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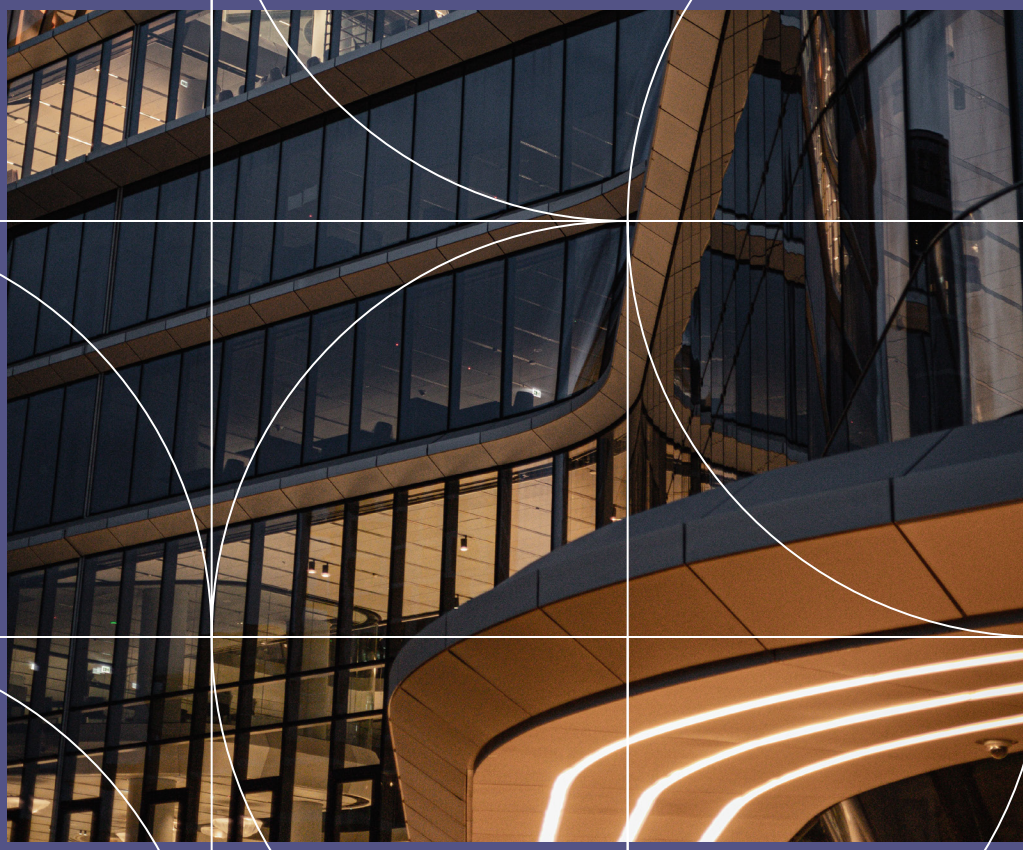
EEOC-Initiated Litigation



2024 Edition

Dear Clients and Friends,

Seyfarth Shaw is once again pleased to provide you with the latest edition of our annual analysis of trends and developments in Equal Employment Opportunity Commission litigation, *EEOC-Initiated Litigation: 2024 Edition*. This desk reference compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2023 and recaps the major policy and political changes we observed in the past year. Our goal is to guide our readers through all aspects of EEOC-initiated litigation, and to empower corporate counsel, human resources professionals, and operations teams to make sound and informed legal and business decisions. We hope that you find this report useful.

And there is so much to explore: 2023 was a whirlwind of change and activity for the agency. We saw the balance of power shift to a Democratic majority with the confirmation of a new Commissioner—a development that has already translated to significant change within the agency and will impact the EEOC for years to come. A new General Counsel also took her seat at the EEOC table; a role that has historically been impactful in shaping EEOC's agenda and strategy. The EEOC developed a new five-year Strategic Enforcement Plan in 2023, describing its substantive goals through 2028. The EEOC also published its similarly-named but distinct Strategic Plan, outlining just how the agency intends to tackle its substantive goals. Each of these developments, and what those developments mean for employers, will be discussed in detail herein.

Part I of this reference introduces the key players in the EEOC, and how their unique views on employment and societal issues will shape real-world application of EEO statutes. **Part II** is an in-depth review of the EEOC's evolving strategic priorities. This includes a fascinating overview of the emerging intersection between Artificial Intelligence issues and the EEOC's agenda, equal pay protections and how the agency plans to address historical pay disparities, a new look at preventing harassment in the workplace, and the EEOC's plans to double-down on large scale litigation, among a host of other topics. Back by popular demand, **Part III** includes a detailed profile of each EEOC District. Practitioners who work with and litigate against the EEOC quickly appreciate that each District has a unique personality and often differing substantive focus areas. It is all about location, location, location. **Part IV** paints the EEOC by the numbers: an empirical analysis of how the EEOC actually targeted employment issues in 2023, and how those trends will translate to activity in 2024. **Part V** is a deeper dive into how the EEOC has addressed particular industries, identifying which sectors tend to land in the EEOC's crosshairs most often, why, and for which issues. Part VI is a new section of our annual publication, exploring the various ways EEOC actions are resolved, from confidential conciliation to Court-ordered Consent Decrees. Finally, **Part VII** provides related guidance concerning how the EEOC leverages the media at various stages in a case.

A special thanks to the team of lawyers and professionals who made this publication possible with tireless efforts throughout the year. This book is meant to be the start of a conversation, and we are standing by to address any further questions or issues our readers wish to share.

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A particular acknowledgment of all of the tireless efforts of Practice Development Manager **Amy Abate** in developing this resource.

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PART I: Agency Composition

A. Equal Employment Opportunity Commission Composition and Background

The EEOC spent most of FY 2023 with its political leadership deadlocked in a 2-2 tie between Democrats and Republicans, and without a Senate-confirmed General Counsel. However, the EEOC ended FY 2023 with a 3-2 Democratic majority firmly in place, with Commissioner Kalpana Kotagal joining the Commission on August 9, 2023. Moreover, at the start of FY 2024, the EEOC's complement of political leadership reached full-strength with the Senate's confirmation of General Counsel Karla Gilbride.

The high level of EEOC litigation and enforcement activity we observed in FY 2023 is a strong reminder that most of the EEOC's operations are not subject to political considerations, are conducted with tacit or explicit bipartisan approval from its political leadership, and are left squarely in the hands of the EEOC's career leadership and front-line staff in the various District Offices throughout the country. For example, EEOC career staff oversaw the spike in merits cases filed by the EEOC in FY 2023.

The Commission's Senate-confirmed leadership team includes five Commission members, each nominated by the President and confirmed by the Senate. The President designates one of the Commissioners as the Chair, and another Commissioner can be designated as the Vice Chair. The EEOC's General Counsel is also nominated by the President and confirmed by the Senate. Of the five Commissioners, no more than three may be members of the same political party, a statutory requirement notionally promoting bipartisanship that outlives administration changes.

At the start of FY 2023, the EEOC's political leadership consisted of: Charlotte A. Burrows (Chair, Democrat); Jocelyn Samuels (Vice Chair, Democrat); Janet Dhillon (Commissioner, Republican); Keith E. Sonderling (Commissioner, Republican); and Andrea R. Lucas (Commissioner, Republican). Commissioner Dhillon's term expired in July 2022, but she was able to keep her seat because Biden's nominee to fill the position, civil rights attorney Kalpana Kotagal, had not yet been confirmed by the Senate. While Commissioner Dhillon could have kept her seat until the end of 2022, she resigned in November 2022, leaving the Commission with a 2-2 partisan split until the Senate's confirmation of Kalpana Kotagal (Commissioner, Democrat) on July 14, 2023.

While the Commissioners must vote on certain official actions of the Commission, Title VII confers on the EEOC's Chair the sole responsibility "for the administrative operations of the Commission".[1] Thus, even with a 2-2 political deadlock on the Commission for most of FY 2023, Chair Burrows could exercise her broad, sole discretion in driving multiple aspects of the EEOC's agenda, including hiring non-Senate-confirmed political appointees, hiring members of the career Senior Executive Service, and evaluating and managing the EEOC's cadre of Senior Executives. In other words, the Chair is directly responsible for hiring and evaluating the performance of the 15 District Directors across the country, as well as other Senior Executives in the agency. Moreover, the Chair's responsibility for the "administrative operations" of the EEOC includes the ability, exercised through the EEOC's Chief Operating Officer, to allocate the EEOC's budget to its various programs and operational efforts. While the Commission as a whole must vote on certain appropriations, the Chair has broad authority in making adjustments—both large and small—to how the Commission spends its money.

And while the Commission has statutory responsibility for deciding when to commence or intervene in litigation against private sector employers, Title VII confers upon the General Counsel responsibility "for the conduct of litigation" by the EEOC.[2] The Commission has previously delegated some of its authority to the General Counsel, but the extent of the delegation has changed over time. The Commission's delegation of litigation authority was last modified in the waning days of the Trump Administration, effective January 13, 2021, keeping more control with the Commission. In particular, this modification provided for an initial review by the members of the Commission of the Office of General Counsel's litigation recommendations,

[1] *See* Section 705(a).

[2] *See* Section 705(b)(1).

and, upon the request of a majority of the Commissioners, the General Counsel would be required to submit the matter to the Commission for a vote. Even so, consistent with previous years, in FY 2023 the vast majority of litigation matters presented to the Commission for a vote were approved on a bipartisan basis.

But once Commissioner Kalpana Kotagal joined the Commission on August 9, 2023, for the first time during the Biden Administration, Chair Burrows was able to take advantage of her 3-2 Democrat majority to bring politically contested matters before the Commission for a vote. One of Commissioner Kotagal's first votes was contributing to a 3-2 Democratic majority vote approving the EEOC's Strategic Plan. Other 3-2 votes on policy matters that occurred towards the end of FY 2023 included approval of the EEOC's Strategic Enforcement Plan[3] (*see* infra Part II), taking steps towards moving forward with issuing the Commission's enforcement guidance on harassment in the workplace,[4] submission of the Commission's formal regulatory agenda, [5] approving a Memorandum of Understanding with the Department of Labor's Wage Hour Division,[6] issuing a Notice of Proposed Rulemaking implementing rules pursuant to the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020, and even a procurement matter relating to enhancing EEO-1 data collection framework.

Consistent with the Commission's usual practice of filing most of its district court litigation towards the end of the fiscal year in September, it was unsurprising to see the Commission voting on a relatively large number of litigation matters following Commissioner Kotagal joining the Commission in August 2023. While the vast majority of these votes were approved on a bipartisan basis, of the votes to initiate federal district court litigation that we know[7] that Commissioner Kotagal participated in during FY 2023, 22% were approved with a 3-2 vote, with the three Democrats on the Commission voting to approve and the two Republicans voting to disapprove. And of the 11 votes regarding the EEOC's filing of an amicus brief in FY 2023 that we know that Commissioner Kotagal participated in, 18% were approved with a 3-2 Democratic majority.

In public comments, Chair Burrows has long expressed her desire to revisit the Commission's litigation delegation processes. Granting greater leeway for the Office of General Counsel, including career staff, as well as Chair Burrows' current ability and willingness to exercise her 3-2 Democratic majority, means that in 2024, we are more likely to see the Commission approve federal district court litigation and amicus filings that have more-partisan implications.

B. EEOC Staffing

Chair Burrows and her staff are responsible for advocating before Congress for increases to the EEOC's budget, and the Chair is also responsible for deciding exactly how the EEOC spends additional money appropriated by Congress. During the Biden Administration, the EEOC has received significant budget increases, and Chair Burrows has made significant investments in hiring front-line enforcement and litigation personnel.

The EEOC's headcount reached 2,173 full-time equivalent employees by FY 2023's end, marking a 6.47% increase from its 2,041 FTEs at the end of FY 2022. In FY 2023, the EEOC made a whopping 493 hires, 338 (69%) of which were in front-line positions (that is, investigators, mediators, attorneys, and administrative

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[3] *See* Christopher Kelleher, Rachel See, Christopher DeGroff, and Andrew Scroggins, *Behind the EEOC Curtain: EEOC's New Strategic Enforcement Plan Reveals Agency Priorities,* Workplace Class Action Blog (Sept. 21, 2023), https://www.workplaceclassaction.com/2023/09/behind-the-eeoc-curtain-eeocs-new-strategic-enforcement-plan-reveals-agency-priorities/#.

[4] *See* Emily Miller and Rachel See, *EEOC Releases Draft Enforcement Guidance on Workplace Harassment and Invites Comment,* Seyfarth News and Insights (Oct. 10, 2023), https://www.seyfarth.com/news-insights/eeoc-releases-draft-enforcement-guidance-on-workplace-harassment-and-invites-comment.html.

[5] *See* Christopher DeGroff, James Nasiri, and Rachel See, *EEOC Adopts 2022-2026 Strategic Plan With an Emphasis on Large-Scale Litigation,* Improving Internal EEOC Processes, Workplace Class Action Blog (Aug. 23, 2023), https://www.workplaceclassaction.com/2023/08/eeoc-adopts-2022-2026-strategic-plan-with-an-emphasis-on-large-scale-litigation-improving-internal-eeoc-processes/.

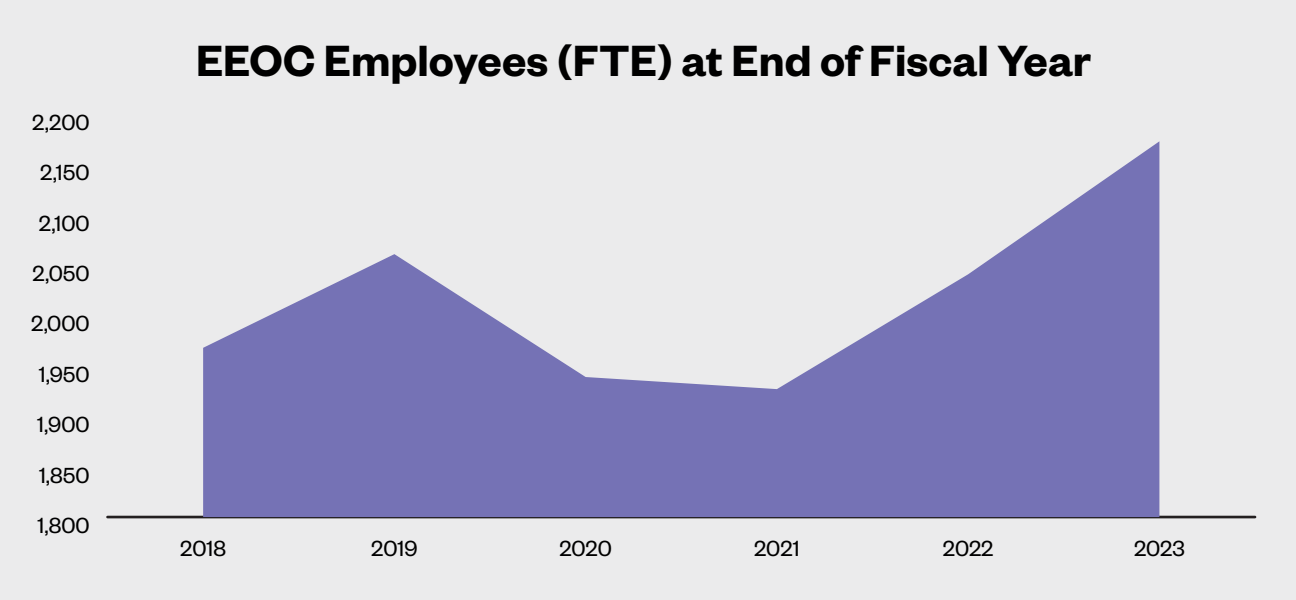
[6] *See* Rachel See, Christopher DeGroff, and Andrew Scroggins, *EEOC and DOL Join Forces – What the Alliance Means for Employers,* Workplace Class Action Blog (Sept. 18, 2023), https://www.workplaceclassaction.com/2023/09/eeoc-and-dol-join-forces-what-the-alliance-means-for-employers/.

[7] Since November 2019, votes of the Commission have been published on its web page. However, there is a delay in the Commission voting on particular matters and the posting of the votes, and, from time to time, the posting of individual matters is further delayed to preserve confidentiality.

staff who support those roles). This past year's pace of hiring at the EEOC is an increase over the hiring that occurred in FY 2022, when the EEOC had 352 hires and 297 "front-line" positions filled. In other words, during FY 2023, the EEOC filled 14% more front-line positions than compared to the previous year.

