



EEOC Announces New Enforcement Priorities

GIG ECONOMY, HIGH TECH SECTOR IN THE CROSSHAIRS

Insights

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Earlier this week, the Equal Employment Opportunity Commission (EEOC) announced a new series of enforcement priorities on which it will focus over the next five years. By releasing its second-ever Strategic Enforcement Plan, the EEOC provided a clear message to employers regarding the areas that will occupy a considerable amount of attention when it comes to investigations, enforcement actions, and litigation from 2017 to 2021.

Although the 23-page document contains a number of themes, four of them appear to be of particular concern to the agency: 21st century employment relationships; the discriminatory backlash against those of Middle Eastern descent and those who practice associated religions; the use of data-centered hiring mechanisms by the high-tech industry; and the concept of equal pay.

Modern Employment Relationships

For the first time, the EEOC's Strategic Enforcement Plan focuses on the fact that the modern business world contains all sorts of various employment relationships that did not exist with the same prevalence in previous generations. Specifically, the agency notes that "complex employment relationships and structures in the 21st-century workplace" will bear its attention, pointing out that temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy will be in its sights in the immediate future.

Employers across the country have faced an increasing number of misclassification challenges, with current and former workers, not to mention numerous government agencies, alleging that organizations have improperly labeled employees as independent contractors. Such challenges can lead to liability in the areas of benefits, workers' compensation coverage, unemployment insurance, payroll taxes, and related matters.

Although the EEOC does not often venture into these typical flashpoint areas, it does stake a claim as being the federal government's main watchdog agency when it comes to civil rights laws. And although independent contractors are rarely entitled to the benefits of federal civil rights protections (such as Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other similar statutory schemes), employees most certainly are. Therefore, the EEOC believes that misclassification of workers can deprive groups of individuals to the types of protections it can secure for them.

To this end, expect the EEOC to wade into the misclassification arena over the coming years, targeting gig economy and sharing economy companies as the new breeding ground for what it considers to be improper contractor relationships.

On a related note, the National Labor Relations Board (NLRB) has focused much of its attention in recent years on the concept of joint employment, broadening the definition as much as possible to ensure the largest possible pool of workers covered by the National Labor Relations Act. It appears that the EEOC will lock arms with the NLRB and echo the same refrain, attempting to capture as many workers as possible under the umbrella of joint employment with an eye towards holding as many employers as possible liable under federal civil rights laws. You can expect the agency to direct resources towards the joint employment issue in the coming years as well.

Backlash Discrimination

The new Strategic Enforcement Plan adds another priority for the agency: claims of backlash discrimination against individuals who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as those perceived to be in these ethnic or religious groups. The EEOC states that “tragic events” in the United States and across the globe have increased the likelihood of discrimination against individuals in these communities.

Employers should ensure that their antidiscrimination policies and practices are robust enough to address any such behavior that could take place in their workplaces. Certain employers may even want to specifically address this concept in managerial training sessions.

Attacking Big Data

The EEOC’s Plan opines that there is a lack of diversity in the technology sector, and states that it will take efforts in the coming five years to address what it perceives to be one of the causes: data-driven screening tools. The agency points out that certain hiring and recruiting techniques – the use of algorithms and internet data-scraping utilizing big data, for example – could actually end up harming a company’s diversity efforts.

An EEOC administrator recently provided an example of the way in which these high-tech methods could end up leading to discriminatory practices. The agency’s chief analyst at the Office of Research, Information and Planning pointed out that when an employer selects the characteristics that it believes would make someone a good hire or cultural fit at a company, and then seeks out job candidates based on those characteristics, it could lead to a disparate impact claim.

As reported by Corporate Counsel, she provided a hypothetical scenario of an emerging company made up primarily of younger males that wants to find new employees that fit in with its culture. If that employer used advanced algorithms to locate job candidates who shared common characteristics with existing successful workers, such as biking to work or preferring perks like happy hours, it could lead to a homogenized workforce. Such hiring techniques could simply replicate the existing demographic profile of the employer, screening out older workers and women, as these potential workers might instead prefer other perks like child care or insurance benefits.

as those potential workers might instead prefer other perks like child care or insurance benefits. If employers decide to employ cutting edge recruiting and hiring methods, they should work closely with their legal counsel to establish parameters that will reduce or eliminate unintended discriminatory acts. The EEOC believes that if the use of these algorithms results in an adverse impact, it would be the employers' responsibility to prevent valid evidence to support their use. To prevent falling into this "guilty until proven innocent" rubric, employers will want to focus now on ensuring their recruiting practices don't lead to an uneven playing field.

Equal Pay For Equal Work

Finally, it should come as no surprise that the EEOC has decided to renew its focus on equal pay for the coming enforcement period. The federal government waded back into this area in 2016 by announcing the wholesale revision of the EEO-1 Form, which will soon capture compensation data in an effort to identify unfair pay practices. Beginning with the 2017 compensation year, employers will have their pay practices under a microscope like never before.

The EEOC will be at the forefront of this intensified scrutiny, collecting data and examining employer compensation schemes to ensure that women and ethnic minorities are not being shortchanged for comparable work. Employers will want to immediately conduct a self-audit of their pay practices to ensure that, once placed under the spotlight, their compensation system does not reflect discriminatory practices.

If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal initiative. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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