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EEOC

Following a fiscal year in which the agency reduced its charge backlog by 10 percent, recovered record amounts for discrimination claimants, and expanded its systemic program, EEOC must cope with budget cuts and a hiring freeze. Agency officials say they are determined to sustain the gains, but as EEOC notches record highs in charges received, it could be difficult to maintain forward momentum.

EEOC Seeks to Build on Recent Gains While Absorbing Budget Cuts

The Equal Employment Opportunity Commission in 2012 aims to build on recent success in reducing its case backlog, expanding its systemic litigation program, and recovering record amounts for discrimination claimants even as budget cuts force a hiring freeze and other resource constraints, agency officials say.

During fiscal year 2011, EEOC received a record 99,947 private sector discrimination charges but also reduced its charge backlog by 10 percent, the first time the commission had cut the backlog since fiscal 2002. EEOC also recovered a record \$364 million for discrimination claimants through administrative enforcement and filed a record-high 23 systemic suits, alleging class-wide discrimination against large groups of employees.

But Congress sliced EEOC's fiscal 2012 budget by about \$6.5 million to \$360 million, following a fiscal 2011 cut of about \$1 million, EEOC Chair Jacqueline A. Berrien said. Her primary challenge for 2012 will be to sustain EEOC's progress in reducing its charge inventory, which stood at 78,136 pending charges as of Sept. 30, 2011, and expanding its systemic program, despite an agency hiring freeze that began in January 2011 and fewer resources available for employee training, travel, and technology improvements.

Berrien attributed EEOC's ability to reduce the backlog, expand its systemic program, and achieve record monetary results at least in part to new hiring and enhanced employee training enabled by substantial bud-

get increases in fiscal years 2009 and 2010. She expressed concern about not repeating EEOC's experience from the early 2000s, when flat funding or worse meant EEOC lost about 25 percent of its workforce while incoming discrimination charges escalated and the case backlog grew.

"One of the real focuses of my attention will be how we deal with the budget constraints in a way that will hopefully preserve the progress that we've been able to make in recent years," Berrien told Bloomberg BNA in a Jan. 9 interview. "It's obviously going to take a great deal of effort and attention to do that, but I think it's very, very important. It would be very disappointing, after making some hard-won progress, [if] we immediately began to see that reversed."

Effects of Budget Cuts. Berrien said EEOC ended fiscal 2011 with about 2,500 employees, but because the hiring freeze forces the agency to leave positions vacant when employees leave, the agency could end fiscal 2012 "with significantly reduced staff." EEOC also will be cutting employee training, although Berrien said EEOC has not completely "zeroed it out" in the current budget.

"It's very important that there is still a way to conduct necessary training," as that is "part of ensuring that the investment we make in our staff yields the maximum benefit to the public," Berrien said. But she added, "Un-

questionably, the amount of [training], and the frequency of it, will be impacted by the resources that we have available.”

EEOC also is suspending “all but the most essential” field office moves or facilities acquisitions and dropping or delaying technology enhancements, Berrien said.

“One of the real focuses of my attention will be how we deal with the budget constraints in a way that will hopefully preserve the progress that we’ve been able to make in recent years,” EEOC Chair Berrien said.

EEOC’s front-line staff will continue to slice the case backlog by using the priority charge-handling process (PCHP), a means to categorize charges that EEOC has used since the mid-1990s, Berrien said. The “overwhelming feedback” from outside evaluators is that PCHP is a “sound and important management tool,” Berrien said.

She added, however, that “one of the casualties” of staffing and resource cuts in the past was that “B” charges, referring to the middle category of those charges that might have merit but are not placed on a fast track, “tended to remain untouched or undressed longer.”

To address the backlog, EEOC has been retraining staff on PCHP and refined its training materials to “reflect that renewed emphasis,” Berrien said. “We expect to do all that we can, in terms of both our training and our management” so consistent implementation of PCHP is part of EEOC’s daily approach, she said.

Reducing the case inventory requires a “multiyear and more sustained approach,” Berrien said. “We’re not talking about a single-year, one-off effort” but rather the need to “make changes across our operations that we’re prepared to do over time.” She added, however, “there’s no question that how long it might take and how significantly we’re able to continue significantly reducing the backlog is likely to be affected” by EEOC staffing levels.

“We’re obviously going to do everything we can to sustain the gains we’ve been able to make,” Berrien said. “We are working very hard as we prepare for the coming fiscal year, to work with our managers and leaders across the country, and their staffs, to do what we can to sustain the progress.”