The following table and chart summarize what we know about the EEOC's headcount from the EEOC's recent Agency Financial Reports[8]:

	"Front Line" Positions Filled	Total Hires	Total EEOC Headcount at end of FY	% Increase, Total Headcount
FY 2020		260	1,939	-5.92%
FY 2021	"Predominately front-line"	"More than 450 authorized"	1,927	-0.62%
FY 2022	297	352 (authorized)	2,041	5.92%
FY 2023	338	493 (actual)	2,173	6.47%



Since FY 2021, in its public reports, the EEOC has described its new hires as helping to "address critical service and morale issues by restoring staffing losses in key areas". The EEOC's headcount had dipped from a high of 2,202 at the end of FY 2016 during the Obama Administration, down to a low of 1,968 at the end of FY 2018 during the Trump administration. Based on the EEOC's own projections, in FY 2024, its headcount will approach the high-watermark levels during the Obama administration.

With this continued increased pace of hiring and increased prioritization of "front-line" hires, the EEOC continues to build its capacity to increase the pace of its investigation and litigation processes in FY 2024.

[8] *See* U.S. Equal Employment Opportunity Commission, *Fiscal Year 2023 Agency Financial Report* (Nov. 15, 2023), https://www.eeoc.gov/fiscal-year-2023-agency-financial-report; U.S. Equal Employment Opportunity Commission, *EEOC Fiscal Year 2022 Agency Financial Report* (Nov. 9, 2022), https://www.eeoc.gov/eeoc-fiscal-year-2022-agency-financial-report; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2021 Agency Financial Report* (2021), https://www.eeoc.gov/fiscal-year-2021-agency-financial-report; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2020 Agency Financial Report U.S. Equal Employment Opportunity Commission* (2020), https://www.eeoc.gov/fiscal-year-2020-agency-financial-report-us-equal-employment-opportunity-commission; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2019 Agency Financial Report U.S. Equal Employment Opportunity Commission* (2019), https://www.eeoc.gov/fiscal-year-2019-agency-financial-report-us-equal-employment-opportunity-commission; U.S. Equal Employment Opportunity Commission, *Performance and Accountability Report Fiscal Year 2018* (2018), https://www.eeoc.gov/performance-and-accountability-report-fiscal-year-2018.

C. EEOC Profiles

Charlotte A. Burrows
(Chair, Democrat)

Charlotte Burrows has been a Commissioner at the EEOC since 2014, when she was nominated by President Obama. She has been designated by President Biden as the Chair of the Commission. On November 8, 2023, Burrows was confirmed by the Senate to serve for a third term, expiring in 2028. Prior to her appointment to the EEOC, she served as Associate Deputy Attorney General at the U.S. Department of Justice (DOJ), and on the staff of Senator Edward M. Kennedy on the Senate Judiciary Committee.

Jocelyn Samuels
(Vice Chair, Democrat)

Jocelyn Samuels joined the EEOC as a Commissioner on October 14, 2020, and on July 14, 2021, was confirmed for a second term expiring in 2026. She has been designated by President Biden as the Commission's Vice Chair. Immediately prior to joining the Commission, she led the Williams Institute, focusing on LGBTQ+ issues. During the Obama administration, she served in leadership positions at the U.S. Department of Health & Human Services and the U.S. Department of Justice.

Kalpana Kotagal
(Commissioner, Democrat)

Kalpana Kotagal joined the EEOC on August 9, 2023, and her term expires in 2027. Before joining the Commission, she was in private practice, focusing on litigating worker-side civil rights issues. She is a co-author of the "Inclusion Rider"—a voluntary agreement between actors, filmmakers and studios aimed at advancing equal opportunity in the film industry both behind the camera and in front of it.

Keith E. Sonderling
(Commissioner, Republican)

Keith E. Sonderling joined the EEOC in 2020, for a term that expires in July 2024. Until January of 2021, he served as the Commission's Vice-Chair. Before joining the EEOC, he served as the Acting and Deputy Administrator of the Wage and Hour Division at the U.S. Department of Labor. Before joining the Department of Labor in 2017, he was a management-side labor and employment lawyer in Florida. Commissioner Sonderling speaks and writes frequently on the benefits and potential harms of using artificial intelligence-based technology in the workplace.

Andrea R. Lucas
(Commissioner, Republican)

Andrea R. Lucas also joined the EEOC in 2020. Her term expires in July 2025. Prior to her appointment to the EEOC, she practiced management-side employment law at a large Washington, D.C. law firm. Recently, Commissioner Lucas has garnered media coverage for her cautionary advice to employers regarding their diversity, equity, and inclusion (DEI) programs. She is also known for emphasizing issues relating to religious discrimination, accommodation, and inclusion; accommodations for pregnancy, childbirth, and related medical conditions; and disability accommodation. Commissioner Lucas' voting patterns demonstrate that among Republican Commissioners, she is a potential "swing" vote; in FY 2023, we know of 28 votes in which she voted to approve a matter with one of her fellow Republican Commissioners voting to disapprove. Of these swing votes in FY 2023, 15 were district court litigation authorization votes and eight were votes approving amicus participation.

Karla Gilbride
(General Counsel, Democrat)

Karla Gilbride was nominated by President Biden as General Counsel of the EEOC, and was confirmed by the Senate on October 17, 2023 to a four-year term. Prior to Gilbride's confirmation, the EEOC had been without a Senate-confirmed General Counsel since President Biden's firing in March 2021 of General Counsel Sharon Gustafson, who had been nominated by President Trump. Gilbride previously litigated cases on behalf of workers and consumers. In May of 2022, she argued before the Supreme Court and obtained a 9-0 victory in a case involving the impact of delay on the enforcement of arbitration clauses, *Morgan v. Sundance, Inc.*, 596 US _, 142 S.Ct. 1708 (2022).

PART II: EEOC's Enforcement Priorities

According to the EEOC, the purpose of its Strategic Enforcement Plan (SEP) is to focus and coordinate the agency's work over multiple years "to have a sustained impact in advancing equal employment opportunity." As in years past, the SEP establishes the EEOC's six substantive area priorities. Part II addresses each of these priorities.

1. Eliminating Barriers In Recruitment and Hiring
2. Protecting Vulnerable Workers and Persons from Underserved Communities
3. Addressing Selected Emerging and Developing Issues
4. Advancing Equal Pay for All Workers
5. Preserving Access to the Legal System
6. Preventing and Remedying Systemic Harassment

A. EEOC's FY 2023 Cornerstone Documents

1. Background

The EEOC released its new Strategic Enforcement Plan for FY 2024-2028 on September 21, 2023.[9] The term for the last SEP expired at the end of FY 2021, but it remained in effect until formally modified or withdrawn. In January 2023, the EEOC posted a draft of the new SEP for public comment. Following a lengthy interval since public comments were accepted, the final SEP now identifies the agency's enforcement priorities for the next five years. The SEP indicates that the agency intends to aggressively pursue its enforcement agenda through Commissioner Charges, directed investigations, and litigation involving systemic harassment and discrimination.[10]

Along with the SEP, the EEOC also outlines its enforcement strategies through its Strategic Plan.[11] Despite the similarity in their titles, these plan documents serve two distinct purposes. The SEP lays out the Commission's specific priorities by highlighting certain areas of law or groups of workers that it will aim to address over the next four years. On the other hand, the Strategic Plan describes *how* the EEOC will achieve its strategic mission, including executing on the priorities contained in the SEP. In the words of the EEOC, the Strategic Plan "establishes a framework for achieving the EEOC's mission to 'prevent and remedy unlawful employment discrimination and advance equal employment opportunity for all.'"[12]

The EEOC first unveiled its SEP in December 2012, stating that the plan "established substantive area priorities and set forth strategies to integrate all components of EEOC's private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from

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[9] U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Releases Strategic Enforcement Plan* (Sept. 21, 2023), https://www.eeoc.gov/newsroom/eeoc-releases-strategic-enforcement-plan.

[10] *See* Christopher Kelleher, Rachel See, Christopher DeGroff, and Andrew Scroggins, *Behind the EEOC Curtain: EEOC's New Strategic Enforcement Plan Reveals Agency Priorities*, Workplace Class Action Blog (Sept. 21, 2023), https://www.workplaceclassaction.com/2023/09/behind-the-eeoc-curtain-eeocs-new-strategic-enforcement-plan-reveals-agency-priorities/#.

[11] *See* Christopher DeGroff, James Nasiri, and Rachel See, *EEOC Adopts 2022-2026 Strategic Plan With an Emphasis on Large-Scale Litigation, Improving Internal EEOC Processes*, Workplace Class Action Blog (Aug. 23, 2023), https://www.workplaceclassaction.com/2023/08/eeoc-adopts-2022-2026-strategic-plan-with-an-emphasis-on-large-scale-litigation-improving-internal-eeoc-processes/.

[12] U.S. Equal Employment Opportunity Commission Strategic Plan 2022-2026, https://www.eeoc.gov/eeoc-strategic-plan-2022-2026.

discrimination in the workplace."[13] The Commission's six major enforcement priorities have remained relatively consistent across multiple iterations of the SEP. But the EEOC can and has changed how it interprets those priorities over the life of those Plans, which has often led to a shift in how the EEOC approaches litigation and the topics and issues it chooses to enforce in the federal courts.[14] According to the EEOC "the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace."[15]

The 2024-2028 SEP reaffirmed the importance of "systemic" cases to the EEOC's overall mission. Systemic cases are those with a strategic impact, meaning they affect how the law influences a particular community, entity, or industry. The EEOC continues to place special emphasis on systemic lawsuits. In November 2019, the EEOC announced that it would be replacing the combined Performance Accountability Report that was formerly published in November of each year.[16] Among other things, the annual Performance Accountability Report contained data regarding the number of systemic cases being handled by the EEOC. The EEOC now publishes an Agency Financial Report in November and a separate Annual Performance Report in February along with the EEOC's Congressional Budget Justification. The Annual Performance Report describes the progress of the EEOC's efforts to achieve its strategic goals and objectives. Employers will have to wait for that Report in February for updated data regarding the EEOC's pursuit of systemic cases. In this year's Agency Financial Report, the EEOC reported that the Commission filed 25 systemic discrimination lawsuits, nearly doubling the number of cases it filed in FY 2022, 2021, and 2020, when it filed only 13 each year.[17]

2. Particular FY 2023 Strategic Enforcement Priorities

The EEOC focused on six different strategic enforcement priorities in FY 2023, including: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers from underserved communities; (3) addressing selected emerging and developing issues; (4) advancing equal pay for all workers; (5) preserving access to the legal system; and (6) preventing and remedying systemic harassment.

Eliminating Barriers In Recruitment and Hiring. The first strategic enforcement priority is eliminating barriers in recruitment and hiring. The EEOC's focus within this priority is to address recruiting and hiring practices that "discriminate on any basis unlawful under the statutes EEOC enforces, including sex, race, national origin, color, religion, age, and disability." The EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring. In recent years, there have been a number of judicial decisions involving the EEOC's attempts to combat discrimination, including the use of pre-employment screening tests.

The FY 2024-2028 SEP added far more detail about the types of hiring practices and policies that the EEOC intends to scrutinize. For example, prior SEPs described the EEOC's intention to prevent steering members of protected groups into specific (often less desirable) jobs. The proposed SEP goes further to explain that the EEOC also will be examining whether employers are segregating workers in jobs, or by job duties, based on membership in a protected group.

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[13] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[14] *See* Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *What A Long Strange Year It's Been …The EEOC's Fiscal Year Comes To An Uncharacteristically Quiet Close,* Workplace Class Action Blog (Sept. 30, 2019), https://www.workplaceclassaction.com/2019/09/what-a-long-strange-year-its-been-the-eeocs-fiscal-year-comes-to-an-uncharacteristically-quiet-close/.

[15] U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Approves Strategic Enforcement Plan*, https://www.eeoc.gov/newsroom/eeoc-approves-strategic-enforcement-plan.

[16] U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, https://www.eeoc.gov/fiscal-year-2019-agency-financial-report-us-equal-employment-opportunity-commission.

[17] U.S. Equal Employment Opportunity Commission, *Fiscal Year 2023 Agency Financial Report*, https://www.eeoc.gov/fiscal-year-2023-agency-financial-report; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2022 Agency Financial Report*, https://www.eeoc.gov/eeoc-fiscal-year-2022-agency-financial-report; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2021 Agency Financial Report*, https://www.eeoc.gov/2021-annual-performance-report-apr; U.S. Equal Employment Opportunity Commission, *Fiscal Year 2020 Agency Financial Report*, https://www.eeoc.gov/fiscal-year-2020-agency-financial-report-us-equal-employment-opportunity-commission.

Building further on this, the SEP includes several new but related areas of focus. These include examining practices that may limit access to work opportunities, such as advertising jobs in a manner that excludes or discourages some protected groups from applying, or denying training, internships, or apprenticeships. The EEOC also intends to scrutinize whether employers are denying opportunities to move from temporary to permanent roles, including when permanent positions are available.

Likewise, the EEOC modified its earlier focus on screening tools that might disproportionately impact workers based on their protected status, with a special emphasis in the new SEP on the use of technology, AI, and machine learning used in job advertisements, recruiting, and hiring decisions. We cover this in further detail in Part II(C).

This aligns with the EEOC's increased interest in how employers use technology to recruit and hire workers. Here, the new SEP emphasizes an employer's use of all technology (not just "automated systems") in hiring and recruitment as an area of strategic focus. The EEOC has, historically, focused on recruiting and hiring in part because private plaintiffs' counsel have been unwilling to champion large scale hiring cases due to cost and challenges identifying potential victims. The proliferation in recent years of electronic tools available to assist employers to find talent in challenging labor markets may provide fertile ground for the EEOC on this issue.

The EEOC has also called out "continued underrepresentation" of women and workers of color in certain industries, naming construction and manufacturing, high tech, STEM, and finance in particular, and indicated its intent to monitor those benefiting from substantial federal investment.

Protecting Vulnerable Workers from Underserved Communities. The second strategic enforcement priority is protecting vulnerable workers. The EEOC's focus within this area is to combat policies and practices that impact "particularly vulnerable workers," including immigrant and migrant workers, and the agency has expanded the categories of workers categorized as "vulnerable and underserved."

For purposes of the SEP, "vulnerable workers" are those who may be unaware of their rights under equal employment opportunity laws, or reluctant or unable to exercise those rights. The EEOC's FY 2024-2028 SEP adds substantially to this priority as well. In a change from prior versions of the SEP, the EEOC has called out 11 different categories of vulnerable workers that it aims to safeguard:

- immigrant and migrant workers;
- individuals employed in low wage jobs, including teenage workers;
- individuals with arrest or conviction records;
- LGBTQI+ individuals;
- Native Americans/Alaska Natives;
- older workers;
- people with developmental or intellectual disabilities;
- people with mental health related disabilities;
- persons with limited literacy or English proficiency;
- temporary workers; and
- survivors of gender-based violence.

Employers in sectors that engage many members of these communities, or who have operations in areas of the country with large populations of such workers, may expect increased inquiry.

Addressing Selected Emerging and Developing Issues. The third strategic priority addresses selected emerging and developing issues. As the name implies, the EEOC may adapt its focus within this priority on a year-to-year basis in accordance with developing case law. Thus, this strategic priority is something of a "wild card."

As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Not surprisingly, the emerging issues identified by the agency have evolved over time. For example, the 2017 SEP identified five emerging and developing issues as strategic priorities: (1) qualification standards and inflexible leave policies that discriminate against individuals with disabilities; (2) accommodating pregnancy-related limitations under the Americans with Disabilities Amendments Act and Pregnancy Discrimination Act; (3) protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from discrimination based on sex; (4) clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures; and (5) addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

Few issues have attracted as much of the EEOC's attention in recent years as its campaign to have LGBTQ discrimination recognized as a prohibited form of discrimination under Title VII. That issue was finally settled in 2020 by the U.S. Supreme Court in the landmark decision of *Bostock v. Clayton County Georgia*, pursuant to which the U.S. Supreme Court ruled that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination. Last year, we reported on the aftermath of the *Bostock* decision and in particular, the religious liberties implications that have come to light following that ruling.

