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Lisa Nagele-Piazza (00:00)
Welcome to The FP 5: Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking down topics into five parts. I'm Lisa Nagele-Piazza from the Fisher Phillips Content team.

The EEOC just made some significant moves in the past few months that could have a huge impact on employers. Jennifer Sandberg joins us today to talk about these changes and how they could affect employers from compliance to investigations, reporting, and risk. Jennifer is the Regional Managing Partner in Fisher Phillips's Fort Lauderdale office. Jennifer, thanks for being on the show today.

Jennifer Sandberg (00:39)
Hi Lisa, thanks for having me.

Lisa Nagele-Piazza (00:41)
So before we get into the EEOC topics, you advise a range of employers, from those with just a handful of employees to those with tens of thousands. Which group tends to surprise you more when they ask you questions?

Jennifer Sandberg (00:56)
You know, I think just employees do surprising things and they do that in small organizations and they do that in really large organizations. So I don't want to sound jaded, but at this point I'm never surprised when the phone rings and somebody asks for help. You know, even in very large organizations, most of them tend to run very lean. So even with a huge human resources staff, even with a huge legal staff, that doesn't always mean that there is the time and the resources for those teams to be fully up to date on everything that's happening in the world of labor and employment law, especially with changes fast and furious at the state level and certainly at the federal level.

Lisa Nagele-Piazza (01:48)
Absolutely. Yeah, it reminded me of my HR days where I knew if I if I couldn't even get my cup of coffee when I got in the door and someone was waiting for me, it was gonna be an interesting day, right? Ah, you have your Fisher Phillips coffee. Of course our audience can't see that, but I can.

Great, do we're gonna cover a lot of EEOC activity today. So on a scale from "skim the summary" to "clear your afternoon," how would you describe the last few months of news from the agency?

Jennifer Sandberg (02:19)
I think it's "a clear your afternoon" kind of time.

Lisa Nagele-Piazza (02:22)
Right? And that's why we're here today to talk about it. And just to take a little step back for our listeners, I'm sure if they're listening to this episode, they're familiar with the Equal Employment Opportunity Commission. But just a reminder that the agency enforces federal workplace anti-discrimination laws that protect workers based on characteristics like gender, race, religion, age, and a few others as well.

And that leads us to our first thing for today. To me, this is kind of the biggest news. The agency wants to eliminate the federal EEO-1 demographic reporting requirement. So Jennifer, can you first just kind of talk about what this reporting requirement is before we get into what's changing?

Jennifer Sandberg (03:14)
Right, so for the last 60 years, in some form or another, employers with more than 100 employees, or federal contractors with more than 50 employees, have been required to report sex: male or female, and then race, ethnicity, status to the federal government, in a summary chart, by location. So for any employer location, you could glance essentially at what looks like an Excel spreadsheet with a bunch of boxes on it, and at a glance see how many employees were male, female, white, Black, Asian in different types of jobs. And the form has varied over the 60 years, but currently there are 10 different job categories, ranging from like your most senior executives, down to entry level laborers and helpers.

Lisa Nagele-Piazza (04:14)
So what is changing now? What just happened recently?

Jennifer Sandberg (04:18)
So, the EEOC has proposed to do away with this requirement. And they, at the moment that is a proposed regulation within the Federal Register and we're waiting through the period of comment, and then the EEOC will be able to go ahead and make their final decision, which most likely will be that reporting will no longer be required. And while that is prospective, just the way this administration has handled different issues, even beyond the EEOC, my prediction is that the EEOC will just never get around to opening the reporting portal for 2026, which would be 2025 data. So while they have a regulatory obligation technically to do so, I think they're just going to forget to open the portal.

Lisa Nagele-Piazza (05:14)
Yeah, that was a good question that I had was, you know, I know they don't have a, I don't think they have a particular time when they actually have to open it by, is that right?

Jennifer Sandberg (05:23)
No, that's right. There's not a time. Traditionally that has been in the spring. A decade ago it was typically March. It was announced months and months in advance and it was the same date every single year. Over the last few years, it has been moving later and later, and we've had less and less time to know what the start date was going to be and a shorter period of time to report as well. So last year it opened in May, but it was a bit of a surprise. It just wasn't open, wasn't open, and then boom, one day it was open and the reporting period was the shortest it had been.

Lisa Nagele-Piazza (06:06)
So employers had to scramble to get it together.

Jennifer Sandberg (06:08)
Yeah, employers had to really scramble. I mean it's one of those you know it's coming.

Lisa Nagele-Piazza (06:13)

Yeah, but as you said, every day every day can be different and a lot of things going on and so yeah, if you if you're not prepared for it and know when it's gonna be due, then you might not be focused on it. Might be doing other things.

So then moving on to our second thing for today, should employers still be collecting this information anyway? If the federal requirement goes away, are there other reasons that they should be looking at demographic data?

