EEOC Going For More Systemic Investigations In 2014; Sound Familiar?

Insights
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An EEOC "systemic" investigation can be as miserable as a class action lawsuit for employers. As we have discussed before, the EEOC has encouraged its management and investigators to scrutinize single claimant EEOC charges for possible expansion to an burdensome corporate wide examination of hiring, promotion or other practices. In FY 2013, the EEOC began using it's "Systematic Watch list," a software application designed to identify charges and litigation involving the same issues against the same employer throughout the country. Last year, **OSHA** rolled out a similar internal IT system to look for citation patterns in companies with numerous locations. Likewise, **OSHA** is slowly using its Severe Violators Enforcement Program (SVEP) to address an entire company because of one site's transgressions.

Despite daily diatribes against the NSA's supposed omniscience, the U.S. DOL, EEOC, NLRB and other agencies have not traditionally been able to "connect-the-dots" and view companies as a single entity. Trust me, until recently, no matter what your corporate history, OSHA and the EEOC generally treated each location as . . . well . . . an individual location. Labor lawyers had been warning employers to not evaluate their exposure solely based on past experiences because the process is "gradually" changing. One recalls the old saying about slowly turning up the heat of a pan in which an unfortunate frog has been placed. Supposedly the frog is lulled to sleep by the gradual increase in heat instead of screaming "what the heck" and leaping out. Ok. I'm getting melodramatic, but you really do need to be vigilant and continuously critically examine your employee processes.

Why Pass Regulations When You Can Expand The Law Through Suits and Enforcement Positions?

No Administration since Reagan has had much success in "rulemaking," let alone passing new laws. And with our polarized government, I also wouldn't expect too many new laws; especially with midterm elections approaching.

I understand the frustration of the Democrats and their appointed heads of OSHA, the EEOC and the NLRB. Nevertheless, the "ends don't justify the means." A pattern has emerged of this Administration by passing rulemaking and legislation to change 40 years of legal precedent. Thus, the EEOC can be expected to pursue its goals of change with increased vigor. The EEOC's stated goals include:

- eliminating systemic barriers in recruitment and hiring;
- protecting immigrant, migrant, and other vulnerable workers;
- emerging issues such as under the ADA, and to a lesser extent lesbian, gay, bisexual, and transsexual individuals (LGTB) under Title VII;
- pregnancy;
- equal pay;
- preserving and expanding access of claimants to the legal system; and
- attacking an ever growing variety of harassment claims through enforcement, outreach, promotion and solicitation.

Your risk of a systemic claim are still not that high, depending on your size or industry, but that's of little consolation if you are the lucky company to see that failure to hire EEOC charge expand to a nationwide examination. And don't think that the EEOC's efforts are limited to California or the Northeast. North Carolina, for example, was one of the EEOC's most active areas for systemic investigations last year. Just ask our Charlotte and Columbia offices.

And while we're at it, don't forget the always present and ever growing wage-hour class actions and corporate wide investigations, as discussed in this week's article by my friend and partner, Hagood Tighe:

Fast-Food Chain Employers: Take Steps Now to Avoid Being the Next FLSA Headline
On almost a daily basis, we read articles about class action lawsuits and settlements against fast-food chains. Almost all chains have had them. Fisher Phillips has defended many of these lawsuits for different chains in all parts of the country. Most class claims are based on one or more of the following types of allegations under the FLSA and/or state wage-related laws:

- Managers illegally adjusted timesheets to avoid overtime,
- Improper use of tip credit,
- Mileage reimbursement or other business expense reimbursement insufficient,
- Improper calculations of overtime pay,
- Employer-retained delivery charges belong to employees,
- Improper uniform deductions, and
- Retaliation against those who complain.

A number of large plaintiff-oriented law firms around the country are bringing these class action cases and looking for more. Adding further fuel to the fire, the New York Attorney General is investigating potential "wage theft" in the fast-food industry. Many fast-food restaurants have received subpoenas from the Attorney General as part of this investigation.

This action should serve as a reminder to employers in all states that sometimes even compliance with the FLSA is not enough. Employers must also take into account the restrictions that states and other jurisdictions might impose under their own laws, particularly with respect to deductions and the payment of wages.

With the recent announcements of million-dollar-plus settlements, fast-food employers would be wise to immediately audit their pay practices to ensure they are not the next big headline.

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