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EEOC Updates: Conciliation Program Changes, Guidance on Systemic Discrimination, EEO-1 Data Collection Resumes and New Leadership

In the past few weeks, the Equal Employment Opportunity Commission (EEOC) has made multiple announcements, some of which are significant. It has revamped its conciliation program with a new final rule, which could make conciliation a more prominent feature in future EEOC proceedings. It has released new guidance on systemic discrimination, and it has issued an alert that EEO-1 data collection will soon resume. As of January 21, the agency is also under new leadership, which could affect the EEOC's agenda for years to come.

New Rules for the EEOC's Conciliation Program and a New Chair for the EEOC

For the first time since it established its conciliation program 40 years ago, the EEOC has announced a new final rule governing such program. Prior to filing a lawsuit relating to a charge for which the EEOC made a finding of reasonable cause to believe discrimination occurred, the EEOC is required to offer employers the opportunity to conciliate the matter. Previously, the EEOC did not provide employer respondents with much information regarding its findings. Under the new final rule, which went into effect on February 16, if a respondent employer agrees to engage in conciliation, the EEOC must provide the employer with a written summary of the facts and information it relied on to support its reasonable cause finding. It also must furnish a written summary of the legal basis for its findings, as well as the calculations underlying any claim for monetary relief.

These changes are designed to provide greater transparency to encourage employer participation in the conciliation process. Currently, about a third of employer respondents refuse to participate in the conciliation process, and about half of the cases for which the EEOC makes a reasonable cause finding are not resolved through conciliation. The EEOC hopes to change those statistics with its new final rule.

The changes to the conciliation process are not without controversy. Supporters argue that the better informed employers are on the EEOC's findings in a case, the more likely they are to engage in efforts to resolve disputes voluntarily, and the more likely such efforts are to be successful. Critics argue that the new final rule will result in expensive and needless litigation against the EEOC, since it provides additional avenues for employer respondents to challenge the adequacy of the EEOC's engagement in the required conciliation process, and could cause delay and incentivize gamesmanship.

On January 7, the EEOC commissioners approved the final rule by voting along political party lines—three Republican votes for the final rule and two Democratic votes against. Thereafter, on January 21, President Biden appointed the two Democratic commissioners who voted against the rules, Charlotte Burrows and Jocelyn Samuels, to be chair and vice chair, respectively, of the EEOC. The chair of the EEOC has significant authority over the day-to-day functions of the agency, including setting the EEOC's agenda. Time will tell how the EEOC charts its course under Ms. Burrows' leadership. Since the terms of the three Republican commissioners do not begin to expire until next year and because major policy initiatives require majority approval, Ms. Burrows' ability to effect significant change may be limited in the near term.

New Guidance on Systemic Discrimination

In addition to the above, the new conciliation final rule requires the EEOC to disclose whether it has designated a particular case as one involving systemic bias. The EEOC also recently launched a new Systemic Enforcement webpage designed to help employers understand how the agency identifies and handles systemic discrimination cases. Systemic cases are those involving discriminatory bias or patterns that may have "a broad impact on an industry, profession, company or geographic location." The EEOC's new webpage provides examples of practices that can lead to systemic cases, such as the steering of job applicants to certain positions based on race or gender, or the posting of job ads showing a preference for "energetic" or "recent graduate" candidates. The webpage also describes the steps the EEOC takes to investigate systemic cases and the resources it draws upon for such investigations. These notably include employers' annual EEO-1 Reports, which are compliance surveys mandated by federal statute and regulations that require covered companies to provide employment data categorized by race/ethnicity, gender and job category.

EEO-1 Data Collection Resumes

Those familiar with the EEOC's data collection practices, including EEO-1 data, will know that due to the COVID-19 pandemic, the EEOC temporarily suspended data collection in May 2020. In January 2021, however, the EEOC announced that data collection will resume in April. Private-sector employers should begin preparing now to submit data for their 2019 and 2020 EEO-1 reports this spring. Collection of EEO-3, EEO-4 and EEO-5 data from covered schools, local referral unions and government entities will also resume between July and October of this year.

Once known, the collection opening dates and the new submission deadlines will be announced in a posting on the EEOC's home page at www.eeoc.gov, as well as on the new dedicated website for the EEOC's data collections. A notification letter also will be sent to eligible filers.

More News on the Horizon

Other changes are also in the works at the EEOC, but some are in limbo due to the regulatory freeze the Biden administration placed on rules that had not been published in the Federal Register before January 20. These include new rules ending the EEOC's long-running practice of providing official time to union officials when they work on their colleagues' discrimination cases, as well as proposed rules on wellness program incentives, which would amend the EEOC's regulations under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. Stay tuned for new developments on these fronts.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com