The FY 2024-2028 SEP has brought notable changes. The new SEP leaves just one priority largely unchanged from the prior SEP: qualification standards and inflexible policies or practices that discriminate against individuals with disabilities will remain an area of focus.

On the other hand, EEOC has dropped two priorities that appeared in this section of previous SEPs. These include protecting LGBT people from discrimination, and clarifying the application of workplace civil rights protections in complex employment relationships and structures. However, those priorities have not fallen completely by the wayside. This is likely just an acknowledgment that these issues are no longer "emerging" areas, but rather have been fully embraced in the EEO universe.

The SEP elaborates on statements from the earlier SEPs related to pregnancy discrimination to include protection for those affected by pregnancy, childbirth, and related medical conditions and disabilities, including under the Pregnant Workers Fairness Act. The PFWA requires covered employers[18] to provide reasonable accommodations to employees and applicants with known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." The EEOC immediately began accepting charges from claimants on June 27, 2023, the day the law went into effect. Prior versions of the SEP have discussed "backlash" discrimination, but the new SEP goes further. The EEOC has noted that discrimination against some groups can arise as a backlash in response to local, national, or global events. The EEOC identifies some groups in particular, including Jews; Muslims; racial or ethnic groups; and LGBTQI+ individuals, but also notes that the groups at issue, and the practices they are subjected to, can be expected to change during the time period covered by this SEP.

Notably, the new SEP dials back the scope of the EEOC's prior focus on COVID-19. Under the SEP, *only* "Long COVID" is now considered an area of strategic emphasis. This is important in part because, while the EEOC and its local counterparts have fielded thousands of charges of discrimination relating to employees' religious and/or medical exemption requests from employers' Covid-19 vaccination mandates, vaccination-related enforcement is not referenced in the SEP.

[18] Under the PWFA, a covered employer includes private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.

The final topic under this priority is "technology-related employment discrimination." Here, the EEOC is interested in particular in employment decisions based on algorithmic decision-making; as well as automated recruitment, selection, production, and performance management tools.

Advancing Equal Pay for All Workers. The fourth strategic priority is advancing enforcement of pay discrimination laws, including the Equal Pay Act and Title VII. We cover the key focus areas relative to this strategic priority in Part II(B).

In the past, the EEOC's primary focus has been combating discrimination in pay based on sex. The FY 2024-2028 SEP revises this priority to make more clear that it intends to focus on pay discrimination based on any protected category.

The SEP departs from prior versions in two other notable ways. First, it includes a statement indicating that the EEOC will not depend on charges from members of the public, but will use its authority to initiate directed investigations and Commissioner's charges in order to facilitate enforcement. Second, the EEOC states its intent to challenge practices that it perceives may impede equal pay, or contribute to pay disparities, including secrecy policies, discouraging or prohibiting workers from sharing pay information, and "reliance on past salary history or applicants' salary expectations to set pay."

The recently announced partnership between the EEOC and the Department of Labor provides the agency an additional source for information that could fuel investigations in this area. We cover the Memorandum of Understanding setting forth this partnership in Part II(A)(3).

Preserving Access to the Legal System. The fifth strategic priority is preserving access to the legal system, and it is largely unchanged from the prior version on this topic. The focus within this priority is on policies or practices that discourage or prohibit individuals from exercising their rights, including any policies that deter or prohibit filing charges with the EEOC or cooperating freely in EEOC investigations, as well as, according to the EEOC, "overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements," failure to maintain applicant and employee data, and retaliatory practices that dissuade employees from exercising their rights. This objective has historically been reflected in the EEOC's aggressive assertion of retaliation claims against employers allegedly obstructing employees' efforts to participate in EEOC proceedings or otherwise oppose discrimination. The EEOC's Enforcement Guidance on Retaliation states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in protected activity that is in furtherance of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, or Title II of the Genetic Information Nondiscrimination Act. Retaliation claims premised on EEO-related activity are comprised of three elements: (1) protected activity through "participation" in an EEO process or "opposition" to discrimination; (2) materially adverse action taken by the employer; and (3) the requisite level of causal connection between the protected activity and the materially adverse action.

Of the 144 cases that were filed by the EEOC in FY 2023, 45 cases—or roughly 31%—involved retaliation claims, signaling the EEOC's continued interest in pursuing—such claims and in turn, the interests of employees' ability to pursue their rights under the anti-discrimination laws.

Preventing and Remedying Systemic Harassment. The sixth strategic priority is preventing and remedying systemic harassment, both in-person and online. This priority is directed at harassment, including sexual harassment and harassment based on sex, race, disability, age, national origin, religion, and color. This strategic priority will continue to focus on systemic cases. Harassment continues to be a serious issue in the workplace. The EEOC has had ample opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees. In FY 2023, there was a total of 44 cases involving harassment claims and 27 of those cases alleged sexual harassment. Additional information on this strategic priority and related case filings appears in Part II(D).

Of note, the FY 2024-2028 SEP now expressly calls out harassment based on pregnancy, gender identity, and sexual orientation. The EEOC has also articulated more detailed support for employer training, including focusing on promoting comprehensive anti-harassment programs and practices and providing education, technical assistance, and policy guidance.

Continued Reliance on Systemic Investigations and Litigation to Advance Strategic Goals. In the FY 2024-2028 SEP, the "Commission once again reaffirms its commitment to the agency's systemic program." The EEOC looks to its SEP priorities to decide what types of systemic investigations and cases to pursue. Indeed, the SEP priority areas are "given precedence over other cases to maximize the EEOC's strategic impact." Now that the EEOC is under Democratic control, the Commission has made a roaring return to its prior levels of litigation activity after a few relatively quiet years. Employers can expect that the EEOC will conduct a more aggressive enforcement agenda with respect to each of the above-referenced priorities.

3. EEOC and Department of Labor Memorandum of Understanding

On September 13, 2023, the EEOC and the Department of Labor Wage Hour Division (WHD) entered into a Memorandum of Understanding (MOU) enabling information sharing, joint investigations, training, and outreach.[19] The MOU now empowers the agencies' field staff to coordinate efforts on both individual matters and larger investigations.[20]

The MOU's information-sharing and other contemplated coordinated activity provisions cover a broad range of activities, touching on all aspects of EEOC and WHD jurisdiction. For example, the MOU explicitly describes that each agency will make complaint referrals to the other, and that the two will share complaint or investigative files, EEO-1 reports and FLSA records, and "statistical analyses or summaries," and that the agencies "will explore ways to efficiently facilitate" the data sharing.

Information sharing under the MOU is not limited to just top-level agency officials in Washington, DC; leadership from each agency's District (or Regional) offices may request information without the need to first obtain approval from HQ in Washington, DC. Importantly, the EEOC District Directors and Regional Attorneys also may designate other EEOC employees to make the request. This means that front-line EEOC staff involved in enforcement and litigation can quickly assess a wide range of information held by WHD. It is also noteworthy that the MOU allows any EEOC Commissioner to directly request information from WHD, without first channeling the request through EEOC career staff. This is significant because it enables EEOC Commissioners from different political parties than the Chair to obtain information directly from WHD.

Significantly, the MOU specifically contemplates that the EEOC may share employer EEO-1 reports with the WHD. This is notable because Title VII prohibits the EEOC from disclosing EEO report data to the public, but the MOU does not bind the WHD in the same way. Instead, the WHD agrees to "observe" Title VII's confidentiality requirements.

Employers can expect the MOU to lead to more information sharing between the EEOC and WHD when it comes to individual charges and investigations. (The MOU contains a high-level framework for coordinated investigations involving the same employer.) The potential for data sharing to fuel broader systemic investigations also should catch the attention of all employers. The ability to gather additional data through this partnership with the WHD adds another powerful tool to the EEOC's investigative powers.

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[19] U.S. Equal Employment Opportunity Commission Memorandum of Understanding Between the U.S. Department of Labor, Wage and Hour Division and the U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/memorandum-understanding-between-us-department-labor-wage-and-hour-division-and-us-equal-employment.

[20] *See* Rachel See, Christopher DeGroff, and Andrew Scroggins, *EEOC and DOL Join Forces – What the Alliance Means for Employers*, Workplace Class Action Blog (Sept. 18, 2023), https://www.workplaceclassaction.com/2023/09/eeoc-and-dol-join-forces-what-the-alliance-means-for-employers/.

B. EEOC Focus on Equal Pay Protections

The EEOC is the federal government's most powerful agency for the enforcement of federal anti-discrimination laws in the workplace. Authorized by Congress to wield broad investigative and subpoena powers for the prevention and remediation of unlawful employment practices, the EEOC's enforcement mechanisms cover a range of activities, from individual and systemic claims investigations, conciliation, litigation and monitoring compliance, to serving as an agent for effecting broader policy change in employment sectors throughout the country. Each iteration of the EEOC's Strategic Enforcement Plan has included a focus on advancing equal pay for all workers.[21]

The number of EEOC lawsuits alleging equal pay violations has dropped significantly over the past few years, most likely due to the previous Republican-led EEOC leadership, for whom this was not a top priority. This has led to a decline in legal decisions relating to equal pay issues, at least those involving the EEOC as a party. Equal pay litigation, itself—apart from the EEOC's involvement – continues apace. And the EEOC has been actively attempting to steer the results, even if not as a party plaintiff.

For example, in September 2023, the EEOC filed an amicus brief in favor of reversal of the United States District Court for the Middle District of Alabama's decision in *Williams v. Alabama State University*.[22] In that case, a female Athletic Director of a university alleged she was underpaid compared to her male successor in the same position. Before the university hired her, the plaintiff had earned a Master's Degree in Athletic Administration and worked for two other Division I schools. When plaintiff was hired in 2018, she was given a $135,000 salary with performance incentives. When she asked for a raise the following year, the university denied her request and gave her a one-time $5,000 signing bonus.[23]

Williams resigned in 2021, and the university posted the Athletic Director position again, modifying the education and experience requirements. On education, the posting required "a master's degree, preferably in sports management or sports administration, an MBA or terminal degree." On experience, the posting required "at least seven to ten years of experience in major leadership posts in sports administration and management."[24] The university hired a male who had a Master's Degree in Secondary Education and a PhD in Higher Education Administration. He had never been an athletic director before. But he requested and received a starting salary of $170,000 along with performance incentives.[25]

Nevertheless, the District Court granted the university's motion for summary judgment on plaintiff's EPA claim. The court held (1) that the university had met its burden on the affirmative defense because the evidence demonstrates that it could have legitimately relied on her successor's higher degree and greater relevant experience to set his higher salary;[26] and (2) that plaintiff had not proven pretext because she failed to produce evidence that directly establishes discrimination, or which would permit a jury to reasonably disbelieve the employer's proffered reason.[27]

The matter was appealed to the Eleventh Circuit, where the EEOC filed an amicus brief urging its interpretation of the burden shifting framework under the EPA.[28] According to the EEOC, the EPA's framework is as follows: (1) the plaintiff must establish a *prima facie* case; (2) the defendant must then prove an affirmative defense that, in fact, caused the difference in pay in order to avoid liability. According to the EEOC, under the EPA, the burden never shifts back to the plaintiff to prove pretext. [29]

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[21] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2024 - 2028, Strategic Enforcement Plan Fiscal Years 2024 - 2028 | U.S. Equal Employment Opportunity Commission (eeoc.gov).

[22] *Williams v. Ala. State Univ.*, No. 2:22-cv-48-ECM, 2023 WL 4632386 (M.D. Ala. July 19, 2023).

[23] *Id.* at *2.

[24] *Id.*

[25] *Id.* at *3.

[26] *Id.* at *4.

[27] *Id.* at *7.

[28] *See* Br. of the EEOC as Amicus Curiae in Support of Appellant and in Favor of Reversal, *Williams v. Ala. State Univ.*, No. 23-12692 (filed Sept. 29, 2023).

[29] *Id.* at 10-13.

Applying the EEOC's interpretation, for the university to prevail, it would need to submit evidence from which a reasonable factfinder could conclude that the proffered reasons do in fact explain the wage disparity (not simply that they could explain the disparity, which would be sufficient under Title VII's *McDonnell Douglass* framework). Further, the EEOC urged that burden is even higher at the summary judgment stage because an employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary.[30] Additionally, under the EEOC's preferred framework, the burden does not shift to the plaintiff to prove pretext.[31] According to the EEOC, the District Court's decision to the contrary goes against Eleventh Circuit precedent, and the majority of other circuits also reject the pretext step for EPA claims.[32] Notwithstanding the EEOC's argument, this issue in fact has been hotly disputed among the federal courts over the past few years.[33] The brief provides insight to the manner in which EEOC works to steer the law in directions that are plaintiff-friendly.

Different burden shifting frameworks may seem like an overly technical distinction to some, but it can have real, case-dispositive impacts. For example, in *EEOC v. First Metropolitan Financial Service, Inc.*,[34] the EEOC alleged that a financial lending company paid two female Branch Managers less than male Branch Managers. The outcome of the case was, to a large extent, determined by the different burden-shifting frameworks applied under Title VII versus the EPA. Although the two statutes apply different standards for establishing a *prima facie* case, the court concluded that "[h]aving found that the Plaintiff successfully established a *prima facie* case under the Equal Pay Act, the Court also finds that the evidence used under the EPA burden is sufficient to establish a *prima facie* case under Title VII."[35] The case then turned on the employer's affirmative defenses.

The court explained that under the burden shifting scheme of Title VII, "[t]he burden of production now shifts to the Defendant to articulate some legitimate, non-discriminatory reason in light of the four exceptions outlined in the Equal Pay Act."[36] The employer argued that the salary of plaintiff's alleged comparator had been set at a time when it needed to hire someone quickly or else close that branch, and the comparator had made a "take it or leave it" demand that the company felt compelled to take. The court held that that satisfied the employer's burden under the Title VII burden-shifting scheme because, under that statute, an employer "need only articulate — not prove — a legitimate, nondiscriminatory reason," to meet its burden of production.[37] However, the employer was not able to rebut the EEOC's claims that those purportedly legitimate reasons were merely a pretext for discrimination; instead, the court found the employer's reasons "highly suspicious" in light of the fact that it had sometimes allowed even larger branches to operate for short periods of time without a manager. [38]

As this cases shows, wage discrimination cases often rise and fall on the identification of an appropriate comparator. Under the federal Equal Pay Act, employers are prohibited from paying employees differently for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[39] Cases often turn on this distinction. For example, in *EEOC v.*

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[30] *Id.* at 14.

[31] *Id.* at 16-19.

[32] *Id.*

[33] *See, e.g., Wilder v. Stephen F. Austin State Univ.*, No. 9:20-cv-40-ZJH, 2021 WL 3288303, at *9 (E.D. Tex. Aug. 2, 2021) (Noting the differences in proving pretext under the *McDonnell Douglas* framework versus the framework applied under the EPA, the court held that, under the EPA, the defendant always keeps the burden of production and persuasion after a plaintiff has established a *prima facie* case: "the court will always consider pretext if the analysis gets that far, but the burden never shifts back to the plaintiff in an EPA claim."); *Mullenix v. Univ. of Tex. at Austin*, No. 1:19-cv-1203-LY, 2021 WL 5881690 (W.D. Tex. Dec. 13, 2021) ("The burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), governs claims under the EPA.") (citing *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460, 466 (5th Cir. 2021)); *Patel v. Tungsten Network, Inc.*, No. 2:20-cv-7603-SB-JEM, 2021 WL 4776348, at *7 (C.D. Cal. Sept. 15, 2021) (holding that the plaintiff did not need to establish pretext to avoid summary judgment because "summary adjudication on the EPA claim is proper only if Defendant produces 'sufficient evidence such that no rational jury could conclude but that these proffered reasons actually motivated the wage disparity' at issue") (quoting *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000)).

[34] *EEOC v. First Metro. Fin. Serv., Inc.*, 449 F. Supp. 3d 638 (N.D. Miss. 2020).

[35] *Id.* at 647.

[36] *Id.* at 647-48.

[37] *Id.* at 648 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 258, 258 (1981)).

[38] *Id.* at 648-49.

[39] 29 U.S.C. § 206(d)(1).

University of Miami,[40] the EEOC alleged that a university paid a female professor less than her counterpart who performed the same job. The university had hired the charging party as an associate professor during the same year that it hired a male professor with comparable qualifications for a lower-ranked position in the same department at a higher salary.[41] The university argued that the professors did not perform substantially equal work and that the salary discrepancy could be explained by a factor other than sex.