Jennifer Sandberg (06:48)
Ah Lisa, the million-dollar question. You know, for the last 60 years, the EEO-1 reports have provided, I'm gonna call it, great cover for an employer to ask definitely new hires, maybe even applicants, about their sex and about their race and ethnicity. Because you had to have that information to complete the form. Without the requirements of that form, it does and it doesn't get a little trickier. And I know that's complicated, but there's some old regulations from the 1970s. I think it's 1976, the Uniform Guidelines on Employee Selection Procedures, that talk about how an employer has an obligation to be sure that they're not engaging in practices that could be discriminatory against any group, and the only way you can figure that out is to have some math to back it up. And so you need to know how many women apply, how many men apply, how many people of various races and ethnicity apply, compared to how many are hired, compared to what does our recruiting community look like? And I'll give you an example: if your recruiting community is Idaho, which is overwhelmingly white, it would be a surprise to have your applicant pool be anything other than overwhelmingly white. Because that's where we live. That's the state.

And so, it gave you an opportunity to collect data and compare yourself essentially to what's normal, whether that's for the geographic area, for your industry, for the type of job, to ensure that you look about like every other employer because that's a pretty good indicator of non-discrimination, where if your numbers are out of whack, it might appear that your thumb was on the scale in one way or another, which is potentially not lawful under Title VII.

Lisa Nagele-Piazza (08:59)
And then are there also states that are collecting this type of data as well?

Jennifer Sandberg (09:03)
Absolutely. So once Colorado heard that the EEO-1 was probably going away, they got very busy and passed their own statute regarding collecting and reporting this type of information. And there are other states that have similar pending legislation. And we'll probably see more of that if EEO-1 reporting does indeed go away. So between, you know, potential state issues, there are still some affirmative action plan issues at a state level, being able to ensure that you're not discriminating in any employment decision, whether that's a hiring decision, a promotion decision, a termination decision: you need some statistical data about the demographics of your workforce, so it's one of those things that for most employers, they still need that information. But they just they need to understand why they're collecting it, the pros and cons of collecting it, and how to manage that data as well. And so that's, you know, the best advice I can give is it's somewhat an individualized decision. And so employers should consult with their employment counsel, somebody who really understands employment law, to be sure they're making a decision that's really going to work for them. One of the things I do hear frequently is clients saying things like, I'm going to keep collecting this data because I think this will come back at some point. Right? Like they don't want to stop the machine that they've built over the last 60 years, because in two or three years, maybe this or something

like this comes back ... if we shut down the data collection, how do you know, what are the problems with getting it started?

Lisa Nagele-Piazza (11:01)
Yeah, that's a really good point.

Our third thing for today, the federal government is shifting away from disparate impact claims. And the EEOC's new national enforcement plan focuses on intentional discrimination. It aims to phase out disparate impact theories as much as possible. Some people say disparate impact. I say disparate, my Philly comes out there. But Jennifer, can you tell us what the difference is between a disparate treatment and a disparate impact claim?

Jennifer Sandberg (11:36)
Absolutely. So let's start with disparate treatment. That is about the, very much about the individual and how that individual has been treated. So essentially the individual raises their hand and says, “I've been discriminated against and let me explain why. Here are things that happened to me.” Disparate impact claims, on the other hand, are typically an individual, often a group of individuals, raising their hand and saying, “Employer, you had a facially neutral policy or process that unfortunately is impacting a huge group of people.” And one of the classic examples of this is employers, especially back in the 70s and 80s, requiring a high school diploma for certain jobs. And at the time, the demographic of the United States, if you were Black, you were much less likely to have that high school diploma. And employers were saying, “Hey, you know, we're a sophisticated workforce. So even if you're sweeping a room in our warehouse, we want you to have a high school diploma.” Well, okay, you might think to yourself, that's a pretty reasonable policy for an employer to have if that's what they want, but you don't need that high school degree to be able to sweep, and so the impact on an entire group of people is that Black applicants were far less likely to be hired. And sure enough, our legal system said this is, “while the policy sounds okay, it's not because it is having an impact against an entire group of people in ... ”

Lisa Nagele-Piazza (13:25)
Without really being applicable to the job.

Jennifer Sandberg (13:27)
“In an unlawful manner.”

Lisa Nagele-Piazza (13:29)
So then what is the EEOC doing now? There's been a lot of talk about not pursuing these disparate impact claims anymore.

Jennifer Sandberg (13:39)
Right. So with the focus off the group, it ties back to, you know, really what we were just talking about, back to the focus on the individual themselves. And frequently an individual claim can still come out of something that might be more of a disparate impact concept. If I'm still the person who didn't get the job and I think that is related to any protected category under Title VII, I can raise my hand. It might make my claim harder to prove because I might not have any evidence unique to me, but the concept is still out there, right? You have policies or practices that kept me from getting a job. And you know, I think that's illegal.

