

# Employment

COMMENTARY

REPRINTED FROM VOLUME 21, ISSUE 23

## With New Systemic and E-RACE Initiatives, More EEOC Class Cases Are on the Way

By Donald R. Livingston, Esq.\*

Two new programs of the Equal Employment Opportunity Commission — the Systemic Initiative and the E-RACE Initiative — will influence whether your next discrimination charge becomes the EEOC's newest class case.

### The Systemic Initiative

The EEOC is restructuring its priorities to file more high-impact lawsuits, just as plaintiffs' lawyers are finding it increasingly difficult to obtain class certification in employment discrimination cases. The EEOC estimates that its Systemic Initiative will generate significant class litigation sometime within the next two years.

These cases could be more difficult to defend than class actions under Federal Rule of Civil Procedure 23. Because the EEOC is not held to the Rule 23 standards that apply to private class actions, there is no opportunity to defeat the claim at a class-certification stage. Moreover, EEOC lawsuits usually come with greater reputation risks for the defendant.

To get more high-impact cases into court, the EEOC is determined to develop a more national perspective to its investigation and litigation programs by creating a proactive and consistent effort at identifying systemic discrimination.

The EEOC will attempt to develop high-impact cases by:

- Providing incentives for staff to expand individual charge investigations;
- Prioritizing cases involving a pattern or practice, policy, or class, where the alleged discrimination has a broad impact on an industry, profession, company or geographic location;

- Providing incentives to district directors and regional attorneys to submit systemic-discrimination charges that are approved by the EEOC's commissioners;
- Making systemic cases the priority of every EEOC office;
- Identifying issues, bases, industries and employers that will be "flagged" in the charge tracking system to alert investigators that a charge may be appropriate for systemic priority; and
- Requiring local offices to use local systemic plans, approved by EEOC headquarters.

The EEOC will change the way it uncovers systemic discrimination by relying more heavily on employees with expertise in statistical cases and targeting employers by using technology. For example, the EEOC will look more closely at data on multiple charges on the same basis filed against the same employer, EEO-1 survey reports and census data.

Local system plans will describe the specific steps each district will take to identify and investigate systemic discrimination and how the identification and investigation of systemic discrimination will be accomplished, taking into consideration the local office's strengths and resources. More importantly, the plans will name specific employers, industries and issues that will be pursued. These plans will not be disclosed to the public.

It is foreseeable that district offices will tend to target employers with high charge volume, which would allow the EEOC to detect patterns across charges. Of course,

the bigger the employer, in terms of number of employees, the higher the charge volume. Any patterns detected in the charges would form the basis for investigations of systemic discrimination and, ultimately, pattern-or-practice lawsuits.

### E-RACE

The EEOC's E-RACE Initiative ("Eradicating Racism and Colorism from Employment") is being coordinated with the broader Systemic Initiative. The agency describes E-RACE as an "outreach, education and enforcement campaign" directed specifically at race discrimination.

An EEOC press release states that the agency will integrate E-RACE with the goals of the Systemic Initiative by focusing on race and color issues that have class and systemic implications. To make the point, one week after announcing E-RACE, the EEOC filed a class lawsuit against the Walgreen's drugstore chain that alleges nationwide racial bias.

The EEOC's public statements on E-RACE say the agency intends to be alert to more subtle forms of race and color discrimination, such as discrimination resulting from hiring and promotion decisions based on discrete employment policies. It appears that the EEOC will give emphasis to claims of disparate impact resulting from the use of employment or personality tests, credit scores, background checks, or advanced technology, such as the use of video résumés, which the agency believes could result in a "disproportionate exclusion of applicants of color who may not have access to broadband-equipped computers or video cameras."

### Positioning to Better Defend Claims

Employers should consider a number of steps to try to minimize the risk of a pattern-or-practice lawsuit filed by the EEOC.

The employer should be aware that EEOC charge forms are *signed* by the charging party, but *completed* by the EEOC. This means that any suggestion in the forms that the charge asserts a pattern or practice of discrimination likely was written into the charge by an EEOC investigator.

This is forewarning that a broad investigation under the EEOC's new Systemic Initiative might ensue. The employer

should be particularly alert to the possibility of a pattern-or-practice investigation growing out of a charge of race discrimination.

It is equally important that the employer be mindful of its reputation with the EEOC and work to build a reputation for credibility and cooperation. This will improve communications with the EEOC and facilitate case settlements before investigations are expanded.

The employer should know how to evaluate charges to influence outcomes. This means understanding the options available to the EEOC and how the agency is likely to conduct its investigation, interpret relevant laws and evaluate evidence, especially statistical evidence.

The employer must also learn to discern whether there is information in the charge or elsewhere that is a cue to an expanded EEOC investigation. For example, an expanded investigation may occur where the charge is one in a sequence of charges on the same issue, directly implicating a policy applicable to other employees, or contains class allegations or the buzz words "similarly situated."

Investigations may also be expanded if the charging party is in a human resources job or other position that has access to personnel or confidential information, or when the notice of charge is accompanied by a subpoena, a request for an on-site visit or a broad request for information.

In light of the EEOC's E-RACE Initiative, it is especially important that employers review policies and practices to ensure they comply with EEOC policy guidance. The EEOC can satisfy the objectives of its initiatives far easier by attacking policies than by bringing other types of class cases that would involve extensive discovery. For this reason, it should be assumed that the EEOC will more closely scrutinize policies during its investigations of individual charges.

*\* Donald R. Livingston is a partner in the Washington office of Akin Gump Strauss Hauer & Feld and author of "EEOC Litigation and Charge Resolution" (BNA) (2005). He can be reached at (202) 887-4242 and [dlivingston@akingump.com](mailto:dlivingston@akingump.com).*