The court first held that a reasonable jury reviewing the duties of the two professors could conclude that their positions were substantially equal.[42] Although the two professors taught different political science specialties, the court noted that they both had doctorate degrees, generally taught the same number of courses at the introductory and advanced levels, and were subject to the same university requirements regarding teaching and research. The university argued that the two professors were not comparable because of their different areas of specialization, because they published in different journals, and because the male professor had published in more prestigious journals. The court found this evidence unpersuasive because "the professors' specializations within the field of political science do not appear to be dispositive as to the question of substantial job similarity," but "[r]ather, subspecialties are considered when evaluating whether a professor conducted research and was subsequently published in high-ranking journals relevant to their respective specializations."[43] The court was ultimately convinced that "the quality of [comparator's] publications and number of cite counts are determinative of this inquiry because the Plaintiff's prima facie case requires a comparison of jobs, not the skills and qualifications of the individuals who hold the jobs."[44]

Written policies regarding salary scales and job categories often factor into equal pay cases as well, as employers often rely on those policies to prove that salaries were set according to by their terms and are therefore not discriminatory. For example, in *EEOC v. Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy (MAPS) to determine compensation for newly hired library supervisors.[45] According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.[46] The court held, however, that the MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.[47] The court concluded that the alleged comparator "was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary [the comparator] had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator's] salary."[48]

After the conclusion of a five-day bench trial, the court concluded that the employer had violated the EPA.[49] The EEOC easily met its burden to establish a prima facie case because the parties stipulated that the comparator's salary was higher than that of each charging party.[50] To carry its burden, the employer argued that each library branch differed with respect to circulation size, outreach efforts, and physical footprint, thus rendering the job duties of each library supervisor too dissimilar to support a finding that

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[40] *EEOC v. Univ. of Miami*, No. 19-cv-23131, 2021 WL 4459683 (S.D. Fla. Sept. 29, 2021).

[41] *Id.* at *6.

[42] *Id.* at *8.

[43] *Id.*

[44] *Id.*

[45] *EEOC v. Enoch Pratt Free Library*, No. 17-cv-2860, 2019 WL 5593279, at *3 (D. Md. Oct. 30, 2019).

[46] *Id.* at *6.

[47] *Id.*

[48] *Id.* at *7. *See* also *EEOC v. George Washington Univ.*, No. 17-cv-1978, 2019 WL 2028398, at *4 (D.D.C. May 8, 2019) (denying an employer's motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility, holding that the complaint "straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities"); *EEOC v. Univ. of Miami*, No. 19-cv-23131-Civ-Scola, 2019 WL 6497888, at *2 (S.D. Fla. Dec. 3, 2019) (denying a motion to dismiss claims brought by professors in the same department because the EEOC had supported its claims of pay discrimination with numerous allegations relating to the professors' job duties, such as teaching classes and publishing books and articles, and allegations that the female professor had two more years of teaching experience and had published more works, and because the EEOC had alleged that both professors were in the same department and had been promoted to full professor at the same time after a review by the same committee based on the same criteria); *EEOC v. Denton Cty.*, No. 4:17-cv-614, 2018 U.S. Dist. LEXIS 175794, at *22 (E.D. Tex. Oct. 12, 2018) (denying cross motions for summary judgment, holding that it was "not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC's claim for violation of the Equal Pay Act entitling it to judgment as a matter of law").

[49] *EEOC v. Enoch Pratt Free Library*, No. 8:17-cv-2860, 2020 WL 7640845 (D. Md. Dec. 23, 2020).

[50] *Id.* at *8.

they performed equal work. The court found, however, that the core job duties were the same, relying in part on evidence that the positions shared the same job description, and supervisors often substituted for one another on a short- or long-term basis without requiring any additional training and without any alteration in pay.[51] The differences among library branches did not defeat the EEOC's case because "none of th[ose] differences translated into *job duties* that differed significantly from one another."[52]

The EEOC has also been pushing the law in a more employee-friendly direction with respect to an employer's affirmative defenses. For example, in *EEOC v. Hunter-Tannersville Central School District*,[53] the employer had pled as an affirmative defense that the charging party and her comparator had each negotiated their salaries, and that those negotiations resulted in the alleged salary disparity.[54] The EEOC argued that "there is simply no basis for the proposition that a male comparator's ability to negotiate a higher salary is a legitimate business-related justification to pay a woman less."[55] The court rejected this argument, but noted that other courts had come to different conclusions as to whether salary negotiations, by themselves, could constitute a valid defense to an EPA claim. Given the unsettled nature of the law, the court was unwilling to adopt the EEOC's interpretation at the pleading stage: "The Court finds that the EEOC did not meet its burden to show that the affirmative defense is insufficient because there is a question of law, specifically whether *Aldrich's* job-relatedness requirement would apply to negotiations, which might allow the defense to succeed."

Finally, recent EEOC litigation has generated some important and noteworthy decisions for employers who undertake the investigation and remediation of equal pay issues upon themselves. For example, in *EEOC v. George Washington University*,[56] an Executive Assistant to the employer's former Athletic Director alleged she was paid less than a male "Special Assistant" for the same work.[57] She filed an internal grievance with the employer's EEO office and a charge with the EEOC. The employer initiated an internal investigation to review the matter, which was initially conducted by non-lawyer staff in the EEO office. The investigation was later handed over to a law firm, which then issued a Confidential Informal Grievance Report.[58]

In discovery, the EEOC requested all documents relating to that investigation. But the employer withheld all documents, except the grievance itself, under the auspices of attorney-client privilege and the work product doctrine, arguing that the investigation was done at the behest of the University's Office of General Counsel and, later, the law firm that conducted the investigation. Some of those documents were created by someone in the EEO office who, while an attorney, was not acting as counsel for the employer. The court held that those materials were privileged because that person had contacted the employer's Office of General Counsel within days of receiving the grievance, after determining that litigation was likely, and had received guidance from the employer's in-house lawyers respecting the conduct of the investigation.[59]

The EEOC also argued that the employer's assertion of a good faith defense to the EEOC's claim for punitive damages worked as a waiver of the privilege over those documents. According to the EEOC, the assertion of that defense puts an employer's state of mind at issue, and in particular, its intent and knowledge of the law. The court held that "a party that has interposed a good faith defense but disclaimed reliance on privileged or protected materials—such as those created in connection with an internal investigation—does not waive protection over those materials."[60] Because the evidence of the employer's good faith was unconnected to its internal investigation, the court held that the privilege had not been waived: "the [employer's good faith] defense relies on evidence that the hiring and compensation decisions at issue here were made in a good faith

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[51] *Id.* at *9.

[52] *Id.* (emphasis in original).

[53] *EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-cv-0352, 2021 WL 5711995 (N.D.N.Y. Dec. 2, 2021).

[54] *Id.* at *3.

[55] *Id.* at *2.

[56] *EEOC v. George Washington Univ.*, 342 F.R.D. 161 (D.D.C. 2022).

[57] *Id.* at 166.

[58] *Id.*

[59] *Id.* at 179.

[60] *Id.* at 187.

effort to comply with the law. Importantly, all those decisions predate the internal investigation because 'the [employer] already had hired [comparator] as Special Assistant and already had determined his and [charging party's] pay at the time that the Internal Investigation began.'"

As noted above, under the leadership put in place by the last administration, the EEOC's enforcement of equal pay issues trailed off a bit, as it did for the EEOC's other priorities as well. Recent events show that the agency still has its eye on this topic. Now that the Commission is staffed with a Democratic majority, some believe it may turn back to these issues with renewed vigor. Now more than ever, it may be in employers' best interests to be mindful of where the EEOC is attempting to drive the law in this area.

C. Preventing Discrimination In Recruiting and Hiring

Over the past decade, the EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring. Most of its enforcement activity has focused on combating hiring practices that could result in age discrimination. But recent years have evidenced a broadening of that focus to claims ranging from sex discrimination, race discrimination, and disability discrimination. In particular, the EEOC has scrutinized how pre-employment screening tests and the use of technology in carrying out the screening process can result in discrimination against certain groups of individuals.

In 2024, employers should expect the EEOC to continue its strategic efforts to develop and file litigation alleging discrimination in recruitment and hiring. While this broad SEP category is not entirely new—recruiting and hiring were also emphasized in the EEOC's prior SEP, covering FY 2017-2021—these efforts are part of the EEOC's ongoing bipartisan warnings to employers and human resources technology vendors about the potential discriminatory impacts of AI in hiring. As we discuss below, while AI has captured much of the media coverage regarding this issue, we believe that the EEOC's strategic emphasis and litigation efforts in 2024 will touch on multiple aspects of hiring and recruiting, and not just AI.

1. Artificial Intelligence and Technology in Recruiting and Hiring

Use of artificial intelligence broke through to the general public in a big way in 2023, and the application of these tools in the workplace was no exception. It has become increasingly common for employers to use artificial intelligence to streamline hiring and recruiting, and that technology will only become more accessible to employers in the years to come.

Prior versions of the SEP announced the EEOC's focus on recruitment and hiring practices and policies that might give rise to discrimination against members of racial, ethnic, and religious groups, as well as women, older workers, and those with disabilities. This year, the EEOC added far more detail about the types of hiring practices and policies that it intends to scrutinize, and specifically noted that it is interested in employers' use of artificial intelligence and automated systems in that regard. The Commission has emphasized its intent to investigate whether protected groups might be harmed—whether intentionally or not—by automated systems used to target job advertisements to particular populations, recruit workers, or aid in hiring decisions.

Specifically, in the new SEP, the EEOC has committed to focusing on the use of technology, AI, and machine learning used in job advertisements, recruiting, and hiring decisions. The new SEP emphasizes an employer's use of all technology (not just "automated systems") in hiring and recruitment as an area strategic focus. The EEOC has, historically, focused on recruiting and hiring in part because private plaintiffs' counsel have been unwilling to champion large scale hiring cases due to cost and challenges identifying potential "victims." The proliferation in recent years of electronic tools available to assist employers to find talent in challenging labor markets may provide fertile ground for the EEOC on this issue.

EEOC leaders have participated in executive branch AI initiatives, including the October 2022 release of the Biden administration's Blueprint for an AI Bill of Rights,[61] and a joint press release with three other federal agencies[62] in April 2023 touting a "commitment to enforce their respective laws and regulations to promote responsible innovation in automated systems." Additionally, in May 2023, all EEOC personnel were requested by EEOC Chair Charlotte Burrows to attend an AI training about how front-line staff could "identify AI-related issues in [their] enforcement work".[63]

On October 30, 2023, President Biden signed a broad-ranging Executive Order, setting in motion action from multiple Departments and independent agencies, with the aim towards both harnessing the benefits of AI and maintaining American leadership in innovation, while addressing risks associated with the use of AI.[64] While President Biden's Executive Order did not directly single out the EEOC for any AI-related deliverables, its mandate is clear to agencies charged with enforcing civil rights laws, such as the EEOC. These agencies are directed to make "comprehensive use of their respective authorities" to address potential civil-rights harms arising from the use of AI, including "issues related to AI and algorithmic discrimination". The Executive Order further directs the Attorney General to "coordinate with and support agencies in their implementation and enforcement of existing Federal laws to address civil rights and civil liberties violations and discrimination related to AI" and directs agencies to coordinate "on best practices for investigating and prosecuting civil rights violations related to AI" and to provide further inter-agency training and technical assistance.

On November 1, 2023, the White House announced the formation of the "US AI Safety Institute" within the National Institute of Standards and Technology (NIST). According to the White House, the new AI Safety Institute will develop "technical guidance that will be used by regulators considering rulemaking and enforcement on issues such as … identifying and mitigating against harmful algorithmic discrimination".[65] NIST has already ramped up its already-intense efforts to gather expertise on AI issues, and, at a minimum, the EEOC will be keyed into these efforts as it accelerates its own enforcement and other efforts in this area.

Against this backdrop, employers should be mindful that any charge of discrimination filed with the EEOC that mentions the use of artificial intelligence—or any other technology in hiring—will not only qualify for priority handling, but is also likely to receive additional scrutiny from EEOC management. Likewise, the SEP is used to inform the EEOC's selection of litigation, so it would not be surprising to see EEOC litigators mining for AI cases to develop and bring.

2. Other Technology in Hiring and the Path Ahead on AI

Importantly, the EEOC signaled that it is focusing on *all* uses of technology in recruitment and hiring, not just artificial intelligence. In August 2023, the EEOC entered into a settlement agreement with iTutorGroup, which many media reports and commenters characterized as the EEOC's "first ever" case involving artificial intelligence discrimination in hiring.

However, according to the EEOC's complaint, the underlying hiring technology simply asked job applicants for their date of birth and was configured to automatically reject female applicants age 55 or older and male applicants age 60 or older. To be clear, automatically rejecting older job applicants, when their birthdates are already known, does not require any sort of artificial intelligence or machine learning.[66]

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[61] https://www.whitehouse.gov/ostp/ai-bill-of-rights/

[62] https://www.eeoc.gov/newsroom/eeoc-chair-burrows-joins-doj-cfpb-and-ftc-officials-release-joint-statement-artificial

[63] https://news.bloomberglaw.com/daily-labor-report/eeoc-to-train-staff-on-ai-based-bias-as-enforcement-efforts-grow

[64] https://www.seyfarth.com/news-insights/president-biden-signs-executive-order-setting-forth-broad-directives-for-artificial-intelligence-regulation-and-enforcement.html

[65] https://www.workplaceclassaction.com/2023/11/how-the-federal-governments-ai-risk-management-practices-will-set-the-standard-a-closer-look-at-government-action-following-president-bidens-executive-order-on-ai/

[66] https://www.seyfarth.com/news-insights/eeocs-settlement-challenging-simple-algorithm-provides-warning-for-employers-using-artificial-intelligence.html

That said, it is entirely fair to say that the EEOC's iTutorGroup complaint and settlement, as well as the way the commission has characterized the lawsuit and settlement, squarely falls within the broader scope of the EEOC's greater scrutiny of all sorts of technology in hiring, even technology that does not involve artificial intelligence. The EEOC's commitment to enforcement in the area of AI and other technology in hiring serves as a strong reminder that employers should be prepared to defend their use of technology in hiring, whether or not it might fall into any particular legal definition of "artificial intelligence."

In response to EEOC charges alleging that the use of AI or other technology is discriminatory, employers should be prepared to explain to EEOC investigators what AI or other technology they have been using in hiring or sourcing processes, and produce evidence that their processes are free of unlawful disparate impact against protected groups. Also, if employers have not already had conversations with their AI vendors or in-house developers about the likelihood of scrutiny of these processes in enforcement actions or litigation, in certain circumstance it could be an opportune time to take a deeper look at how technology is being used in their own organization.

In public comments in October 2023,[67] EEOC Chair Charlotte Burrows continued to express her apprehensions regarding the potential discriminatory impact of AI, especially highlighting concerns about algorithms trained on insufficiently diverse data. Employers facing scrutiny of their hiring or sourcing technology by the EEOC may also wish to anticipate how they would be able to respond to any concerns about the diversity of their algorithm's training data, and the measures that they or their vendors have taken to rectify any applicable concerns.

The EEOC's sharper enforcement focus on AI and hiring technology is set against a backdrop of broader regulatory activity outside of the Executive Branch. In 2023, Congress began hosting high-profile hearings on AI regulation, although clear legislative proposals from leadership have yet to emerge. Moreover, state and local regulations are also coming into play, potentially paving the way for EEOC actions or private lawsuits.

For example, New York City's Local Law 144,[68] whose enforcement began in July 2023, mandates employers to publish bias audit summaries for certain automated hiring tools. Disclosures made pursuant to New York City's law, or similar state and local proposed efforts, could turn heads at the EEOC or attract lawyers searching for litigation opportunities.

3. Job Advertisements

The EEOC's SEP accentuates the risks associated with unlawfully targeted job advertisements, or advertisements that otherwise deter people from specific protected groups from applying. The EEOC's emphasis here includes job advertisements posted in traditional media that might contain discriminatory language, as well as issues involving algorithmic targeting of job advertisements.