Lisa Nagele-Piazza (14:26)

Yeah, and even with the federal government moving away from disparate impact claims, my understanding is that state laws might still consider this as well as even federal courts?

Jennifer Sandberg (14:38)
Absolutely. Absolutely. So just because the EEOC focus has changed doesn't mean employers are completely off the hook. It depends, it's highly state dependent. But in some states like California, for example, very few claims are actually brought--employment claims are actually brought--under federal law. They're almost always brought under state law because state law is so much more protective of employees than federal law. And California is not alone in this, there are lots of states where employees are much better protected by state law than they are federal law.

Lisa Nagele-Piazza (15:20)
You're listening to the FP 5. I'm Lisa Nagele-Piazza, and we're here with Jennifer Sandberg. Jennifer's the Regional Managing Partner of Fisher Phillips's Fort Lauderdale office. Just a quick reminder, you can find links to our recent insights on the EEOC in this episode's podcast show notes.

And that leads us to our fourth thing. We've talked a lot about what has changed from the EEOC, so let's talk about what hasn't changed. And as you mentioned, the agency still enforces the same statutes as it always has. Can you talk a little bit about those protections under federal law for employees?

Jennifer Sandberg (15:56)
Absolutely. So Title VII has not been eroded in any fashion by the Trump administration or by the EEOC and their recent changes. And so, as I mentioned, when you talked about theme, with that law still in place, with state laws still in place, for the average employer, what's being talked about doesn't result in drastic change or for that matter, any change at all. You still need to be a non-discriminatory employer. And to be able to do that, the changes that the EEOC has proposed really become somewhat theoretical and not a reason to change. you know, how you've been managing a compliant business.

Lisa Nagele-Piazza (16:55)
Right.

Jennifer Sandberg (16:55)
If you're a business or employer that has maybe played a little fast and loose with the rules, maybe you have a little more comfort with continuing to do that, but it's still a bad idea. It always was. So all this talk at the EEOC level isn't really isn't giving you any cover or making legal problems that you might have any safer.

Lisa Nagele-Piazza (17:23)
Yeah, and you know, I remember reading from the Trump administration, you know, just that reminder in the guidance that says Title VII still protects every group that that is covered there, no matter who's harmed, so they're still looking at it that way. And maybe a reporting requirement or two will be going away, but you still have an obligation to have a discrimination free workplace.

Jennifer Sandberg (17:48)
Right, right. And you know, that really just comes down to no matter a person's age, race, sex, religion, national origin, citizenship status, pregnancy status, disability status. That's not the whole list, but that's a good start.

Whether you're in one camp or not in that camp, employment decisions aren't supposed to be based on any of those characteristics. Employment decisions are supposed to be based on merit and individual skill and the other qualities that are important to an employer to be able to do a particular job.

Lisa Nagele-Piazza (18:31)
Mm-hmm.

For our fifth and final topic for today, what are some of the best practices for compliance for employers who are grappling with these changes?

Jennifer Sandberg (18:47)
That's a great question, Lisa. And I think it really ties back to what we've already answered. In some ways, there aren't major changes that are going to impact how a compliant employer does things. If you want to continue to be a low-risk workplace when it comes to employment law, you want to treat employees fairly, not because the law requires fairness--it does not--but it's a good first start. If you're being fair, you're highly unlikely to be to be discriminating, and just to treat all people equally. There is a huge focus at the EEOC level and at the federal level again to look at the individual and to be sure every individual is treated equally without regard for any protected characteristics. And this is in any employment decision that an employer makes, how people get paid, who gets a promotion, who gets a transfer, who gets a perk that comes along with a particular job, who gets terminated. So every employment decision needs to essentially pass the Title VII test and other federal employment laws. If we have these protected categories, then we are not factoring those into our employment decisions and we have policies and processes in place to ensure that our individual hiring managers and decision-making managers are actually doing the right thing.

Lisa Nagele-Piazza (20:26)
Jennifer, is there anything else that you want listeners to know about what's going on with the EEOC right now or compliance in general?

Jennifer Sandberg (20:35)
Again, I think it's probably more about doing the right thing like you always have, rather than what has changed. But for employers taking the time to review your policies and practices, do a self-audit, ask yourself, are we in a good place, are we as legally compliant as we can be? Is always a good idea. And if an employer hasn't done that recently, this would be a good time. I feel like whenever there's more news around changes at the EEOC, around changes at the federal government level, and that information is showing up, you know, in newspapers or in podcasts or TikTok videos, it just makes employees more aware of what their rights might be, make them more questioning of employer policies. And it leads employees to believe that things are really different. And so sometimes it makes employees look around and say, gosh, is my organization really doing things the right way? Do I think we're compliant with current law? Whether the employees are right or wrong doesn't really matter. It's just employee sensitivity tends to increase when there's more media attention around certain things, and so I think it presents an opportunity for an employer to say, “Yeah, we really do have things buttoned up,” or “there are things we could do better.”

