

Changes to Come in EEOC Enforcement

By Leah Shepherd

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Employers are likely to see a shift in enforcement by the U.S. Equal Employment Opportunity Commission (EEOC) with a bigger budget, potentially new leadership and revised strategic priorities.

President Joe Biden nominated Kalpana Kotagal, a Democrat, to chair the EEOC after Janet Dhillon, a Republican, resigned in November. The U.S. Senate hasn't confirmed Kotagal's nomination yet.

For 2022, the agency's six strategic enforcement priorities were:

- Eliminating barriers in recruitment and hiring.
- Preventing systemic harassment.
- Protecting vulnerable workers.
- Ensuring equal pay protection for all workers.
- Preserving access to the legal system.
- Addressing selected emerging and developing issues.

On Jan. 10, the EEOC published a proposed strategic enforcement plan (<https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan>) for fiscal years 2023-2027. If approved by the commission, it would modify the agency's six enforcement priorities by:

- Expanding the category of vulnerable workers to include people with intellectual and developmental disabilities, individuals with arrest or conviction records, LGBTQ+ individuals, temporary workers, older workers, individuals employed in low-wage jobs, and workers with limited literacy or English proficiency.
- Recognizing employers' increasing use of artificial intelligence (AI) and machine learning in job advertisements, recruiting and hiring.
- Focusing on discrimination associated with the COVID-19 pandemic and other threats to public health, violations of the newly enacted Pregnant Workers Fairness Act (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/senate-pregnant-worker-protections.aspx) and technology-related employment discrimination.
- Focusing on overly broad nondisclosure agreements (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ndas-sexual-misconduct-claims.aspx) and nondisparagement agreements.

"The EEOC will likely be more aggressive in pursuing enforcement actions around these priorities than what we have seen from [them] in recent years. The EEOC will very likely have a Democrat-majority commission soon," said Andrew Turnbull, an attorney with Morrison Foerster in Washington, D.C. Currently, the commissioners are two Republicans and two Democrats.

Andrew Maunz, an attorney with Jackson Lewis in Pittsburgh, said he expects to see the EEOC focus more on equal pay violations and disparate impact allegations where a particular policy is alleged to negatively affect a certain group. The EEOC has "specifically mentio. focusing on the lack of diversity in the construction and tech industries, particularly as it relates to hiring barriers in recruiting," Turnbull said.

Employers can spend some extra time and attention on certain legal areas where they know enforcement is growing.

"Employers do not want to find themselves looking down the barrel of a large-scale systemic case when they first learn about a particular EEOC hot spot," said Christopher DeGross, an attorney with Seyfarth in Chicago. "Taking the time to learn what the EEOC is focusing on gives employers an opportunity to shape training, policies and operational decisions in a way that keeps them out of the agency's crosshairs."

For employers, time spent complying with EEOC regulations can serve double duty to prevent some private lawsuits.

"Where the EEOC goes, private plaintiffs' counsel often follows, drafting on the EEOC's trail-blazing efforts," DeGross explained. "Staying ahead of EEOC hot spots can help inoculate employers against potential private litigation, as well."

More money for the EEOC may create opportunity to expand enforcement. The federal budget included \$455 million for the EEOC in fiscal year 2023, up from \$420 million in fiscal year 2022.

"The EEOC has historically struggled with backlogged cases and charges, meaning they have often played catch-up on enforcement efforts," DeGross said. "A bigger budget translates to more personnel, meaning the EEOC can be more proactive, both in litigation and pursuing more charges. Importantly, it also means the EEOC can invest in technology and experts that allow the EEOC to litigate even more effectively."

Distribution of Cases

The EEOC received 61,331 charges in 2021, down from 67,448 charges in 2020. The number of charges has declined since 2017, when the commission received a five-year high of 84,254 charges, according to a recent report

(https://www.seyfarth.com/dir_docs/publications/EEOC-Initiated-Litigation-2023.pdf) from Seyfarth. Retaliation is the most common type of allegation.

Charges associated with alleged discrimination under Title VII of the Civil Rights Act of 1964 accounted for 61 percent of the cases filed in 2021, while the Americans with Disabilities Act accounted for 27 percent, and the Age Discrimination in Employment Act accounted for 7 percent, Seyfarth reported. In 2021, 53 percent of the Title VII cases were for sex discrimination, while 17 percent were for race discrimination, 4 percent were for national origin discrimination and 3 percent were for religious discrimination.

"The distribution of cases filed by statute remained roughly consistent compared to the last few years," the report stated.

The EEOC continues to prioritize systemic cases with strategic impact, meaning those that affect how the law influences a particular community, entity or industry, the report noted.

Employers should understand that each EEOC region has its own local priorities, DeGross said. Arkansas, Mississippi, Alabama, Tennessee and Nevada had the most charges filed per capita in 2021.

"Some states have very strong state statutes and civil rights agencies that draw a large number of filings away from the federal EEOC," DeGross explained. "The EEOC has emphasized educating employees and applicants about their rights, and those efforts differ from EEOC region to region. The Chicago and Philadelphia EEOC offices, for example, have invested in vigorous outreach programs, which could encourage charge filing."

Artificial Intelligence

Going forward, the EEOC is likely to place more scrutiny of employers' use of technology and AI (www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/artificial-intelligence-takes-center-stage-at-eoc.aspx) in recruiting, screening, hiring and performance reviews.

Employers should fully understand the factors used by AI tools in recruiting and ensure they do not inadvertently screen for impermissible medical or disability-related information from candidates, DeGross said.

"Employers often believe that once they have vetted their AI tool for biases, they do not need to review it again. But the AI tool is supposed to constantly evolve and learn based on inputs employers feed into the AI tool. It is typically best to have some human in the loop, manually reviewing the tool on a regular basis, to ensure that the AI tool is not developing biases over time," Turnbull said.

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