

A Glimpse Into the Future: The EEOC's New Strategic Enforcement Plan

By Peter N. Farley and Kara D. Duffle

Stating that now is an “opportune moment for transformative change” that will require a strategic focus of resources and a rigorous commitment to reducing discriminatory practices in the workplace, the Equal Employment Opportunity Commission (Commission) approved its 2013–2016 Strategic Enforcement Plan (SEP). The SEP is intended

to maximize and coordinate the Commission’s limited resources by pursuing certain designated priorities. Based on the SEP, public comments by at least one of the commissioners and other information we have gathered, we expect the Commission to take a targeted, enforcement-oriented approach with increased litigation, subpoenas and Commissioner charges. Accordingly, employers should proactively review their policies and practices in anticipation of more expansive enforcement by the Commission.

The Commission chose its enforcement priorities based on the issues having a perceived broad impact, involvement in developing areas of law, effect on workers who lack awareness of the Commission’s legal safeguards, or government enforcement as opposed to private litigation. With these considerations in mind, the SEP set forth six strategic enforcement priorities:

1. Eliminate barriers in recruitment and hiring.
2. Protect immigrant, migrant, and other vulnerable workers.
3. Address emerging and developing issues.
4. Enforce equal pay laws.
5. Preserve access to the legal system.
6. Prevent harassment through systemic enforcement and targeted outreach.

We will discuss a few of the SEP’s enforcement initiatives below.

With respect to the recruitment and hiring initiative, we expect the Commission to focus heavily on disparate



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impact cases concerning facially neutral screening tools for new hires. For example, the Commission may begin to audit employers for data, documents and evidence of disparate impact in addition to investigating intentionally discriminatory policies and procedures. The Commission is concerned that certain classes of individuals continue to face discriminatory practices, and we believe that it will put a strong emphasis on systemic discrimination in the form of tools such as pre-employment tests, background checks and date-of-birth inquiries. Criminal convictions and credit histories, for example, could be considered a

Disparate or adverse impact claims usually involve employment practices that are facially neutral, but in application can have a discriminatory effect on a protected class of employees. In the SEP, the Commission made it clear that it is focusing on certain screening tools that have may have a disparate impact, such as pre-employment tests, general background or criminal history checks, date-of-birth inquiries, and credit-history checks.

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source of disparate impact. Based on this information, we believe employers need to review their hiring and promotion practices and ensure that facially neutral policies do not adversely impact protected classes of employees or applicants.

Also, several other areas of employment law are emerging and developing because of societal, demographic and workplace changes. The Commission stated that “swift and responsive attention” to demographic changes, new judicial interpretations and significant events is necessary because these developments could affect employment practices. For example, with the substantial unemployment rates that have plagued the country for the last several years, we believe that the Commission may make an effort to expand Title VII to cover unemployed individuals under a disparate impact theory. The Commission may





also look to Title VII's sex discrimination provisions when considering coverage of lesbian, gay, bisexual and transgender individuals.

In addition, it appears that pregnancy will be a big issue. With more women in the workplace, employers need to keep an eye on any employment practices or policies that could adversely affect pregnant women. We believe the Commission will attempt to add legislation regarding lactation rights in response to certain state laws that cover lactation. Furthermore, the Commission may take an additional step and designate pregnancy a per se disability. Recent case law supports these interpretations. For example, in *Keith v. Oakland County*, 703 F.3d 918 (6th Cir. 2013), the court noted the importance of individualized assessments for complying with the American with Disabilities Act (ADA). Although the Fourth Circuit disagreed with this interpretation in *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013), and held that the employer's actions with

respect to pregnant women did not violate the ADA, we believe *Young* will have limited applicability because it was decided under the ADA before the legislation was amended.

The number of Commission charges has remained constant over the past two years, with a slight decrease in 2012. However, based on information that we have gathered and public comments, we expect Commission charges to increase this year. The SEP makes clear that the Commission is interested in a multi-pronged, coordinated and targeted approach, and we believe this approach will result in increased enforcement actions and employment litigation. [S](#)