4. Job Segregation or Steering Based on Protected Characteristics

Job segregation and steering issues have been included in the SEP since 2017. Charges and litigation in this category could involve practices that do not necessarily focus on technology, such as steering women away from certain positions, channeling workers onto certain shifts, or assigning workers to certain positions based on a protected class. However, as with other hiring categories in the SEP, there is also a technology angle, with the EEOC expressing potential heightened interest in charges involving technology that applies—with or without AI—allegedly discriminatory steering or segregation, such as by suggesting jobs for which an applicant or employee is well-matched.

[67] https://www.brookings.edu/events/ai-in-employment-and-hiring-a-fireside-chat-with-eeoc-chair-charlotte-a-burrows/

[68] https://www.seyfarth.com/news-insights/artificial-intelligence-in-employment-what-new-york-citys-local-law-144-means-for-automated-employment-decision-tools.html

5. Focus Area: Hearing Impairment Issues In Recruiting and Hiring

The EEOC filed 48 disability-related lawsuits in FY 2023, nearly doubling the 27 ADA cases it filed the previous year. While these filings concerned a broad range of disabilities, one particular type of case stood out: claims concerning employee and applicant hearing impairments. Not coincidentally, the EEOC published guidance in late January 2023 regarding hearing disabilities in the workplace.[69] The guidance contains a series of question-and-answer documents addressing how the ADA applies to job applicants and employees with hearing disabilities. In particular, the document explains: when an employee may ask an applicant or employee questions about a hearing condition and how it should treat voluntarily disclosures; what types of reasonable accommodations applicants or employees with hearing disabilities may need; how an employer should handle safety concerns about applicants and employees with hearing disabilities; and how an employer can ensure that no employee is harassed because of a hearing disability.

After publishing this guidance, the EEOC filed nine ADA cases on behalf of hearing impaired applicants and employees. The Chicago District led the pack, pressing three of these cases in Illinois, followed by one in each of Florida, Kansas, Maryland, Massachusetts, New York, and Ohio.

Many of the cases related to recruiting and hiring fell into one of two categories. In some cases, the EEOC challenged the employers' assumptions that deaf applicants could not perform jobs safely. For example, one employer faced scrutiny for allegedly rejecting an applicant who sought a job as forklift operator in a warehouse without first engaging in the interactive process, despite the applicant's prior warehouse experience and forklift driver certification. In another case, an employer allegedly required candidates seeking driver positions to take a hearing test that the EEOC claimed screened out hearing impaired drivers, rather than following alternative criteria approved by the U.S. Department of Transportation to ensure an equivalent level of driver safety.

In other cases, the EEOC challenged employers' alleged failure to provide American Sign Language (ASL) interpreters as an accommodation. In one such case, the EEOC alleged that the employer deemed verbal communication and hearing to be job requirements, and terminated the candidacy of a hearing impaired person as a result. In another, the EEOC alleged that an employer ended an applicant's candidacy after deciding "it would be a challenge having an inter[preter] on site" if the person were hired.[70]

These decisions remind employers that it is necessary to engage in the interactive process with applicants and employees, including during the interview process, and that decisions should not be made based on stereotypes.

6. Likely Focus on Vision Impairments in FY 2024

Enforcing laws protecting individuals with visual disabilities will also continue to be a priority for the EEOC in 2024. In July 2023, the EEOC issued its Updated EEOC Resource About the ADA and Individuals with Visual Disabilities at Work.[71] This technical assistance document explains how the ADA applies to job applicants and employees with disabilities. This document outlines when, according to the EEOC, an employer may as an applicant or employee questions about their vision, how an employer should treat voluntary disclosure about visual disabilities, and what types of reasonable accommodations those with visual disabilities may need in the workplace. The document also highlights new technologies for reasonable accommodation, and describes how using artificial intelligence and lgorithms to make employment decisions can impact individuals with visual disabilities. Finally, the guidance also addresses how an employer should handle safety concerns about applicants and employees with visual disabilities, and methods to prevent harassment and retaliation.

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[69] U.S. Equal Employment Opportunity Commission, *Hearing Disabilities in the Workplace and the Americans with Disabilities Act* (Jan. 24, 2023), https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act.

[70] *See U.S. Equal Employment Opportunity Commission v. Tech Mahindra (Americas) Inc.*, No. 6:23-cv-063967 (W.D.N.Y.).

[71] Press Release, U.S. Equal Employment Opportunity Commission, *Updated EEOC Resources About the ADA and Individuals with Visual Disabilities at Work* (July 26, 2023), https://www.eeoc.gov/newsroom/updated-eeoc-resource-about-ada-and-individuals-visual-disabilities-work#:~:text=%E2%80%9CProviding%20reasonable%20accommodations%20is%20an,the%20resources%20needed%20to%20succeed.

7. Staffing Company Issues

In the FY 2024-2028 SEP, staffing relationships are no longer an "emerging and developing" issue, as they were in the previous SEP. Instead, the EEOC has expanded its efforts related to "the vulnerable and underserved workers"—those "who may be unaware of their rights under [EEO] laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections"—including "temporary workers." The EEOC will prioritize "eliminating barriers in recruitments and hiring" in areas relevant to staffing, including the following:

- limiting employees to temporary work when qualified for available permanent positions;
- limiting access to temp-to-hire positions, or other job training or advancement opportunities;
- channeling, steering or segregating individuals into specific jobs or job duties by protected group;
- use of automated systems to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups;
- job advertisements that exclude or discourage certain demographic groups from applying;
- restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access; and
- screening tools or requirements that disproportionately impact workers based on protected status, including those using AI/automated systems, pre-employment tests, and background checks.

The EEOC filed multiple suits related to temporary work arrangements in FY 2023. In some of those cases, the EEOC alleged that a client of a staffing company made discriminatory requests, which the staffing company honored. For example, the EEOC alleged that one company communicated with its staffing provider using "code" for discrimination, such as asking for candidates with "good finger dexterity" to fill female-dominated positions, even though employees of either sex could perform the jobs. The EEOC further alleged that the company also maintained male-dominated positions, and in the uncommon instances when women were hired for those roles, they were paid less. In another case, the EEOC alleged that a client of a staffing company and the staffing company together made decisions to segregate and assign Black employees to less desirable and lower-paying positions.

In a separate case, the EEOC alleged that the staffing company independently made discriminatory choices that impacted temporary workers. For example, the EEOC accused a construction staffing company of failing to hire women for construction jobs based on stereotypes about their skills, and assigning Black employees only to certain areas based on assumptions about what its clients wanted. The result was that fewer women and Black employees were placed on assignment, and those that were assigned received fewer hours and less pay than men and white employees. These cases remind employers that decisions should be based on the ability to perform the duties of the job, and not on stereotypes or assumptions.

8. Focus Area: Underrepresentation in Particular Industries

The final paragraph in the new SEP's section on hiring maintains the 2017-2021 SEP's emphasis on issues relating to the continued underrepresentation of women and workers of color in certain sectors like construction, manufacturing, technology, STEM and finance.

We should expect the EEOC to continue efforts toward analyzing the diversity of these sector-specific workforces, and developing enforcement and litigation targets addressing any perceived gaps.

D. Preventing Harassment In The Workplace

The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013. In September 2023, the EEOC published its Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Guidance").[72] The Proposed Guidance was meant to replace several earlier EEOC guidance documents, aiming to define what constitutes harassment, examine when a basis for employer liability exists, and offer suggestions for preventative practices.[73] According to the Proposed Guidance, the EEOC will find harassing conduct to be unlawful if the conduct is based on an individual's race, color, national origin, religion, age, disability, or an individual or family member's genetic test or family medical history.[74] Further, the Proposed Guidance specifically sets forth the EEOC's position that as a protected basis "sex" includes, but is not limited to, sex stereotyping, gender identity, sexual orientation, pregnancy, childbirth, and a woman's reproductive decisions, such as those relating to contraception and abortion.[75] Moreover, the EEOC announced that it will even entertain harassment claims based on (1) the EEOC announced that it will entertain harassment claims based on (1) "perceived" membership in a protected class (even if the perception is incorrect)[76]; (2) for "associational harassment," where an employee who is a member of a protected class claims harassment based on his/her association with individuals who do not share their protected characteristics;[77] (3) where the alleged harassment was not directed at the employee;[78] and (4) in instances where the alleged harassment occurred outside of the workplace.[79]

The Proposed Guidance expands upon the 2017 guidance that was put on hold under the Trump Administration. While parts of the 2023 guidance are largely noncontroversial (for example, it is widely understood that epithets based on a protected class can serve as the basis for a harassment claim), the draft enforcement guidance treads some new ground.[80] Some of the key new additions include:

- **Harassment in Virtual Work Environments:** As with conduct within a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. This can include, for instance:

  - Sexist comments made during a video meeting; (2) Racist imagery that is visible in an employee's workspace while the employee participates in a video meeting; and (3) Sexual comments made during a video meeting about a bed being near an employee in the video image.[81]

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[72] Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, Proposed Enforcement Guidance on Unlawful Harassment, (Sept. 29, 2023), https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace.

[73] *See id.*

[74] *Id.* at 5-15.

[75] *Id; see Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003)(upholding jury verdict finding the plaintiff was subjected to a hostile work environment based on pregnancy where the plaintiff's supervisor made numerous derogatory comments about her pregnancy and required the plaintiff to provide advance notice and documentation of doctor's appointments, even though the plaintiff's coworkers were not required to provide such information for appointments); 42 U.S.C. § 2000e(k) ("The terms of 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ."); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020); *Sch. Of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 995 (8th Cir. 2022)("Bostock held that the statute's prohibition on employment discrimination 'because of sex' encompasses discrimination on the basis of sexual orientation and gender identity.").

[76] *See, e.g., Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299 (11th Cir. 2012)('[A] harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers repeatedly referred to an employee of Indian descent as "Taliban" or "Arab" and stated that "[t]his is America . . . not the Islamic country where you came from," even though the harassing comments did not accurately describe the employee's actual country of origin.).

[77] *See e.g., Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263 (1st Cir. 2022)(concluding that claims alleging discrimination based on interracial association "are fundamentally consistent with *Bostock [v. Clayton County*, 140 S. Ct. 1731 (2020)] and Title VII's plain language prohibiting action 'because of such individual []' plaintiff's race"). *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers).

[78] *See e.g., Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that the District Court erred in evaluating plaintiffs' section 1981 and section 1983 claims of racial harassment by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark, but each plaintiff became aware of all of the conduct).

[79] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, see supra note 1, at 52.

[80] Emily J. Miller & Rachel V. See, *EEOC Releases Draft Enforcement Guidance on Workplace Harassment and Invites Comment*, Seyfarth Shaw LLP Legal Update (Oct. 10, 2023), https://www.seyfarth.com/news-insights/eeoc-releases-draft-enforcement-guidance-on-workplace-harassment-and-invites-comment.html.

[81] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, at 53.

- **Scope of Hostile Work Environment Claims:** Conduct that can affect the terms and conditions of employment, even though it ***does not occur*** in a work related context, includes electronic communications using private phones, computers, or social media accounts, *if it impacts the workplace*.[82]

  - Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer generated intimate images using social media can contribute to a hostile work environment, *if it impacts the workplace*.[83]

The EEOC provides employers with what it views as a practical toolkit to prevent and correct harassment in the workplace using effective anti-harassment policies and training programs. In regards to employer anti-harassment policies, the Proposed Guidance encourages employers to: (1) clearly identify accessible points of contact to whom reports of harassment should be made and include contact information, and (2) explain the employer's complaint process, including the process's anti-retaliation and confidentiality protections.[84] The Proposed Guidance also lays out several features that anti-harassment trainings should include to maximize their effectiveness:

- It explains the employer's anti-harassment policy and complaint process, including any ADR process, and confidentiality and anti-retaliation protections;

- It describes and provides examples of prohibited harassment, as well as conduct that, if left unchecked, might rise to the level of prohibited harassment;

- It provides information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;

- It provides supervisors and managers information about how to prevent, identify, stop, report, and correct harassment, such as actions that can be taken to minimize the risk of harassment, and clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of.[85]

Should the Proposed Guidance take effect as written, employers will face the challenge of balancing conflicting guidance. The EEOC's requirement that employers act on out-of-work conduct that creates a hostile work environment is in apparent conflict with the National Labor Relations Board (NLRB) August 2023 decision requiring that employers take care not to place impermissible restrictions on employee speech, including out-of-work speech on social media.[86] Employers will also have to juggle the EEOC's mandate that they "must take corrective action that is 'reasonably calculated to prevent further harassment'" (emphasis added) with the NLRB's May 2023 decision prohibiting employers from disciplining employees for certain harassing conduct that occurs while an employee is engaged in protected conduct.[87] While the NLRB acknowledges the concern that conflicts could arise between its holding and antidiscrimination laws, it says only that it will cross that bridge if it comes. The EEOC's draft enforcement guidance is silent on the topic.

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[82] *Id.* at 54.

[83] *Id.* at 55.

[84] *Id.* at 66-67.

[85] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, at 70.

[86] *Stericycle, Inc., and Teamsters Local 628*, 372 NLRB No. 113 (2023) (holding that a facially neutral work rule is presumptively unlawful if a "reasonable" employee predisposed to engaging in protected concerted activity could interpret the rule to have a coercive meaning.").

[87] *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023) (holding that employers must evaluate employee misconduct, including harassing conduct, against "setting-specific standards" to determine whether the misconduct is afforded impunity because the employee was engaged in conduct otherwise protected by the National Labor Relations Act.).

E. EEOC's Emphasis on Combating Systemic Discrimination

Systemic discrimination refers to biases that are "built into systems, originating in the way work is organized" and "refers to structures that shape the work environment or employment prospects differently for different types or workers."[88] The EEOC defines systemic cases as "pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location."[89]

In the EEOC's Fiscal Year 2023 Agency Financial Report, Chair Burrows emphasized the EEOC's commitment and focus on Combating systemic discrimination. Since 2006, the EEOC has made "the identification, investigation, and litigation of systemic discrimination cases (i.e. pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area) a top priority."[90] In Fiscal Year 2023, the EEOC filed 25 systemic lawsuits, nearly double the number filed in each of the past three fiscal years, and increased enforcement on both private sector and federal sector employers.

Below are some examples of the systemic discrimination lawsuits filed by the EEOC in Fiscal Year 2023:

- ***EEOC v. Tesla, Inc.*, Case No. 4:23-cv-04984 (N.D. Cal. 2023):** In a Title VII action, the EEOC alleges systemic discrimination, harassment and retaliation by the employer against Black employees at its manufacturing facilities in Fremont, California.

- ***EEOC v. Inova Home Health LLC et al.*, Case No. 1:23-cv-00264 (E.D. Va. 2023):** The Washington Field Office of the EEOC, along with attorneys from the Philadelphia District, sued companies providing home healthcare coordination services in northern Virginia alleging they paid a group of female employee less than their male counterparts. The parties settled after several months of litigation.

- ***EEOC v. Asphalt Paving Systems, Inc.*, Case No. 8:23-cv-02169 (M.D. Fla. 2023):** Out of the EEOC's Miami office, this Title VII case alleges Black employees were subjected to a hostile work environment that included racial slurs, threatening conduct and humiliating working conditions.

Employers should expect that the Commission will continue to make good on its promise to litigate large-scale, high-impact, and high-profile investigations and cases that address the issues identified as its enforcement priorities and areas of focus.

[88] *Systemic Enforcement at the EEOC*, https://www.eeoc.gov/systemic-enforcement-eeoc.

[89] *Systemic Enforcement at the EEOC*, https://www.eeoc.gov/systemic-enforcement-eeoc.

[90] *EEOC Strategic Plan 2022-2026*, https://www.eeoc.gov/eeoc-strategic-plan-2022-2026.

PART III: District Office Profiles

While the EEOC is a national enforcement body, the Commission's 15 District Offices often take different approaches to their respective litigation and settlement activity. To that end, Part III provides an overview of key developments from each District Office in FY 2023. Each summary begins with a District Profile, which outlines key players and litigation statistics. These statistics include: 1) the number of lawsuits filed in FY 2023, followed by the district's rank among other offices; 2) the average time period between the issuance of a determination letter and the subsequent failure to conciliate notice; 3) the average time period between the failure to conciliate notice and the EEOC's complaint; and 4) the average time period between the issuance of a determination letter and the EEOC's complaint. Finally, the District breakdowns also contain summaries of notable lawsuits and settlements attributable to each office in FY 2023.