Lisa Nagele-Piazza (22:12)

So Jennifer, we're officially at the end of the show, but before we wrap things up, this is the part of the episode where we get to know you a little better in five questions. It's kind of my favorite part of the show. Are you ready for them?

Jennifer Sandberg (22:24)
I'm ready. Let's do it.

Lisa Nagele-Piazza (22:25)
Great. So first question. What's something you could give a presentation on for ten minutes without any preparation at all?

Jennifer Sandberg (22:33)
So this actually happened recently. I was at a networking event and the guest speaker did not appear. And of course the organizer panicked and there were about 30 of us in the room. And he's like, “Well, let's just make our introductions really long.” And when I got around to saying I was an employment lawyer, somebody said, “Gosh, you know, what's something every employer in this room might need to know about?” And I was like, oh my gosh, we're talking about everybody from realtors, like with maybe one employee, to people with hundreds of employees. So I'm like, “Ooh, let's talk about restrictive covenants,” which is not normally one of my employment law practice areas. But next thing you know, it was probably 10 or 15 minutes later, there were tons of questions. And then everybody was like, “Oh my God, did you guys plan that? How were you able to talk so long about that?” I'm like, just give me a topic, get me started, let me go.

Lisa Nagele-Piazza (23:31)
That's good. I geek out on restrictive covenants too. So I get it.

Jennifer Sandberg (23:37)
So there's always a lot to say.

Lisa Nagele-Piazza (23:39)
Yes. Second question. What's a small thing that always makes your day better?

Jennifer Sandberg (23:44)
Oh gosh, just a chance to be outside, spend a little time with my husband, spend a little time with my dog. You know it's gonna be a good day.

Lisa Nagele-Piazza (23:53)
Me too. You know, I have a little cat bed next to my desk and I just love it when my cat is behaving and sleeping. It's, it brightens my day.

Jennifer Sandberg (24:03)
And not walking across your keyboard.

Lisa Nagele-Piazza (24:05)
Yes, which happens more often than I'd like to admit. Third question: Do you have a favorite movie hero, or even a villain?

Jennifer Sandberg (24:15)
hero, villain. Maybe so that I don't have to pick, how about Pierce Brosnan's character in Thomas Crown Affair? You know, you're rooting for him, but he's kind of the bad guy. He's breaking the law, but then he puts things back and fixes everything, and I don't know. I kinda like the disconnect in that.

Lisa Nagele-Piazza (24:35)
Yeah, little bit of both. Little hero, little villain. And fourth question Do you prefer litigation or transactional law?

Jennifer Sandberg (24:44)
Lisa, this one's easy for me. I don't litigate at all.

Lisa Nagele-Piazza (24:49)
Oh okay, I learned something new about you today, Jennifer.

Jennifer Sandberg (24:51)
And that's on purpose. So I'm all about transactional. And for me, that really means compliance. And what I love is you start your day, you think you know where it's going, and then the phone starts ringing, the emails start coming in. You don't know what size company, you don't know what state of employment, you don't know what the issue is going to be, but it's somebody who needs help with something now, and you help them.

Lisa Nagele-Piazza (25:17)
Yeah, absolutely. And the fifth question is an easy one. What's your favorite way to spend a free Saturday?

Jennifer Sandberg (25:25)
Oh, in the winter it's definitely snowboarding.

Lisa Nagele-Piazza (25:28)
Okay. That's not quite the Florida activity. So I'm assuming you go someplace else. What's your favorite place to go?

Jennifer Sandberg (25:36)
Oh, you know, any place that there's lots of fresh snow.

Lisa Nagele-Piazza (25:40)
Yes, excellent.

Jennifer Sandberg (25:41)
Which usually means out west.

Lisa Nagele-Piazza (25:43)
Yeah, I lived in Colorado for five years and I am not a skier. I tried it twice and I realized it was not for me, but I love the slopes in the summertime. I love taking the gondola up and hiking around. So that's a warm weather activity for me.

All right, well that's all the time we have for now. Thanks again for being on the show, Jennifer.

Jennifer Sandberg (26:05)
Thanks for having me, Lisa, I appreciate it.

Lisa Nagele-Piazza (26:09)
And thank you for listening to The FP 5. You can find links to a couple of the insights on these changes from the EEOC in the show notes. And we'll see you next week.

And just a reminder: listening to this podcast doesn't constitute legal advice and doesn't establish an attorney-client relationship. For more information, you can visit fisherphillips.com/legal-notices.