Employees Feel Pressure, Union Reports. Gabrielle Martin, head of the EEOC employees union, said “morale is pretty low” among some EEOC employees as already “short-staffed” field offices lose investigators and other employees through attrition. Employees are concerned about the volume of work and “how to get it done,” Martin, who is president of the National Council of EEOC Locals, No. 216, American Federation of Government Employees, said.

Employees also feel pressure as a result of EEOC’s emphasis on investigating and litigating systemic cases in every field office, Martin told Bloomberg BNA. Such

resource-intensive cases can take two or three years to investigate and can resemble “digging a dry well” if no class case ends up being filed, she said. For field offices, “the impact is huge” in diverted resources if attorneys and others spend substantial time on a class investigation only to come up empty, Martin said.

Restrictions on employee travel, even for attorneys working on private sector litigation and administrative judges working on federal sector cases, also are having an adverse effect, Martin said. Video-conferencing may not be an adequate substitute for evaluating witnesses and parties in person, she said.

Martin said EEOC needs to “create efficiencies,” such as adopting a union plan that would free investigators from conducting initial charge intake interviews and instead have lower-paid “bridge employees” do the “hard screening job” while investigators perform the higher-level work they are paid to do.

EEOC’s revised budget for fiscal 2012 still includes the possibility of two unpaid furlough days for employees, Martin said. “That ties into morale and why efficiencies are so important,” she said.

EEOC has not announced any plans to furlough staff, an agency spokeswoman said Jan. 20. “Given the difficult times we’re in, when we’re all still operating under tight budgets, the commission may need to consider a range of cost-saving measures,” the spokeswoman told Bloomberg BNA.

Regulations and Possible Policy Guidance. A final rule under the Age Discrimination in Employment Act regarding disparate impact and the “reasonable factor other than age” defense is expected sometime during the first few months of 2012.

By a 3-2 vote this past Nov. 16, EEOC approved a draft final rule, which amends the agency’s current ADEA regulations in light of the U.S. Supreme Court decisions in *Smith v. Jackson*, 544 U.S. 228, 92 FEP Cases 1824 (2005) (24 EDR 426, 4/6/05) and *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 103 FEP Cases 908 (2008) (30 EDR 809, 6/25/08). The five-member commission’s Republican appointees, Victoria Lipnic and Constance Barker, dissented on the grounds that EEOC was effectively requiring employers under the ADEA to satisfy a “business necessity” test, which the Supreme Court expressly rejected as the proper standard.

Michael Eastman, executive director for labor law policy at the U.S. Chamber of Commerce in Washington, D.C., said the chamber has “serious concerns” about the EEOC draft final rule and is “closely watching” the proposal, which is pending at the White House Office of Management and Budget.

The chamber and the Society for Human Resource Management also are monitoring EEOC’s consideration of policy guidance regarding employers’ use of credit histories in hiring. EEOC held a public meeting on the issue in October 2010, focusing on the potential disparate impacts on racial minorities, women, and persons with disabilities.

Eastman said chamber representatives subsequently have met with EEOC regarding the issue and that he understands the commission is having “active discussions” internally about issuing new guidance.

Business groups are monitoring EEOC's consideration of policy guidance regarding use of credit histories, and updated guidance on leave as an ADA accommodation and employers' use of criminal records also could be on tap.

Michael K. Layman, manager of labor and employment policy at SHRM in Alexandria, Va., also mentioned that EEOC is looking at new guidance to limit credit or consumer checks. "We've been in conversation with the EEOC but don't know what's coming," Layman told Bloomberg BNA, noting that several states have prohibited some employers from conducting such checks. "For certain positions, a credit check is necessary," he said. "If a hospital is considering hiring a chief financial officer, they may be interested in that person's financial management."

EEOC this year also might update guidance on leave as an Americans with Disabilities Act reasonable accommodation and on employers' use of arrest and conviction records. EEOC held public meetings on both topics last year and witnesses called for new or updated guidance.

EEOC officials, including Lipnic, subsequently have said the agency is considering updated guidance on leave as an ADA reasonable accommodation. But in contrast to the credit history issue, Eastman said, new guidance on leave under the ADA "doesn't appear to be on fast track."

Meanwhile, Berrien said EEOC still is reviewing the information it received during and after its public meetings regarding employers' credit and criminal history checks and the ADA leave issue. The agency does not "have a specific timetable for release" of any updated guidance, she said.

"We've been looking at that information we got in the meetings with an eye towards how we can improve that information that's available to the public about how to comply with the laws we enforce and how to improve our enforcement," Berrien said.

