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What Employers Should Take From the EEOC's Latest Report

On November 19, the U.S. Equal Employment Opportunity Commission (EEOC) published its Fiscal Year 2019 Agency Financial Report. While the report contains some eye-catching statistics related to the EEOC's enforcement agenda for 2019, the biggest takeaways for employers are the key insights and lessons for dealing with EEOC matters in 2020.

The Report's Most Interesting Data

On February 12, 2018, the EEOC implemented its Strategic Plan for Fiscal Years 2018-2022, which outlined three objectives: to combat and prevent employment discrimination through enforcement, to prevent employment discrimination and promote inclusive workplaces through education and outreach, and to achieve EEOC organizational excellence.

With respect to the first objective, the report highlights the EEOC's enforcement efforts in resolving charges of discrimination through both investigation and its alternative dispute resolution (ADR) mechanisms. According to the report, in fiscal year 2019, the EEOC recovered more than $486 million for victims of alleged discrimination. Of the money recovered in the private sector, more than $39 million was recovered through litigation (as the EEOC cannot award monetary relief administratively), while more than $346 million came through the settlement of claims using the EEOC's ADR mechanisms.

The EEOC's ADR mechanisms provide two avenues for resolution prior to litigation. First, prior to investigation, the EEOC invites parties to engage in voluntary mediation. Second, if the EEOC reaches a "probable cause" determination on a given charge of discrimination, it is required by law to engage in conciliation efforts with the parties before filing suit. The report highlights that in fiscal year 2019, the EEOC conducted 8,999 mediations and resolved 6,394 of those cases prior to investigation. The EEOC also reported that participants viewed the mediation process favorably, with 96.8 percent of all participants indicating they would use it for future charges. The EEOC also saw an uptick in respondent participation in mediation and successful conciliation efforts.

Of final note is the EEOC's focus on achieving "organizational excellence." Within this objective, the report emphasizes the EEOC's online intake process, which allows potential claimants to easily file pre-charge inquiries online and schedule interview appointments. The report claims that as a result of its online intake process, the EEOC has seen more than an 11 percent increase in the number of inquiries submitted to the EEOC compared with fiscal year 2018.

Advice for Employers Responding to EEOC Charges

As the decade winds to a close, it is clear that the EEOC is not slowing down its investigation and enforcement efforts. Indeed, with the implementation of its online inquiry platform, the door is wide open for potential claimants to initiate EEOC claims faster and easier than ever. Moreover, employers can expect that with an increased public awareness of discrimination and harassment issues (particularly now in the "me too" era), they will continue to face charges before the EEOC. As always, however, employers can feel confident in their ability to navigate the charge process by working with legal counsel and understanding how best to engage with the EEOC, either through mediation or during investigation.

Take Advantage of the Mediation Process

The data contained in the report indicates an interesting disparity for mediation. While the EEOC successfully resolved approximately 71 percent of mediations in fiscal year 2019, only 30.7 percent of respondents took advantage of the mediation process. This is somewhat surprising, given the advantages presented by EEOC mediation.

First, engaging in mediation prior to investigation allows for early resolution of charges. While many charges are dismissed with a "no probable cause" determination in short order, that is not always the case. The EEOC will often require substantial information from employers beyond their initial response to the charge, with the investigation process sometimes lasting years. Mediation allows employers an early, no-risk opportunity to resolve a charge. Mediation is entirely voluntary and employers are not required to settle a case once they accept mediation.

Second, the EEOC's mediation success rate of 71 percent is no fluke. The EEOC's mediators are generally knowledgeable of the law and skilled at brokering agreements between participants. Employers can feel confident going into mediation that they will receive a "fair shake" and be given the opportunity to resolve the case on reasonable terms.

Be Prepared to Fully Engage With the EEOC If Mediation Is Unsuccessful

Should mediation prove to be either infeasible or unsuccessful, employers should be prepared to substantively engage with the EEOC on pending charges. As noted above, in appropriate cases the EEOC will issue findings of no probable cause, handing employers a key (and sometimes final) victory in discrimination disputes. However, the EEOC needs a basis to reach such a finding. For that reason, a position statement that simply denies the allegations in a charge is rarely enough for the EEOC. While the charge is the complainant's chance to tell his or her story, the employer's position statement is its chance to tell its version of the story. Employers should always be cognizant of the fact that, at the end of the day, decisions reached by the EEOC are made by individuals reading the submissions from the parties. Presenting the facts in a compelling and accurate way that not only refutes the claimant's allegations but also places the dispute in proper context, can go a long way toward giving the EEOC reason to find no probable cause.

This lesson should extend beyond the initial response process. While a position statement is often all the EEOC requires from employers, that is not always the case. The EEOC may make follow-up information requests and/or seek witness interviews. Again, these should be treated not as nuisances, but instead as opportunities for employers to give the EEOC context and a basis to dismiss a charge.

Bottom Line

The EEOC's doors are wide open to potential claimants and, as demonstrated by the statistics in its report, the EEOC remains aggressive (and often successful) in investigating claims. Employers should be aware of the tools available to them during the charge process. Prudent employers, working with their legal counsel, understand these tools, including the importance of mediation, and if it fails, how to effectively engage with the EEOC during investigations and defend claims.

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Authors



Theresa A. Kelly

Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com