resources have strategic impact to prevent and remedy discrimination and advance equal opportunity employment.

1. Eliminating Barriers in Recruitment and Hiring

The request for comments, notes there is a lack of diversity in certain industries such as construction and high tech. To achieve the EEOC's purpose of advancing equal employment opportunities, the EEOC will focus on recruitment and hiring practices including:

- The use of artificial intelligence in job advertisements, recruiting applicants, and making or assisting in hiring decisions.
- The use of language that is exclusive in job descriptions and may discourage vulnerable and underserved workers from applying.
- The selection of job titles and responsibilities for vulnerable and underserved workers based on protected characteristics.
- Making determinations related to on-the-job training, pre-apprenticeship or apprenticeship programs, temp-to-hire positions, internships, or other job training or advancement opportunities based on protected characteristics.

- Relegating vulnerable and underserved workers to temporary work when these workers are qualified for open permanent positions.
- The use of hiring processes and systems that due to their nature and design are difficult to navigate for workers with disabilities or other vulnerable and underserved applicants.
- Pre-employment screening tools that exclude vulnerable and underserved applicants based on a protected category.

2. Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

The SEP is concerned with harassment, retaliation, job segregation, labor trafficking, discriminatory pay, and the disparate working conditions experienced by vulnerable workers and persons from underserved communities. Vulnerable workers and persons from underserved communities include workers with intellectual and developmental disabilities, individuals with arrest or conviction records, LGBTQI+ individuals, temporary workers, older workers, individuals employed in low wage jobs, and individuals with limited English proficiency

3. Addressing Selected Emerging and Developing Issues

The SEP is especially concerned with emerging issues around the impact that the use of technology, like the use of software that incorporates algorithmic decision-making, has on individuals with an actual or perceived disability. In light of reports of continued discrimination associated with COVID-19, one developing issue is unlawful discriminatory practices associated with COVID-19 including:

- Failure to provide a reasonable accommodation to individuals with disabilities or sincerely held religious beliefs.
- Medical inquiries.
- Discrimination based on an actual or perceived disability related to COVID-19, such as the effects of long COVID.

Similarly, the EEOC is concerned about the impact of software that incorporates algorithmic decision-making in creating applicant and employee standards that are inflexible and discriminate against individuals with a disability. Likewise, an emerging issue under the SEP is protecting individuals affected by pregnancy, childbirth, and related medical conditions.

The SEP is also focused on the emerging issues surrounding the influence that discriminatory acts of violence outside the workplace have on employees in a protected category inside the workplace.

4. Advancing Equal Pay for All Workers

Pay gap statistics highlight the continued wage disparity for vulnerable and underserved workers as well as workers with other protected characteristics. While some employers may be subject to no salary history bills, which prohibit employers from asking applicants about their salary history, this is not the only type of policy that contributes to pay discrimination. Other such policies include pay secrecy policies, retaliating against workers for asking about pay or sharing their pay with coworkers, or requiring applicants to specify their desired salary or expected salary at the application stage. The Commission will focus on these policies and use directed investigations to determine whether an employer is engaged in unlawful pay discrimination

5. Preserving Access to the Legal System

At the end of its last session, Congress passed the Speak Out Act banning the use of pre-dispute non-disclosure and non-disparagement clauses involving sexual assault and harassment claims. The SEP reaffirms the EEOC's focus on all policies that limit an employee's right to pursue or discourage and employee from pursing their rights under employment discrimination statues. With this end in mind, the EEOC will focus on:

- overly broad agreements, including waivers, releases, non-disclosure agreements, non-disparagement agreements;
- unlawful, unenforceable, or otherwise improper mandatory arbitration agreements;
- failure to maintain applicant and employee records; and
- retaliatory practices against those who engage in protected activity.

6. Preventing and Remedying Systemic Harassment

More than one-third of EEOC charges between FY 2017 and FY 2021 included an allegation of harassment. The request for comment calls out harassment in all forms—including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, gender identity, and sexual orientation) or a combination or intersection of any of these. In addition to traditional enforcement activities like monetary and targetable equitable relief, the request for comment calls for anti-harassment programs and practices.

Implications for Employers:

Although the SEP is still a draft, employers should expect the EEOC to pay close attention to Charges that encompass the priorities outlined above. "Systemic investigations, resolutions, and lawsuits typically have strategic impact because they involve 'pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company, or geographic location.'"

The comment period closes February 9, and the SEP is effective the day following approval by the Commission. In the meantime, employers would be well advised to review their existing policies for compliance with the SEP's identified priorities. Employers may also consider ensuring that employees have internal resources to raise complaints of discrimination and that those complaints are thoroughly investigated. Likewise, employers may review their use of artificial intelligence in employment decisions and ensure that all candidates and employees are not excluded on the basis of a protected category, and ensure there is a process for candidates and employees to request a reasonable accommodation.