But she declined to comment on the timing of any potential policy guidance, noting "it would be hard to say which would come through first."

Berrien said she is "hopeful" an EEOC proposed rule on handling federal sector discrimination complaints, published in 2009, might be finalized in 2012. "We've made progress towards that," she said, adding that EEOC commissioners currently are providing feedback on a draft federal sector rule.

EEOC also currently is developing a new five-year strategic plan. On Jan. 18, it released a draft plan for public comment. Berrien said the process, in which Commissioner Chai Feldblum and EEOC's chief operating officer are leading an internal examination of the agency's processes, has caused a "renewed awareness" about the importance of EEOC's mission and the need for the strategic use of resources.

"We ultimately will need a vote on the plan as a commission, but I think we have really had a tremendous

amount of input from a wide array of people responsible for the work of the agency over the past six months," Berrien said. EEOC is "excited about the prospect of getting some feedback on our draft plan from the public as well," she said.

EEOC will hold a public meeting on its proposed strategic plan to consider public comments and discuss the draft plan, Berrien said.

Small Business Task Force, Pregnancy Bias. EEOC recognizes that "not only lawyers but members of the public, [including] employers who may not have the benefit of regular legal counsel, a very broad group of stakeholders who are part of the 'lay' community, need to understand as well what we do," Berrien told Bloomberg BNA.

To that end, EEOC Commissioner Barker is leading an internal task force reviewing the agency's compliance assistance to small employers. Barker's group is examining what EEOC currently provides and how it can improve outreach to small businesses that might lack regular access to legal counsel, Berrien said.

A "significant part" of the task force's work will be determining if EEOC can better use technology to make information "more readily available" to small employers and other stakeholders, Berrien said. EEOC expects a public meeting in 2012 at which Barker will present the group's findings and recommendations, Berrien said.

EEOC also will hold a public meeting in February on pregnancy and caregiver discrimination, an issue the commission last discussed publicly at a May 2007 meeting when it issued a policy guidance on potential discrimination against employees with caregiver responsibilities. Commissioner Stuart Ishimaru is organizing that meeting, Berrien said.

Continuing Focus on Pay Issues. As part of its ongoing focus on pay discrimination issues, EEOC in 2012 expects a report from the National Academy of Sciences regarding employment compensation data, Berrien said. EEOC in 2010 had commissioned an NAS study to apprise EEOC of the data currently available to identify instances of pay discrimination and to recommend whether EEOC should change its existing data collection and analysis, Berrien said.

"We believe it was important to take a very close look and get expert guidance on the information that's already available before asking for or seeking any new, additional information," she said.

The Labor Department's Office of Federal Contract Compliance Programs last year issued an advance notice of proposed rulemaking on a compensation data tool for federal contractors. Berrien said EEOC has "certainly been in communication with OFCCP" as that agency solicits comments from contractors and other stakeholders on how to craft useful data on pay and compensation.

"We view [OFCCP's] efforts and our efforts as complementary," Berrien said. "We certainly try to keep informed about each effort as we've gone on and are very conscious of the need to work on this issue in a way that avoids either redundancy or conflict."

Following up on a joint memorandum that Berrien and Office of Personnel Management Director John Berry issued last August, Berrien said EEOC also is taking part in an interagency initiative to close a gender pay gap in federal employment.

Commissioner Feldblum is working with representatives from OPM and EEOC's Office of Federal Operations to identify and address the causes of a nine-cent gap between the average pay of male and female federal employees, meaning female employees earn 91 cents for every dollar earned by men. The group will suggest steps the federal government as an employer can take to close the gap, Berrien said.

As for private sector pay discrimination issues, Berrien said EEOC has worked with the Labor Department and the Justice Department to develop "better training" for federal employees responsible for identifying and investigating equal pay claims. "To date, more than 1,300 federal employees at Labor and EEOC have been trained," Berrien said.

Don Livingston, a former EEOC general counsel now a management attorney with Akin Gump Strauss Hauer & Feld in Washington, D.C., said "it would be a surprise" if EEOC did not file systemic litigation under the Equal Pay Act this year.

In accord with President Obama's equal pay enforcement initiative, EEOC has opened investigations of employers under the EPA in its Chicago, New York, and Phoenix district offices and perhaps elsewhere, Livingston told Bloomberg BNA Jan. 5. Given that activity, Livingston said he expects some EPA lawsuits will be coming from EEOC.

Expansion of Systemic Program. On the enforcement side, EEOC General Counsel P. David Lopez said the commission in fiscal 2011 filed a record-high 23 lawsuits alleging classwide discrimination against large groups of employees or applicants and that systemic cases now account for 4.2 percent of EEOC's court docket.

