

Employment Law Update - December 2011

December 14, 2011

THE EEOC: ANNUAL RECORDS, SYSTEMIC DISCRIMINATION AND OTHER ISSUES TO WATCH IN 2012

In a November 15, 2011, press release, the U.S. Equal Employment Opportunity Commission (EEOC) touted a number of records achieved during the past 12 months. Of note:

- 99,947 charges of employment discrimination – the largest annual total ever – were filed in the previous fiscal year.
- EEOC adjudicated a record number of cases, reducing its backlog of pending cases by 10 percent.
- EEOC levied more than \$364.6 million in monetary benefits for victims of workplace discrimination, the highest level ever.
- EEOC's private-sector national mediation program hit a record by collecting more than \$170 million in monetary benefits for plaintiffs, and by resolving 9,831 such cases, which was still another milestone.

In addition to these record-breaking numbers, EEOC has continued to build a strong national systemic enforcement program. "Systemic discrimination" involves a pattern or practice, policy or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. Examples of systemic practices include discriminatory barriers in recruiting and hiring; discriminatorily restricted access to management trainee programs and to high-level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments.

As of October 31, 2011 (the end of the federal government's fiscal year), there were 580 systemic investigations, involving more than 2,000 charges underway. During the past 12 months, EEOC field units filed 261 lawsuits. The commission believes it has a unique mission to identify and rectify systemic discrimination in the workplace. Because of legal and financial obstacles often faced by plaintiff's counsel in bringing such lawsuits, EEOC is somewhat uniquely positioned to attack systemic discrimination. Although congressional funding for the commission's enforcement efforts has been slightly cut for fiscal year 2012, EEOC's 2012 budget request indicated that it would continue to prioritize funding for systemic initiatives.

Recent systemic discrimination judgments include:

- Outback Steakhouse: \$19 million, for sex bias against women in a “glass ceiling” suit by EEOC;
- Albertsons: \$9 million, for job bias based on race, color, national origin and retaliation;
- Sears, Roebuck: \$6.2 million, for disability bias;
- Allstate: \$4.5 million, for age bias;
- Scrub, Inc.: \$3 million, for racial bias in hiring, and
- GRMI (d/b/a “Bahama Breeze”): \$1.26 million, for a racially hostile work environment.

As EEOC continues to expand its efforts to partner with employee advocacy groups to identify and address discriminatory practices, employers should continue to examine the practices used to recruit, hire, promote, train and retain employees. In addition to examining practices in the areas of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information, employers particularly should be aware of a heightened EEOC focus in the following three areas:

- The Americans with Disabilities Act, as the EEOC has publicly declared a greater focus on enforcement of the ADA;
- The use of credit checks by employers, and whether a disparate impact on certain workers results from a policy of checking the credit histories of employees; and
- The use of criminal background checks by employers, and whether a disparate impact on certain workers results from a policy of checking the criminal background of employees.

In conjunction with examining practices, employers should review policies to make sure they have been updated to address these issues and remember to train managers and supervisors on the policies and practices in place.