EEOC Atlanta District Office

DISTRICT PROFILE

Director: **Darrell Graham**

Regional Attorney: **Marcus G. Keegan**

Merit Cases Filed in FY 2023: **9 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **99**

Average Days Between Failure to Conciliate & Complaint: **185**

Average Days Between Determination Letter & Complaint: **285**

KEY CASES FILED IN FY 2023

***EEOC v. Zoe Center for Pediatric & Adolescent Health LLC,* 4:23-cv-00167 (M.D. Ga.)** According to the EEOC, Zoe Center, a provider of pediatric and adolescent health services, violated the ADA. Specifically, the EEOC alleged that, in January 2022, an employee requested an accommodation to work remotely three days per week due to her disabilities. The employee was a web designer capable of performing all her duties remotely. Nonetheless, the company denied her request the next day and terminated her.

***EEOC v. Waste Industries, U.S.A.*, 1:23-cv-0429 (N.D. Ga.)** The EEOC filed suit against four companies in the waste industry on behalf of a class of applicants who applied for truck driver positions at various locations who were passed over because of their sex. During the application and interview processes, female applicants faced derogatory comments about their feminine appearance and were often subjected to discriminatory inquiries casting doubt on their competency to perform the job based on sex-based stereotypes. The female applicants were qualified to perform the job but were allegedly denied employment in favor of less qualified, male applicants.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Grady Memorial Hospital Corp.*, 1:22-CV-02059 (N.D. Ga.)** Atlanta public hospital Grady Memorial agreed to pay $55,000 and provide other relief to resolve an ADA lawsuit. The EEOC alleged that Grady failed to accommodate an employee's disability by requiring her to furnish superfluous

doctor's notes and firing her before she could do so for violation of other work rules, which the EEOC claimed was pretextual. Under the Consent Decree, Grady also stipulated to certain injunctive relief, including allowing the EEOC to monitor future accommodation requests.

***EEOC v. Fischer Connectors, Inc.*, 1:22-cv-03884 (N.D. Ga.)** According to the EEOC, Swiss-based manufacturer Fischer Connectors settled an ADEA lawsuit in which the EEOC alleged that defendant intentionally designed a plan to eliminate older employees in favor of a newer, younger workforce. The parties entered into a Consent Decree pursuant to which Fischer will pay $460,000, train employees on the ADEA, post a notice about anti-discrimination laws, and be subject to EEOC monitoring.

EEOC Birmingham District Office

DISTRICT PROFILE

Director: **Bradley A. Anderson**

Regional Attorney: **Marsha Rucker**

Merit Cases Filed in FY 2023: **7 (T-6th)**

Average Days Between Determination Letter & Failure to Conciliate: **40**

Average Days Between Failure to Conciliate & Complaint: **92**

Average Days Between Determination Letter & Complaint: **132**

KEY CASES FILED IN FY 2023

***EEOC vs. TCI of Alabama LLC*, 4:23-cv-1200 (N.D. Ala.)** The EEOC filed suit alleging that TCI retaliated against a manager in violation of Title VII after a female job applicant filed a charge against the company. During TCI's internal investigation into the charge, the manager explained that TCI had a practice of not hiring female laborers dating back to the company's founding. Allegedly, TCI's president pressured the manager to change his story, but the manager refused and was terminated.

***EEOC vs. Security Engineers Inc.*, 2:23-cv-1213 (N.D. Ala.)** The EEOC sued Security Engineers alleging that since March of 2017, it discriminated against a nationwide class of female applicants by refusing to hire or assign them to security officer positions because of their sex. Specifically, the EEOC alleged that defendant complied with its clients' discriminatory requests for male security officers and now seeks monetary damages including back pay, compensatory and punitive damages, and injunctive relief.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Mueller Co. LLC and IH Servs. Inc.*, 4:23-cv-552 (N.D. Ala.)** Defendants Mueller Co. LLC and IH Services agreed to pay $150,000 and provide other relief to settle claims of sexual harassment and retaliation under Title VII. In its suit, the EEOC alleged they subjected female cleaning workers IH assigned to Mueller's facilities to unwanted sexual comments and touching. In addition to the monetary relief, the parties' three-year Consent Decree committed both defendants to review and revise their sexual harassment and retaliation policies, post or distribute them to employees, and provide annual training to employees on such policies.

EEOC Charlotte District Office

DISTRICT PROFILE

Director: **Betsy Rader**

Regional Attorney: **Melinda Dugas**

Merit Cases Filed in FY 2023: **9 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **149**

Average Days Between Failure to Conciliate & Complaint: **229**

Average Days Between Determination Letter & Complaint: **378**

KEY CASES FILED IN FY 2023

***EEOC v. Suncakes, LLC d/b/a IHOP*, 3:23-cv-00274 (W.D.N.C)** The EEOC filed a lawsuit on behalf of a former employee asserting claims for religious discrimination and failure to accommodate. Originally, the employee requested and was granted an accommodation of not working on Sundays in accordance with his religious beliefs. However, after a change in management, his new manager scheduled him to work on two Sundays. After working these days, the employee refused to work any further Sundays and the general manager precluded him from working his next shift and terminated him. The EEOC further alleges that the manager expressed hostility toward religion in comments made to other employees.

***EEOC v. Hooters of America LLC*, 1:23-cv-722 (M.D.N.C.)** The EEOC filed suit on behalf of a class of female employees claiming that Hooters engaged in discrimination when it primarily laid off Hooters Girls who were Black and/or had dark skin tones during the COVID-19 pandemic. According to the EEOC, when Hooters eventually recalled employees, it recalled mostly white or light skin employees. Prior to the layoffs, 51% of Hooters Girls were Black and/or had dark skin tones whereas after the recall that number was at only 8%.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. iTutor Group, Inc.*, 1:22-cv-02565 (E.D.N.Y.)** The EEOC and defendants, three companies providing language tutoring to students in China, settled a lawsuit the EEOC brought on behalf of over 200 applicants. The EEOC claimed defendants denied the applicants employment because of their age. The EEOC alleged defendants' software automatically rejected female applicants over 55 and male applicants over 60. The parties agreed that defendants will pay $365,000, adopt a new anti-discrimination policy, and provide training for employees involved in hiring. The EEOC will also monitor defendants' compliance with the Consent Decree for at least five years.

***EEOC v. NSN, LLC*, 5:22-cv-00237 (E.D.N.C.)** Defendant NSN will pay $42,000 to settle a disability discrimination and retaliation lawsuit. The EEOC filed suit on behalf of a former employee whose reasonable accommodations were rescinded after a change in management. The two-year Consent Decree resolving the case also requires NSN to adopt and implement a new disability accommodation policy and provide training to all personnel concerning its obligation to comply with federal employment law.

***EEOC v. Aurora Renovations and Developments, LLC d/b/a Aurora Pro Services*, 1:22-cv-00490 (M.D.N.C.)** Aurora Renovations agreed to pay $50,000 to settle a Title VII lawsuit in which the EEOC claimed that defendant required all employees to attend daily Christian prayer meetings led by the company's owner and fired an employee who sought an exemption. Under the parties' three-year Consent Decree, the company is prohibited from discriminating or retaliating against employees, must adopt and implement new anti-discrimination and retaliation policies, and provide training for its personnel.

EEOC Chicago District Office

DISTRICT PROFILE

Director: **Diane I. Smason (Acting)**

Regional Attorney: **Gregory M. Gochanour**

Merit Cases Filed in FY 2023: **13 (T-2nd)**

Average Days Between Determination Letter & Failure to Conciliate: **113**

Average Days Between Failure to Conciliate & Complaint: **135**

Average Days Between Determination Letter & Complaint: **248**

KEY CASES FILED IN FY 2023

***EEOC v. TKO Construction Services*, 0:23-cv-3010 (D. Minn.)** According to the EEOC's suit, a former recruiter worked for TKO, a construction staffing company, in July 2018. TKO employees informed the recruiter that the company did not hire women for construction jobs, Blacks in certain areas, and individuals over 40 years old due to client preferences, a practice TKO's president later confirmed to the recruiter. Wanting to avoid engaging in unlawful conduct, the recruiter resigned. In its suit, the EEOC alleges that TKO failed to recruit, hire, assign or refer a class of aggrieved individuals for employment because of their sex, race, and age. The EEOC further alleges that TKO's discriminatory classifications resulted in female and Black employees being assigned fewer hours and receiving less pay than male or white employees, respectively.

***EEOC v. Alliance Ground International LLC*, 1:23-cv-14302 (N.D. Ill)** The EEOC brought suit after a deaf applicant sought a position working in a warehouse through Skills for Chicagoland's Future, a job training and placement not-for-profit. The EEOC alleges that despite being qualified for the position, Alliance Ground rejected the application based on its assumption that individuals who are deaf are incapable of working safely in a warehouse setting. The lawsuit further alleges that Alliance Ground maintains a policy denying employment to deaf individuals in any of its warehouses and that it destroyed large numbers of job applications in violation of record-keeping laws.

***EEOC v. R & G Endeavors Inc. d/b/a Culver's Restaurants of Cottage Grove*, 0:23-cv-1501 (D. Minn.)** The EEOC sued R & G Endeavors, a fast-food franchisee, claiming it subjected multiple workers to harassment at its restaurant. The EEOC alleges that managers and other employers targeted a gay, African American employee when they directed homophobic and racial insults toward him. The suit also claims that female employees, some as young as fourteen, were subjected to sexual harassment through unwanted sexual touching, jokes, and propositions. In addition, R & G Endeavors also faces allegations of disability-based pay discrimination.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Symphony Deerbrook, LLC*, 1:21-cv-02978 (N.D. Ill)** Symphony Deerbrook, a nursing and rehabilitation facility, agreed to pay $400,000 to settle a pregnancy discrimination lawsuit filed by the EEOC. In its suit, the EEOC alleged that the facility maintained a policy requiring employees to notify it of any pregnancy and obtain a doctor's note permitting them to work without restrictions. The EEOC further alleged that the facility denied pregnancy-related accommodations and terminated employees but did not require the same of similarly situated employees. In addition to monetary relief, the Consent Decree enjoins the facility from future pregnancy-based discrimination and requires it to provide anti-discrimination training for all employees.

***EEOC v. Lacey's Place LLC Series Midlothian*, 2:22-cv-02161 (C.D. Ill)** The EEOC Lacey's Place, an operator of more than 30 video game parlors, settled a Title VII and EPA lawsuit. The EEOC claimed female district managers were compensated at lower rates than male coworkers with similar experience. It further alleged that female managers were fired after complaining about the pay disparity. Pursuant to the parties' four-year Consent Decree, Lacey's Place agreed to pay $92,964, conduct a pay equity study, submit biannual reports to the EEOC, and implement a written policy against sex-based pay discrimination and retaliation.

EEOC Dallas District Office

DISTRICT PROFILE

Director: **Travis Nicholson**

Regional Attorney: **Robert Canino**

Merit Cases Filed in FY 2023: **9 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **121**

Average Days Between Failure to Conciliate & Complaint: **111**

Average Days Between Determination Letter & Complaint: **232**

KEY CASES FILED IN FY 2023

***EEOC v. National Telecommuting Institute, Inc.*, 5:23-cv-1210 (W. D. Tex.)** The EEOC alleges that when NTI learned applicants used accessibility software that converted text to speech, it informed them there were no positions that could accommodate the software. The EEOC further alleges that as a general practice, NTI subsequently failed or refused to place or refer the applicants for employment. Moreover, the EEOC claims defendant denied blind and low-vision applicants access to placement services by failing to provide reasonable accommodations enabling their participation in its pre-employment application process.

***EEOC v. Paramount Healthcare Consultants LLC*, 3:23-cv-00359 (W.D. Tex.)** According to the EEOC's complaint, the EEOC sued two companies after an administrator at a nursing home facility sexually harassed a housekeeping aide by making unwelcome sexual comments and contacts. After reporting the conduct to her supervisor, who escalated the complaint to human resources, the HR director was dismissive and suggested she invited the behavior. The EEOC maintains that no

credible investigation ever took place and that the administrator received no discipline. Following her complaint, management retaliated against the aide and disciplined the supervisor for "gossiping." The EEOC alleges both employees were constructively discharged from their positions.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Alden Short Inc.*, 3:18-cv-02125 (N.D. Tex.)** Pursuant to a three-year Consent Decree, defendants Alden Short and its subsidiary Hinson Jennings, LLC will pay $85,000 to settle a national origin harassment lawsuit filed by the EEOC. The EEOC alleged that the owner, president, and chief operating officer created a hostile work environment by making comments related to the national origin of three Hispanic female employees. The Consent Decree also prohibits future discrimination and requires the creation and implementation of a new employee handbook and to provide annual training on discrimination.

***EEOC v. University of Texas at Perma Basin*, 7:22-cv-00210 (W.D. Tex.)** The University of Texas, Permian Basin agreed to pay $46,000 in damages pursuant to a three-year Consent Decree settling a lawsuit filed by the EEOC alleging violations of the Equal Pay Act. The EEOC alleged Defendant compensated a female associate professor less than two males performing substantially equal work. The decree further requires Defendant to revise its compensation policy and provide annual training to employees involved in making compensation decisions for faculty.

EEOC Houston District Office

DISTRICT PROFILE

Director: **Rayford O. Irvin**

Regional Attorney: **Rudy L. Sustaita**

Merit Cases Filed in FY 2023: **8 (5th)**

Average Days Between Determination Letter & Failure to Conciliate: **102**

Average Days Between Failure to Conciliate & Complaint: **279**

Average Days Between Determination Letter & Complaint: **381**

KEY CASES FILED IN FY 2023

***EEOC v. Employment & Training Centers Inc.*, 4:23-cv-3201 (S. D. Tex.)** The EEOC filed suit on behalf of an applicant alleging that defendant company failed to provide him with a reasonable accommodation pursuant to the ADA. Specifically, the EEOC alleges that the company made a conditional offer of employment to the applicant who has end-stage renal disease. The offer was subject to his ability to pass a urine drug test; however, the applicant could not produce urine because of his disability and requested an alternative method. Defendant summarily rejected his request stating it could not provide an accommodation because no alternative was available. It thereafter rescinded its offer. The EEOC asserts that internal records showed alternative testing methods were feasible.

***EEOC v. Ecoseve, LLC*, 6:23-cv-01321 (W.D. La.)** The EEOC filed suit against Ecoserv, LLC, an industrial cleaning company, alleging it violated federal law by engaging in a pattern or practice of refusing to hire applicants who were Black, female, or 40 years old or over, and by firing a human resources employee

who opposed its discriminatory practices. According to the EEOC's lawsuit, Ecoserv instructed a former human resources employee to limit the number of African American workers she hired. The HR official learned of other discriminatory practices such as not hiring women or older workers for non-office positions. The HR official opposed and refused to abide by the practices and informed her manager that the company's hiring practices violated Federal law. Shortly thereafter, Defendant terminated her.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Hooters of Louisiana LLC*, 2:23-cv-02864 (E. D. La.)** Under a three-year Consent Decree, Hooters and associated companies agreed to pay former employees $650,000 in backpay and damages and provide training, revise policies, and provide the EEOC with regular reports as part of its settlement with the agency. According to the EEOC, defendants subjected African American employees to demeaning race-based remarks which created an offensive work environment. Furthermore, defendants failed to rehire any qualified African American employees, many of whom complained of race-based discrimination, after laying them off at the outset of the COVID-19 pandemic.

***EEOC v. Lion Elastomers, LLC*, 1:21-cv-00493 (E.D. Tex.)** Lion Elastomers agreed to pay $175,000 and revise its anti-discrimination policies pursuant to a 30-month Consent Decree. The Consent Decree also requires defendant to distribute the revised policies to employees, provide managers and human resources staff with training on the ADA, and inform them of their legal obligation to prevent, address, and remedy disability-based discrimination. The Consent Decree comes after the EEOC filed suit on behalf of a class of applicants whose job offers were rescinded based on the company's assumption that they were unable to lift heavy objects based on their back impairments.

