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Understanding and Adjusting to the EEOC's Strategic Enforcement Plan for 2024 to 2028

Earlier this Fall, the EEOC released its strategic enforcement plan (SEP) for fiscal years 2024 to 2028. The SEP establishes the EEOC's six subject matter priorities that the Agency will focus its tools, including enforcement (including investigations, settlements, and litigation), education and outreach, research, and policy development on during that time frame. This SEP has important implications for employers as it lays out specific areas where failing to comply with federal employment laws and EEOC guidance could result in tough EEOC enforcement actions.

Priority #1: Eliminating Barriers in Recruitment and Hiring

The EEOC's focus on discrimination in recruitment and hiring practices is a central tenet of its mission. However, this SEP lists a variety of new concepts that the EEOC will engage with to pursue its goals, such as:

- job advertisements that exclude or discourage certain protected groups from applying;
- policies and practices that limit access 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;
- reliance on restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access; and
- the use of screening tools or requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks.

Priority #2 Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

The second priority the EEOC has highlighted is protecting vulnerable workers from harassment, retaliation, job segregation, labor trafficking, discriminatory pay, and disparate working conditions.

The SEP describes vulnerable workers as: immigrant and migrant workers and workers on temporary visas; people with developmental or intellectual disabilities; workers with mental health-related disabilities; individuals with arrest or conviction records; LGBTQI+ individuals, temporary workers; older workers; individuals employed

in low wage jobs, including teenage workers employed in such jobs; survivors of gender-based violence; Native Americans/Alaska Natives; and persons with limited literacy or English proficiency.

Priority #3: Addressing Selected Emerging and Developing Issues

The EEOC's third priority is to address several emerging and developing issues such as:

- Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities;
- Protecting workers affected by pregnancy, childbirth, or related medical conditions under the Pregnancy Discrimination Act (PDA) and the Pregnant Workers Fairness Act (PWFA), as well as pregnancy-related disabilities under the Americans with Disabilities Act (ADA);
- Discrimination influenced by or arising as backlash in response to local, national, or global events, including discriminatory bias arising as a result of recurring historical prejudices;
- Employment discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID; and
- Technology-related employment discrimination.

Priority #4: Advancing Equal Pay for All Workers

The SEP's fourth priority is equal pay enforcement. The Commission intends to be more imposing in discovering pay discrepancies by using directed investigations and Commissioner Charges, where appropriate, to facilitate enforcement. Further, the SEP also illustrates that the Commission is open to reviewing other practices that it believes could contribute to pay disparities, such as pay secrecy policies, discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers, and reliance on past salary history or applicants' salary expectations to set pay.

Priority #5: Preserving Access to the Legal System

The SEP's fifth priority is preserving access to the legal system, specifically focusing on "policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede the EEOC's investigative or enforcement efforts."

For instance, the SEP states that the EEOC will focus on

- overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements;
- unlawful, unenforceable, or otherwise improper mandatory arbitration provisions;
- employers' failure to keep applicant and employee data and records required by statute or EEOC regulations; and
- retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws.

Priority #6: Preventing and Remedying Systemic Harassment

The SEP's sixth priority is to reiterate its goal of preventing and remedying harassment. In support of that priority, the SEP states that over 34 percent of the charges of employment discrimination the EEOC received

between FY 2018 and FY 2022 included an allegation of harassment. This SEP does highlight a focus on remedying harassment online as well as in-person, so it will be interesting to see if and how the EEOC follows up on this promise with any guidance documents or enforcement decisions.

Employer Implications

This SEP reinforces the EEOC's commitment to pursuing its overall mission of preventing and remedying discrimination. However, it does reveal that it is willing to pursue that goal in more novel ways than before, such as discouraging policies that support pay secrecy, prohibiting workers from asking about pay or sharing their pay with coworkers, or relying on past salary history or applicants' salary expectations to set pay; or pursuing cases of discrimination based on modern technology: such as job advertisements that exclude or discourage certain protected groups from applying, reliance on restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access; and the use of screening tools or requirements that disproportionately impact workers on a protected basis.

Since this document establishes the EEOC's enforcement priorities for the next four years, charges that fall within these categories will result in additional attention compared to prior years. Employers should consider the following steps to mitigate their legal risk:

- Reviewing the use of technology in hiring and recruitment practices;
- Confirming that vulnerable populations are definitively aware of their legal rights in the workplace;
- Reviewing harassment policies to ensure policies account for both online and in-person harassment;
- Evaluating any policies relating to discussing pay and confirming that inequitable pay disparities are minimized; and
- Refraining from using overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements when not necessary to protect confidential business information.