

What Lies Ahead? The EEOC and the New Administration

By Hope Eastman

While we are in a time of political uncertainty with the new administration, the EEOC continues its work and has given some clues in its most recent EEOC Compliance Manual Newsletter as to what they think is ahead. Among the points worth mentioning:

- Changes in the Commission's makeup. President Trump has appointed a current member of the EEOC, Vicki Lipnic, as its Acting Chair. Ms. Lipnic has been a Republican member of the Commission since April 2010. Her term on the Commission was extended until 2020 during the Obama Administration. However, depending on the pace of appointments, President Trump could appoint a new Chair immediately (to fill the term of Constance Barker, another Republican whose second term was not extended by the Senate in December). Beyond that, he will be able to shift the Commission to a Republican majority when the term of the former Chair, Jenny Yang, expires on July 1, likely bringing an end to the Democratic majority. In a recent speech, Chair Lipnic has suggested that the EEOC will focus on age discrimination and equal pay with a new focus on exploring ways to foster job growth. A new Chair and a new Republican majority could bring further alterations in the Commission's current agenda.
- EEO-1's Expansion to Cover Pay Data. One signature - but highly controversial - move by the EEOC this year has been its decision to use the EEO-1 to require employers with more than 100 employees to report summary pay data by race, gender and ethnicity. Currently the EEO-1 only collects data on the numbers of employees in each of those demographic categories. Undoing the pay reporting requirement appears to be a top priority for the Administration in light of significant opposition from business groups and employers. Commissioner Lipnic has signaled that she wants to a "re-evaluation" of the modified EEO-1.
- Wellness Program Incentives. Another likely candidate for reversal or modification is the Commission's regulation limiting incentives employers can offer for participation in wellness programs. The business community wants these incentives to support their wellness programs which are encouraged by the ACA, at least for now. Also facing continuing challenge under the ADA will be employer requirements that employees undergo a medical exam as a condition of obtaining employer-subsidized health benefits.
- Reining in Litigation. The recently departed General Counsel, David Lopez, presided over a period of aggressive litigation, especially pushing novel legal theories. The General Counsel has wide discretion although some cases must be approved by the Commission itself. This is another likely target for change, as Chair Lipnic and other Republicans support giving the Republican-led Commission significantly more control over litigation.
- Budget and Staffing. Congress has shrunk the EEOC's budget for the past six fiscal years. The Commission now has 30% fewer investigators than it did in 2002. The EEOC only filed 86 lawsuits in fiscal 2016, 16 of which were systemic cases that broadly affect a targeted employer, industry or geographic region. Both the Democratic and Republican members of the Commission have supported the highly visible - but costly - systemic litigation. Chair Lipnic has signaled that she supports systemic litigation but wants the Commission to be more strategic about its use. There are fears that budget cuts, along with Republican efforts to rein in litigation, will undermine this effort.
- Legal Status of LGBT Discrimination. In recent years, the Commission has pushed what many consider a novel idea: that Title VII of the Civil Rights Act of 1964 covers sexual orientation and gender identity (although the statute itself is silent on those issues). The issue is now before the courts. Some think that because big companies already recognize protection for sexual orientation and gender identity, the business community won't make this a priority for action by the Administration. The issue, however, still simmers and until directed otherwise it will be part of the EEOC's portfolio in 2017.
- EEOC Draft Guidance on Harassment. On January 20, 2017, the EEOC released for public comment, updated draft guidance on harassment which was based on the work of a task force jointly led by Commissioners Feldblum and Lipnic. The comment period has now closed. Commissioner Lipnic has said that such cases "remain a far too dominant part" of the Commission's workload more than 30 years after the Supreme Court ruled that sexual harassment violates federal anti-discrimination

law. Although it has bipartisan support within the Commission, the fate of this guidance may very well depend on the pace of Trump Administration appointments.

Given so much change and uncertainty, all employers can really do at this point is to **stay tuned**.