Every EEOC field office now is pursuing at least one classwide case, Lopez told Bloomberg BNA Jan. 10. "So any perception that the systemic program is limited to two or three [field] offices is incorrect and we're now expecting much more activity out of all our offices," he said.

Recent successes for EEOC's systemic program included a \$20 million settlement with Verizon in an Americans with Disabilities Act leave policy case, a \$10 million settlement with Roadway Express Inc. on racial harassment and discrimination claims, and a \$3 million settlement with Scrub Inc. in Chicago in a race discrimination hiring case, Lopez said.

The systemic program now includes cases under almost every statute EEOC enforces, Lopez said. In selecting cases to pursue, he said, given the commission's limited resources, he considers where EEOC "can make an impact as a law enforcement agency," in relation to the private plaintiffs' bar, the "advocacy community," and other government agencies.

EEOC has identified hiring discrimination and lawsuits on behalf of "underserved communities," including agricultural workers and immigrants, as areas it is uniquely suited to investigate and litigate, Lopez said.

He highlighted three pending EEOC nationwide class cases alleging discrimination in hiring. The agency has sued Bass Pro Outdoor World for alleged national origin and race discrimination against black and Hispanic applicants; Texas Roadhouse restaurants for alleged age discrimination; and Kaplan Higher Education for alleged disparate impact on black applicants from its use of credit histories as a screening tool.

EEOC has identified hiring discrimination and cases involving "underserved communities," such as immigrants and agricultural workers, as areas it is uniquely suited to investigate and litigate, General Counsel Lopez said.

Lopez emphasized EEOC's success in obtaining a preliminary injunction against Evans Fruit Co. from the U.S. District Court for the Eastern District of Washington to bar employer retaliation against immigrant female farm workers participating in a sexual harassment class action. "It's extremely difficult to do that in employment cases, but we're willing to go to bat to make sure that people feel safe coming forward," he said.

Emphasis on ADA Amendments Act Cases. EEOC in fiscal 2011 filed 60 suits under the ADA Amendments Act, up from nine the previous year, as Lopez said it was important that "we really got out ahead" in making sure courts recognize Congress's intent to expand the act's coverage. Many of the cases involve conditions such as diabetes, epilepsy, cancer, and intellectual disabilities, regarding which courts had issued unfavorable rulings under the original ADA, but now are certainly covered under the ADA Amendments Act, Lopez said.

Courts have yet to issue many rulings under the ADA Amendments Act, which took effect Jan. 1, 2009, but Lopez said in 2012, he hopes to see "some very positive decisions" affirming the amended act's broad coverage.

The general counsel has established a trial program aimed at sharing "the best thinking on how to prosecute cases" with EEOC lawyers nationwide, providing an electronic bank of jury instructions, motions in limine, and the like so commission lawyers "didn't operate in isolation," Lopez said.

"It's real important to have a very successful trial program because that helps our enforcement efforts, makes it easier to settle cases, makes it easier to conciliate cases," he said. "The success of our trial program sends a strong message that when we file a case, we are willing to try it and, if we try it, there is a reasonable likelihood we will prevail."

EEOC in fiscal 2011 had "one of our best years" with trials, as the commission won "the majority" of cases going to trial, with five cases resulting in plaintiffs' verdicts awarding damages, including punitive damages, Lopez said.

As for pay discrimination, Lopez noted EEOC's \$172,000 settlement with Amtrak in a case alleging sex discrimination in pay under Title VII of the 1964 Civil Rights Act and the Equal Pay Act. He said EEOC currently is litigating five cases alleging pay discrimination under Title VII and the EPA, on which the agency has conducted employee training. "We're hoping to start to see the fruits of that in the litigation, that is obviously very important to the commission," he said. "We just haven't seen a lot of litigation activity in that area."

Potential Effects of Wal-Mart Discussed. Lopez said while the U.S. Supreme Court decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 112 FEP Cases 769 (2011), is a “major case” with potential implications for EEOC’s litigation program, “we have not seen any issues raised against us specifically citing *Wal-Mart* yet.”

Lopez emphasized *Wal-Mart* reversed certification of a private sector class action covered by Rule 23 of the Federal Rules of Civil Procedure, which does not apply to EEOC, and that it was “one of the most expansive” class actions in history, potentially covering more than one million female employees. EEOC does not have pending cases, even those alleging a nationwide class, that “are anywhere near that scale,” he said.