EEOC Indianapolis District Office

DISTRICT PROFILE

Director: **Michelle Eisele**

Regional Attorney: **Kenneth Bird**

Merit Cases Filed in FY 2023: **13 (T-2nd)**

Average Days Between Determination Letter & Failure to Conciliate: **66**

Average Days Between Failure to Conciliate & Complaint: **242**

Average Days Between Determination Letter & Complaint: **309**

KEY CASES FILED IN FY 2023

***EEOC v. The Phoenix Center, Inc.*, 1:23-cv-592 (S.D. Ohio)** The EEOC filed suit alleging that The Phoenix Center, a mental health and substance use recovery center, engaged in disability discrimination. According to the suit, defendant rejected two applicants because of their disability or based on the perception that they have a disability. The EEOC further claims that defendant subjected a class of applicants to impermissible medical inquiries.

***EEOC v. Trinity Health d/b/a Mercy Health St. Mary's*, 1:23-cv-00435 (W.D. Mich.)** The EEOC filed suit on behalf of an individual alleging his job offer was rescinded after he refused to receive a flu vaccine for religious reasons. Specifically, the EEOC alleges that Mercy Health maintained an influenza policy

which required employees to receive an annual flu shot, subject to exemptions. As his conditional job offer was pending, he applied for exemption pursuant to the policy but was denied. His job offer was then rescinded without explanation.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Munster Medical Research Foundation, Inc. d/b/a Community Hospital*, 2:23-cv-00201 (N.D. Ind.)** Defendant agreed to pay $158,000, rehire a former registered nurse, and adopt policy changes to settle a lawsuit filed by the EEOC. In addition to the monetary relief, the three-year Consent Decree provided for injunctive relief, ensuring qualified employees with disabilities are reassigned to vacant positions rather than terminated. The decree further requires that defendant provide human resources personnel with annual training on the ADA's reasonable accommodation requirements. The Consent Decree came after the EEOC filed suit alleging that defendant failed to assign a nurse to an alternative position after she suffered a workplace injury resulting in lifting restrictions.

***EEOC v. R&L Carriers Shared Services, LLC & R&L Carriers, Inc.*, 1:17-cv-00515 (S.D. Ohio)** Defendants agreed to pay $1,250,000 to settle a class action lawsuit filed by the EEOC. It must also provide equitable and affirmative relief, such as training hiring personnel and engaging in outreach and recruitment efforts to employer women as loaders. The settlement resolves the EEOC's suit, in which it alleged that R&L discriminated against women in its hiring for loader positions after female applicants were rejected from the position because of their sex.

EEOC Los Angeles District Office

DISTRICT PROFILE

Director: **Christine Park-Gonzalez**

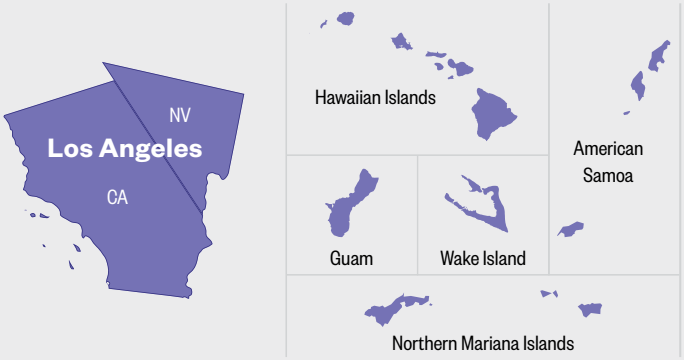
Regional Attorney: **Anna Y. Park**

Merit Cases Filed in FY 2023: **10 (T-3rd)**

Average Days Between Determination Letter & Failure to Conciliate: **183**

Average Days Between Failure to Conciliate & Complaint: **337**

Average Days Between Determination Letter & Complaint: **466**



KEY CASES FILED IN FY 2023

***EEOC v. Pacific Culinary Group, Inc.*, 2:23-cv-3018 (C.D. Cal.)** The EEOC filed suit on behalf of a class of individuals it alleges were subjected to unlawful discrimination and retaliation. The defendants, two companies who sell, produce, and distribute food products allegedly, since 2020, subjected male and female workers to sexual harassment. This included unwelcome sexual advances, comments about their appearance, and questions about employees' sexual preferences. After receiving multiple complaints, the company failed to take remedial action, instead disciplining the complaining employees.

***EEOC v. Mariscos El Puerto, Inc.*, 2:23-cv-01309, 2:23-cv-01310 (D. Nev)** The EEOC filed companion lawsuits against two defendants in the restaurant and bar industry. According to the Complaint, defendants subjected female workers to sexual harassment and gay and lesbian workers to discrimination and harassment. The EEOC alleges that male managers required female employees to engage in sexual

activities to maintain their employment. It further claimed that managers and supervisors discriminated against gay and lesbian workers because of their sexual orientation, including physical assaults and the use of slurs. In addition to terminating employees who refused or opposed management's behavior, the EEOC alleges employees who resigned were constructively discharged.

KEY SETTLEMENTS SECURED IN FY 2023

Joe & The Juice Joe & The Juice, a nationwide restaurant, settled a Title VII charge in which the EEOC claimed that it failed to recruit, hire, and promote female employees. Settlement was achieved during the EEOC's administrative conciliation process, where Joe & the Juice agreed to provide $715,000 in monetary relief. Pursuant to the agreement, it will also establish a class fund for female applicants who were denied employment, appoint an EEO monitor to supervise its compliance, and develop a nationwide internal online platform to ensure equal access to employment opportunities.

***EEOC v. Orange Treeidence OPCO, LLC d/b/a Riverwalk Post-Acute, Providence Group, Inc.*, 5:22-cv-00425 (C.D. Cal.)** The EEOC and defendants, a nursing facility and consulting services agency, resolved a Title VII lawsuit in which the EEOC alleged defendants subjected Black employees to racial harassment and failed to adequately address their complaints. Pursuant to the three-year Consent Decree, defendants will pay $865,000 to class members, appoint an EEO monitor, review and revise their discrimination and harassment policies, and provide training on anti-discrimination laws.

EEOC Memphis District Office

DISTRICT PROFILE

Director: **Edmund C. Sims (Acting)**

Regional Attorney: **Faye Williams**

Merit Cases Filed in FY 2023: **9 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **38**

Average Days Between Failure to Conciliate & Complaint: **259**

Average Days Between Determination Letter & Complaint: **220**

KEY CASES FILED IN FY 2023

EEOC v. Prestigious Placement, Inc., Civil Case No. 2:23-cv-02568 (W.D. Tenn.) The EEOC filed a lawsuit against joint employers Prestigious Placement, Inc. and Prosero d/b/a Spinnaker Management Group alleging that female employees were subjected to a sexually hostile work environment. The EEOC alleges that beginning in at least February 2021, a male team lead routinely subjected female employees to inappropriate sexual comments and text messages. When the female employees reported the harassment, Spinnaker retaliated against them by terminating their employment. One female employee reported the harassment to the onsite manager for Prestigious Placement and two supervisors for Spinnaker, but they took no action. The EEOC claims that both Prestigious Placement and Spinnaker knew or should have known of the male team lead's sexually harassing behavior, and that they failed to take appropriate remedial action to eliminate the sexual harassment from the workplace. Additionally, they terminated female employees when they complained about the harassment according to the EEOC.

EEOC vs. Simply Slims, L.L.C., and or Dixie Chicken, L.L.C. d/b/a Slim Chickens **Civil Action No. 6:23-cv-06090 (W.D. Ark.)** The EEOC filed a lawsuit against the Defendant alleging teens and young adults were subjected to sexual harassment and a sexually hostile work environment. The Complaint alleges that a shift manager made inappropriate sexual comments to a young female who immediately reported the comments to the general manager. Though the Company received notice of the sexual harassment, the Company failed to address the harassment and the shift manager continued to harass other young female employees, including teenagers. The shift manager would brush up against the girls intentionally, rub their shoulders, and poke them in inappropriate places. He fondled the breast of one young female, touched one on her bottom, and placed his hand on the inner thigh of another. Eventually, the sexual harassment forced several of the employees to resign.

KEY SETTLEMENTS SECURED IN FY 2023

EEOC v. USF Holland, LLC**, Civil Action No. 3:20-cv-00270 (N,D. Miss.)** The EEOC and the Defendant, a less-than-truckload carrier, resolved a Title VII lawsuit brought by the EEOC that alleged that the company's Olive Branch, Mississippi branch had only hired one female driver since 1986, whom they terminated before her first route. The EEOC also alleged that the company had failed to hire qualified female applicants who applied over the years as drivers. The company agreed to pay $490,000.00 to settle the suit. Pursuant to a three-year Consent Decree, the company will establish a $120,000 scholarship fund. The Defendant will award the scholarships four times annually for $10,000 each throughout the duration of the decree to female applicants who seek to obtain their truck driver certifications through the company's truck driver apprenticeship program, revise its anti-discrimination policy and conduct annual training designed to prevent discrimination at its Olive Branch, Mississippi facility.

EEOC v. Whiting-Turner Contracting Company**, Civil Action No. 3:2021-cv-00753 (M.D. Tenn.)** The Defendant, a construction management and general contracting company, settled a Title VII lawsuit with the EEOC in which the EEOC alleged the company subjected black workers to a racially hostile work environment, then fired them after they complained. The Defendant will pay $1.2 million to a class of black former workers. Pursuant to a two-year Consent Decree, the company is required to incorporate a strict prohibition against racial graffiti, racial jokes, racial slurs, racial epithets, and hate symbols into its anti-harassment policy, assign an EEO liaison to each of its construction sites and conduct semi-annual training on Title VII of the Civil Rights Act of 1964.

EEOC Miami District Office

DISTRICT PROFILE

Director: **Evangeline Hawthorne**

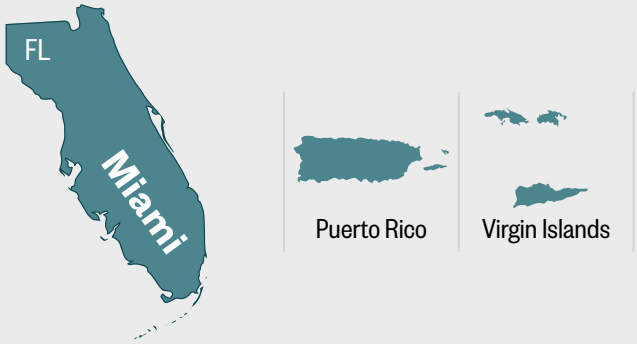
Regional Attorney: **Robert E. Weisberg**

Merit Cases Filed in FY 2023: **7 (T-6th)**

Average Days Between Determination Letter & Failure to Conciliate: **58**

Average Days Between Failure to Conciliate & Complaint: **157**

Average Days Between Determination Letter & Complaint: **170**



KEY CASES FILED IN FY 2023

***EEOC v. Asphalt Paving Systems, Inc.*, Civil Action No. 8:23-cv-02169 (M.D. Fla.)** The EEOC filed a Title VII lawsuit against Asphalt Paving Systems, Inc., an asphalt paving company, alleging that African American employees were subjected to racism and a hostile work environment through the open use of racial slurs and racist comments, including use of the "n-word" by employees and managers. Black employees were also subjected to demeaning working conditions, such as being required to work without breaks while white employees watched, and being forced to relieve themselves outdoors while white employees were taken to indoor bathrooms. The Complaint further alleges that APS prevented members of an African American paving crew from finding alternative employment by contacting a future employer and requesting that they not hire them.

***EEOC v. Kane's Furniture, LLC, d/b/a Kane's Furniture* Civil Action No. 8:23-cv-02067 (M.D. Fla.)** The EEOC filed a lawsuit against Kane's Furniture, LLC, a furniture store operator, alleging sex discrimination. In its Complaint, the EEOC alleges that Kane's chief executive officer instructed other company personnel not to hire women as delivery drivers or warehouse associates. Consistent with this instruction, Kane's refused to hire any female delivery drivers, delivery assistants, and warehouse associates across its Florida facilities, according to the EEOC.

KEY SETTLEMENTS SECURED IN FY 2023

EEOC v. Arubaanse Luchtvaart Maatschhappij Nv, Inc. d/b/a Aruba Airlines, Civil Action No. 1:23-cv-20597 (S.D. Fla.) The EEOC and Aruba Airlines settled a Title VII lawsuit brought by the EEOC which alleged a pregnant employee was terminated soon after announcing her pregnancy. The company will pay $75,000.00 in monetary relief. Pursuant to the four-year Consent Decree, the Defendant it will adopt and enforce a policy against discrimination based on pregnancy should it resume its U.S. operations. It will provide anti-discrimination and anti-retaliation training to human resources personnel, managers, and employees to ensure employees are aware of their rights and complaint procedures and management and human resources personnel are aware of their obligations to prevent workplace discrimination and how to address complaints. The decree also requires Aruba Airlines to provide the EEOC with reports of any complaints of pregnancy discrimination and describe its actions taken in response to each complaint.

***EEOC v. Houcorp, Inc.*, Civil Action No. 2:23-cv-14191 (S.D. Fla.)** The EEOC settled an ADA lawsuit it initiated against the company, a fast-food restaurant franchise, alleging that the company refused to provide an American Sign Language (ASL) interpreter upon request for an employee's orientation.

The company will pay $50,000.00 and provide ASL interpreters to applicants and employees, upon request, for interviews, orientations, trainings, and performance reviews. Pursuant to the three-year Consent Decree, the company is required to update its job postings and hiring advertisements, revise its anti-discrimination policies, post a notice regarding this lawsuit, and report on the handling of requests for reasonable accommodations. The company will also provide live training to owners, managers, and human resources personnel on the ADA, as well as training designed specifically to raise awareness about issues affecting the deaf community and dispelling stereotypes associated with hiring deaf or hard-of-hearing individuals. Also, the Company will conduct an internal audit to identify potential obstacles and to make the workplace more accessible to deaf and hard-of-hearing applicants and employees.

EEOC New York District Office

DISTRICT PROFILE

Director: **Timothy Riera (Acting)**

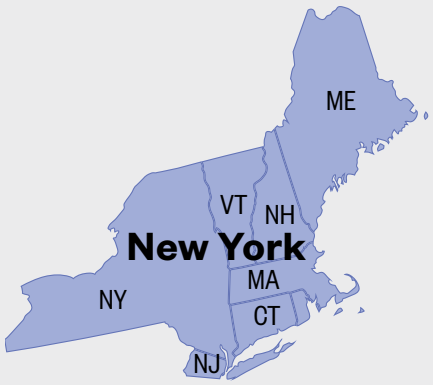
Regional Attorney: **Jeffrey Burstein**

Merit Cases Filed in FY 2023: **10 (T-3rd)**

Average Days Between Determination Letter & Failure to Conciliate: **99**

Average Days Between Failure to Conciliate & Complaint: **103**

Average Days Between Determination Letter & Complaint: **202**



KEY CASES FILED IN FY 2023

***EEOC v. ACARE HHC d/b/a Four Seasons Licensed Home Health Care,* 23-cv-5760 (E.D.N.Y.)** The EEOC filed a Title VII lawsuit against ACARE HHC d/b/a Four Seasons Licensed Home Health Care, which provides its clients with home health aides, alleging Four Seasons routinely would consent to racial preferences of patients in making home health aide assignments, including by removing Black and Hispanic home health aides based on clients' race and national origin-based requests. Those aides would be transferred to a new assignment or, if no other assignment were available, they would be terminated, according to the EEOC.

***EEOC v. T.C. Wheelers, Inc. d/b/a T.C. Wheelers Bar & Pizzeria*, Civil Action No. 1:23-cv-00286 (W.D.N.Y.)** The EEOC filed a Title VII lawsuit against T.C. Wheelers, Inc. D/b/a Wheelers Bar & Pizzeria, a restaurant, alleging that beginning in January 2021, one of T.C. Wheelers' owners repeatedly harassed an employee, a transgender male, including telling the employee that he "wasn't a real man," asking invasive questions about his transition, and asking, "Does she have female parts?" T.C. Wheelers' owners also intentionally misgendered the employee by using female pronouns (such as "she" or "her") and took no action as other employees and customers did the same. Additionally, the EEOC alleges that management and employees at T.C. Wheelers made numerous other anti-transgender comments, including asking questions about the employee's genitalia, telling him he wasn't a "real guy," and equating being transgender to pedophilia. The employee complained repeatedly to management, and TC Wheelers failed to protect the employee by not addressing the almost daily harassment from all levels of staff, including owners, managers, and line employees. Eventually, the employee had no choice but to resign, according to the Complaint.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Staffing Solutions of WNY, Inc.*, Civil Action No. 1:18-cv-00562 (W.D.N.Y.)** Staffing Solutions of WNY, Inc., a staffing agency, agreed to pay $550,000.00 to settle a Title VII lawsuit brought by the EEOC that alleged the company rejected black, disabled, pregnant and older applicants and forced out an Office Manager who opposed the discrimination. Pursuant to a three-year Consent Decree, $475,000 must be distributed to applicants and employees who were subjected to Staffing Solutions' discriminatory practices. The decree also provides for significant non-monetary relief designed to prevent further discrimination. Staffing Solutions will pay $75,000 to retain an independent monitor to regularly review its hiring and placement decisions to ensure they are legal, provide its owner and internal staff with extensive anti-discrimination training, and investigate complaints of discrimination. Also, the decree requires Staffing Solutions' owner to send a letter to all clients committing the company to following federal laws prohibiting discrimination; includes various injunctions against discrimination in the future; and requires the company to adopt a robust anti-discrimination policy and distribute it to all applicants and employees. The EEOC will monitor Staffing Solutions' compliance with these obligations for the next three years.

