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KD Alert: EEOC Identifies National Priorities for 2013-2016

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On December 17, 2012, the U.S. Equal Employment Opportunity Commission ("EEOC") approved a Strategic Enforcement Plan for Fiscal Years 2013 – 2016 ("SEP"). The stated purpose of the SEP is "to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace." To say the least, these are aggressive initiatives which ultimately will become the impetus for even more charges of discrimination. From an employer's perspective, the SEP provides valuable insight into the EEOC's targeted enforcement areas and an "advance" opportunity to strengthen internal policies and procedures before claims arise.

The Six National Priorities.

According to the SEP, the EEOC will focus on the following issues for the next three years:

1. **Class-based Recruitment and Hiring Practices: In particular, the EEOC will focus on practices that discriminate against racial, ethnic and religious groups, older workers, women and people with disabilities. In this category, employers can anticipate an increase in discrimination claims under Title VII based on criminal background checks.**
2. **Immigrant, Migrant and Other Vulnerable Workers: The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting "vulnerable workers" who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Such claims could implicate federal statutes that extend beyond the EEOC's jurisdiction—including the Fair Labor Standards Act and/or the Immigration and Nationality Act, inasmuch the EEOC operates under Memoranda of Understanding with the Wage and Hour Division of the Department of the Labor and the Office of Special Counsel for Immigration.**
3. **Addressing Emerging and Developing Issues: The ambiguity built into this category affords the EEOC flexibility to expand its list of national priorities. But the following "emerging issues" are specifically identified in the SEP: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat; 2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act; and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.**
4. **Enforcing Equal Pay Laws: During his first term in office, President Obama signed the Lilly Ledbetter Fair Pay Act in 2009, created the National Equal Pay Enforcement Task Force, and appointed a woman–Jacqueline A. Berrien–as Chair of the EEOC. It should come as no surprise, therefore, that the EEOC will continue its efforts to eradicate compensation discrimination. In furtherance of this pursuit, the EEOC has trained thousands of intake workers at various federal agencies on identifying, investigating, and remediating pay discrimination.**
5. **Preserving Access to the Legal System: The enforcement of anti-retaliation laws is, perhaps, the most obvious mechanism through which the EEOC can preserve access to the legal system. The last few years have seen a steady increase in the enforcement of such laws. This trend will continue not only because of the EEOC's desire to preserve access to the legal system but also because a prima facie retaliation claim can be established by demonstrating sufficient temporal proximity between the protected activity and the adverse employment action, arguably making such claims easier to prosecute than discrimination claims.**
6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach: This program is not new. The EEOC has previously made systemic discrimination a priority. An additional targeted outreach campaign to deter harassment in the workplace has been put in place to help facilitate compliant workplaces.**

District Complement Plans.

The SEP requires each District to prepare their own District Complement Plans ("DCP") which must (1) identify how the office will implement the SEP priorities; 2) identify local enforcement priorities, including areas for systemic investigation and litigation and strategies for addressing them; and (3) identify strategies for collaborative legal/enforcement efforts. Plans submitted by March 29, 2013 will take effect on June 1, 2013, unless expressly disapproved by the EEOC.

Priority Charge Handling.

In 2013, there will be increased focus on improved implementation of the Priority Charge Handling Procedures (PCHP). Adopted in 1995, the PCHP serves to afford certain charges the highest priority in terms of investigations. Priority charges include those: (1) where investigation likely would result in a cause finding and (2) where irreparable harm will result unless processing is expedited. Non-priority issues may be pursued by the EEOC if resources permit. Due to the limited resources available, it is suspected that non-priority charges may languish until a Notice of Rights is issued.

Preventive Measures for Employers.

The SEP provides important insight into the EEOC's priorities for the next three years. Employers should seize this opportunity, with the assistance of legal counsel, to implement the following preventive measures:

- Review and revise – if necessary – EEO policies to ensure current compliance with applicable laws, paying particular attention to the areas identified as national priorities.
- Use caution before basing an employment decision on a criminal background check and/or criminal history.
- Continue to document recruitment efforts, hiring and promotion practices, disciplinary actions, and any changes to the terms and/or conditions of employment.
- Provide mandatory anti-harassment training for management and staff to ensure awareness of EEO policies and procedures.
- Review wage and compensation packages to prevent or remedy unlawful discrepancies in pay and/or potential wage and hour disputes.
- Tread lightly with potential cross-over claims, i.e., claims that could result in investigations by multiple federal agencies such as the Department of Labor and/or the Office of Special Counsel for Immigration.
- Be prepared for the June 1, 2013 implementation of the District Complement Plan prepared by the District Office in your area. Take the above steps to prevent claims based on the local enforcement priorities identified therein.

For more information on this matter, please contact the attorneys in KD's Employment Law practice.

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