“I think that’s really important to understanding how *Wal-Mart* is going to function for both the government and the private bar in the future because this is sort of an unprecedented case,” Lopez said. “And we don’t have anything of that scale. We do have some national cases but only a handful of national cases that are comparable in structure” to the *Wal-Mart* case.

“This is one where time will tell,” Lopez said. “We’ve talked a lot about it, we’re looking at stuff. It’s really important to see what the courts do on that, if anything, with respect to the statutes we enforce.”

Asked if *Wal-Mart* will affect whether EEOC pursues cases alleging an employer’s subjective decisionmaking or delegation of discretion to supervisors caused class-wide discrimination, Lopez said that, even that part of the court’s decision is “very nuanced.”

“I think there’s pretty much consensus that it’s going to be a tad more difficult for the private bar to get class actions certified and that will mean more responsibility for [EEOC] to play a role in addressing systemic discrimination,” Lopez said. “I think everyone agrees that’s going to be part of the fallout from *Wal-Mart*. In terms of the analytical fallout, I think it’s still too early to tell.”

Resource Constraints in GC’s Office. As for EEOC’s hiring freeze and other cutbacks in available resources, Lopez said “it’s obviously something we have to be very concerned about.”

Lopez, a former EEOC trial attorney in Phoenix, said the agency “has always functioned very close to the bone” and has a “good history of doing a lot with a little.” But he acknowledged that “if we get to the point where we start losing people, now we can’t replace them” and that “obviously is going to have an enormous impact on our ability to prosecute the cases.”

Like Berrien, Lopez said he believes the infusion of new staff in fiscal years 2009 and 2010 was among the reasons EEOC could grow its systemic case docket and reduce the charge backlog. “If we’re not able to replace people, it could have the opposite effect,” he said.

Lopez added, however, that he always has been focused on “making sure we operate efficiently and effectively” and that has driven his decisions on the use of technology, employee training, and streamlining levels of review for litigation.

“It’s really important that we look at these budgetary times as a challenge to operate more effectively,” Lopez said. “There’s a lot of work for us to do, a lot of work that we’re not always able to do because of resources. But I want to make sure that we use all of our very talented and creative lawyers to the best of their abilities.”

“We really focused a lot on coming up with the best practices and the best ideas on saving money on litigation costs, for achieving economies of scale,” he said. “That’s a big part of what I have to do in this job.”

Lopez said that, because of the budget cuts, in-person skills training in Washington, D.C., for attorneys and legal staff has been scaled back and the Office of General Counsel now is “trying to use technology as best we can” for employee training. EEOC was able to complete its first-ever paralegals training in Washington before funding started to dry up, Lopez said. “That’s really important when you have a systemic program because the paralegals carry such a big load on those cases,” he said. “It’s a key position in the agency.”

Employers’ Reactions to EEOC. Livingston of Akin Gump said the systemic program may become “harder to implement” because of EEOC’s resource constraints. Unless the general counsel is able to increase the number of EEOC lawyers, it might be “unrealistic” to expect further increases in the filing of systemic cases, Livingston said.

He said EEOC probably would continue its focus on systemic cases challenging specific employer policies such as leave policies under the ADA or criminal conviction policies under Title VII, in contrast to *Wal-Mart*-like challenges to employers’ subjective decisionmaking. Cases challenging employer policies require fewer resources to investigate and try than the *Wal-Mart*-type cases, Livingston said.

Employers perceive EEOC as being “much more aggressive” than previously in “testing the outer boundaries” of Title VII and agency investigative authority, management lawyer Don Livingston said.

But Livingston said he also expects EEOC to litigate more pay and promotion class cases, as there appears to be a “pervasive view” within EEOC that they should be considering more Title VII litigation, given the constraints *Wal-Mart* places on private class actions.

Employers generally perceive the current EEOC as being “much more aggressive” than previous administrations in “testing the outer boundaries” of Title VII substantive law and the limits of EEOC’s investigative authority, Livingston said.

For example, while EEOC for almost 25 years has had policy guidance regarding employers’ use of criminal histories, Livingston said he did not think that policy contemplated EEOC suing employers for alleged sex discrimination against men for disqualifying applicants with past criminal convictions.

Eastman of the U.S. Chamber of Commerce said he has heard increased complaints from employers about EEOC being “overaggressive” in its information requests in litigation. The chamber is weighing what action, if any, to take in response, he said.

EEOC under Chair Berrien has had “an open door,” which the chamber appreciates, even if “we haven’t always agreed” with the commission’s decisions, Eastman said.

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