***EEOC v. iTutorGroup, Inc., et al.*, Civil Action No. 1:22-cv-02565 (E.D.N.Y.)** The EEOC and iTutorGroup, three integrated companies providing English-language tutoring services to students in China, settled an ADEA lawsuit brought by the EEOC alleging that the company programmed its online software to automatically reject more than 200 older applicants. The company will pay $365,000.00 to applicants who were rejected due to age pursuant to the Consent Decree. Although iTutorGroup has ceased hiring tutors in the United States, the decree also provides for significant non-monetary relief designed to prevent discrimination should iTutorGroup ever resume its U.S. operations. That relief includes extensive and continuing training for those involved in hiring tutors, issuance of a new anti-discrimination policy, and strong injunctions against discriminatory hiring based on age or sex and requesting applicants' birth dates. The EEOC will monitor iTutorGroup's compliance with these obligations for at least the next five years or longer if iTutorGroup resumes hiring tutors in the United States, and if iTutorGroup does resume its U.S. operations, it must notify and interview those applicants allegedly rejected because of age.

EEOC Philadelphia District Office

DISTRICT PROFILE

Director: **Jamie Williamson**

Regional Attorney: **Debra Lawrence**

Merit Cases Filed in FY 2023: **19 (1st)**

Average Days Between Determination Letter & Failure to Conciliate: **60**

Average Days Between Failure to Conciliate & Complaint: **195**

Average Days Between Determination Letter & Complaint: **256**

KEY CASES FILED IN FY 2023

***EEOC v. TA Dedicated, Inc. d/b/a Transport America and TForce TL Holdings USA, Inc. d/b/a Transportation Enterprise Services*, Civil Action No. 1:23-cv-01802 (N.D. Ohio)** The EEOC filed a Title VII lawsuit against TA Dedicated, Inc. D/b/a Transport America and TForce TL Holdings USA, Inc. D/b/a Transportation Enterprise Services, trucking companies, alleging that beginning in late 2018

workers and supervisors at Transport's facility in North Jackson, Ohio harassed two mechanics because they are gay. The harassment included frequent use of gay slurs and other derogatory comments, physical violence and other inappropriate contact, defacement of uniforms, and other hostile behavior.

The EEOC alleges the companies' human resources and management officials were aware of the harassment but failed to take effective action to stop it and prevent it from recurring in the future. Rather, after the mechanics reported the harassment, the shop manager threatened that anyone who went to human resources would lose their position. The mechanics suffered further harassment and retaliation, including destruction of personal property, unfavorable assignments, false accusations, and discharge or being forced to quit, according to the EEOC.

***EEOC v. Hatzel & Buehler, Inc.*, Civil Action No. 3:23-cv-03093 (D.N.J.)** The EEOC filed an ADEA lawsuit against Hatzel & Buehler, Inc., a commercial electrical contractor, alleging that since at least November 2020, the Company has refused to hire older applicants and job candidates for project manager and estimator positions at its New Jersey location on account of their ages. The Complaint charges that the vice president of Hatzel & Buehler's New Jersey branch requested that a recruiting company seek out younger project manager and estimator candidates for Hatzel & Buhler job opportunities, and that he refused to hire older workers because they did not fall within his stated age range. The EEOC also alleged that the same vice president engaged in age-discriminatory recruitment practices and failed to retain job applicant and hiring-related records in violation of federal law.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Mechanical Design Systems, Inc.*, Civil Action No. 8:22-cv-02463 (D. Md.)** Mechanical Design Systems, Inc., a heating, ventilation and air conditioning (HVAC) design and installation services company, settled a Title VII lawsuit brought against it by the EEOC alleging female project managers were paid less than male colleagues to perform equal work and, in many instances, the females were called upon to perform additional work or duties. The female project managers were paid significantly less than their male colleagues despite having more experience and seniority in the position and satisfactorily performing their duties. The company will pay $210,000.00 to the two females named in the lawsuit. The Consent Decree also requires the company to take affirmative steps to prevent pay discrimination in the future. This includes implementation of enhanced compensation and discrimination policies, training for human resources and management officials involved in compensation decisions, and notices to employees about their rights. The company has also agreed to raise the pay of a still-employed female project manager to correspond with her male counterpart.

***EEOC v. UFP Ranson, LLC*, Civil Action No. 3:21-CV-00149 (N.D.W. Va.)** The EEOC and UFP Ranson, LLC, a manufacturer of lumber and building materials, settled a Title VII lawsuit alleging race and religious discrimination after the company subjected a black Muslim worker and six other black workers to harassment and fired one as retaliation for complaining. The company will pay $215,000.00 to a class of seven claimants. The Company is prohibited from engaging in race or religious discrimination or retaliation in the future. The company must designate a management-level official to serve as an onsite local equal employment opportunity administrator. The Defendant must create and disseminate a revised anti-discrimination policy and distribute procedures to appeal the company's handling or resolution of religious harassment and discrimination or retaliation complaints. The company must also provide training on Title VII to the local EEO administrator and other employees with authority to investigate or take corrective action in response to employee complaints of harassment or discrimination.

EEOC Phoenix District Office

DISTRICT PROFILE

Director: **Nancy Sienko (Acting)**

Regional Attorney: **Mary Jo O'Neill**

Merit Cases Filed in FY 2023: **9 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **116**

Average Days Between Failure to Conciliate & Complaint: **171**

Average Days Between Determination Letter & Complaint: **302**

KEY CASES FILED IN FY 2023

***EEOC v. Sandia Transportation, LLC*, Civil Action No. 1:23-cv-00274 (D.N.M.)** The EEOC files a Title VII lawsuit against Sandia Transportation, LLC, a non-emergency medical transportation company, alleging that Sandia subjected female employees to harassment because of their sex, because they were lesbians, or because they did not fit management's idea of femininity. According to the Complaint, the owner of the company expressed that he did not believe female employees belonged in the workplace. Sandia's owner also subjected a group of female employees to severe or pervasive harassment, calling them "f*ckin' lesbians" and telling each of them "women like [them] would be killed in [his] country." The owner often referred to women as "fat ugly bitches," "dumb," "stupid," "lazy," and "ignorant," and he frequently told everyone, "I hate f*ckin' dealing with women!" On March 24, 2017, Sandia's owner announced to the office that "All the lesbians are fired!" the EEOC charges.

***EEOC v. A&A Appliance Inc. d/b/a Appliance Factory Outlet, Inc.*, Civil Action No. 1:23-cv-02456 (D. Colo.)** The EEOC has filed an ADA lawsuit against A&A Appliance, Inc. d/b/a Appliance Factory Outlet, Inc., a corporation operating appliance stores, alleging that a sales associate who had ongoing symptoms related to a COVID-19 infection requested additional leave of approximately one to two weeks and Appliance Factory refused to grant the accommodation and failed to communicate with the employee about the precise nature of her condition or what alternative accommodation could be made to meet her needs. When the sales associate's leave expired, Appliance Factory terminated her, the Complaint charges.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. SSC Montrose San Juan Operating Co., LLC and SavaSeniorCare Administrative Services LLC, d/b/a The San Juan Living Center*, Civil Action No. 20-cv-03162 (D. Colo.)** The EEOC and the Defendants (SAVA), skilled nursing facility operators, settled a Title VII lawsuit alleging female employees were subjected to sexual harassment by grabbing their breasts and buttocks, asking them for sexual favors, and directing inappropriate sexual language and gestures towards them. The female employees complained about the harassment to the San Juan Living Center's management and both the center's management as well as nationwide SAVA administrative employees were aware of the residents' ongoing hostile behavior and sexual harassment, but did nothing to stop or prevent it. SAVA then retaliated against a female employee who reported sexual harassment by suspending her without pay and firing her within days of her complaint. Pursuant to the Consent Decree, SAVA has agreed to pay $150,000.00 to the victims of sexual harassment and retaliation. Should SAVA operate any skilled-nursing facility in

Colorado in the future, it will review and revise its anti-discrimination policies to prevent unlawful sexual harassment, including sexual harassment by residents. SAVA will also provide training to its employees in Colorado on how to properly care for and report residents who engage in hostile behavior or unwelcome sexual behavior.

***EEOC v. Roark-Whitten Hospitality 2, LP., d.b.a. Whitten Inn, et.al.*, Civil Action No. 1:14-cv-00884 (D.N.M.)** The Company, a hotel, settled a Title VII lawsuit brought be the EEOC alleging that Hispanic employees were subjected to discrimination and a hostile work environment, including disparate treatment and racial slurs and comments. The EEOC charged that the Whitten Inn enforced a discriminatory no-Spanish policy and a name-changing policy that made employees with ethnic-sounding names use an anglicized name instead. Several of the employees were fired or forced to quit in retaliation for complaining about the discrimination or refusing to anglicize their names or to stop speaking in Spanish to customers who spoke in Spanish. The two settlement agreements filed with and approved by the court require Whitten Inn to pay $65,000 and SGI to pay $22,000 in compensatory damages to the aggrieved individuals who were harmed by the discrimination in this matter.

***EEOC v. Circle K Stores Inc.* (Conciliation Agreement)** Circle K Stores Inc. entered into a nationwide conciliation agreement to pay $8,000,000 to resolve an investigation concerning disability, pregnancy, and retaliation discrimination charges concerning alleged violations of the Americans with Disabilities Act, Title VII, and the Pregnancy Discrimination Act. The EEOC had determined it had reasonable cause to believe Circle K denied reasonable accommodations to both pregnant employees and those with disabilities. The investigation also included allegations that employees were subjected to actions such as involuntary unpaid leave, requirements that employees be completely healed to return to work, and terminations. The settlement includes a class fund to compensate aggrieved individuals and covers impacted individuals employed at Circle K from 2009 to 2022. Circle K also agreed to: update its policies as needed; appoint a coordinator to provide oversight on pregnancy-related disability policies, requests for accommodations, and maintenance of records; conduct climate surveys and exit interviews with specific attention to the accommodation process; conduct anti-discrimination training for all employees, including management; and require performance evaluations of managers, including consideration of compliance with equal employment opportunity laws. The terms of the agreement are in effect for four years.

EEOC San Francisco District Office

DISTRICT PROFILE

Director: **Nancy Sienko**

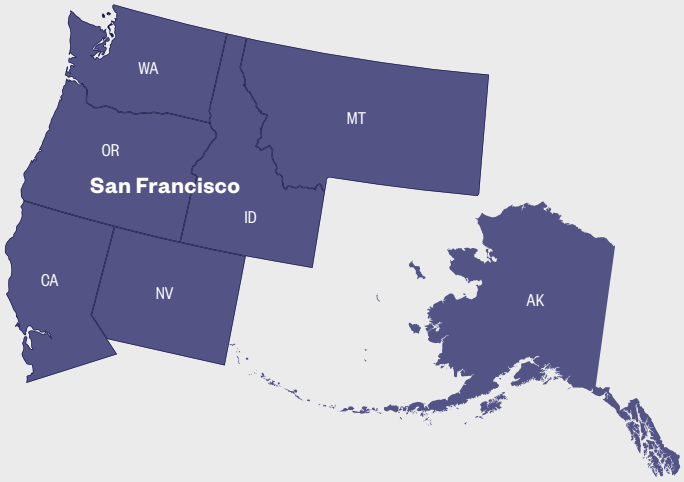
Regional Attorney: **Roberta Steele**

Merit Cases Filed in FY 2023: **5 (7th)**

Average Days Between Determination Letter & Failure to Conciliate: **120**

Average Days Between Failure to Conciliate & Complaint: **306**

Average Days Between Determination Letter & Complaint: **426**



KEY CASES FILED IN FY 2023

***EEOC v. Covius Services LLC*, Civil Action No. 2:23cv186 (E.D. Wash.)** The EEOC filed an ADA lawsuit against Covius Services LLC, a provider of services, solutions and technology for financial companies, alleging the company refused to hire a woman with chronic migraines and fibromyalgia because she was on pain medication. The EEOC claims the employee was qualified to become a non-escrow tax specialist for Covius based on her education and prior experience, but because the company regarded her as disabled, it wouldn't give her the job.

***EEOC v. PRC Industries, Inc. Corp.*, Civil Action No. 3:23cv135 (D. Nev.)** The EEOC filed a Title VII lawsuit against PRC Industries, Inc. Corp., an E-commerce remanufacturer, alleging that Black employees were subjected to a hostile work environment, including offensive language and that their complaints were ignored by PRC. The employees were ultimately terminated according to the Complaint.

KEY SETTLEMENTS SECURED IN FY 2023

***EEOC v. Packaging Corporation of America Central California Corrugated, LLC, et al.*, Civil Action No. 2:20-cv-01948 (E.D. Cal.)** The EEOC and the Defendants have reached a settlement regarding a Title VII case brought by the EEOC alleging that African American workers faced racial taunts and nooses in the workplace. By way of case background, the alleged conduct at issue in this lawsuit occurred almost exclusively before Defendant Packaging Corporation of America acquired the underlying business. Pursuant to the three-year Consent Decree, the Company will pay $385,000 in lost wages and emotional distress damages to the two former employees. The Defendants will revamp company policies and train employees on preventing and reporting racial harassment. The companies will also implement policies and procedures to facilitate the prompt and thorough investigations of any future complaints of discrimination or harassment.

***EEOC v. Chipotle Services, LLC and Chipotle Mexican Grill, Inc.*, Civil Action No. 2:22-cv-00279 (W.D. Wash.)** Chipotle agreed to settle a Title VII lawsuit brought by the EEOC alleging that crew members were sexually harassed and despite their reports to management, Chipotle failed to adequately investigate their complaints and did not take adequate remedial measures to stop the sexual harassment. Pursuant to the three-year Consent Decree, Chipotle will pay $400,000 to the three former employees and will appoint an internal Consent Decree coordinator to review, revise and implement anti-discriminatory policies and procedures that prohibit sexual harassment and retaliation. Chipotle will provide additional sexual harassment training to its employees, supervisors and managers at seven of its Washington restaurants

in Bellevue, Redmond, Issaquah and Sammamish. Chipotle will also provide additional training to its HR investigators on how to conduct sexual discrimination and harassment investigations. Chipotle will also adopt and disseminate policies holding its supervisors and managers accountable for their compliance with its EEO policies and procedures.

EEOC St. Louis District Office

DISTRICT PROFILE

Director: **David Davis**

Regional Attorney: **Andrea Baran**

Merit Cases Filed in FY 2023: **7 (T-6th)**

Average Days Between Determination Letter & Failure to Conciliate: **155**

Average Days Between Failure to Conciliate & Complaint: **109**

Average Days Between Determination Letter & Complaint: **265**

KEY CASES FILED IN FY 2023

***EEOC v. V8 Motors LLC d/b/a Vicars Powersports*, Civil Action No. 6:23-cv-00299 (E.D. Okla.)** The EEOC filed a Title VII lawsuit against V8 Motors LLC d/b/a Vicars Powersports, a retailer of ATVs, UTVs, dirt bikes, motorcycles and personal watercraft. The Complaint states that prior to April 2020, a female employee at Vicars Powersports was performing both finance manager and sales manager duties. She was the only woman working in the sales department. In April 2020, the dealership hired a new male general manager and a new male finance manager, and took away the female's finance manager duties, reducing her role to sales manager. The new male managers immediately began subjecting the female employee to sexually offensive conduct and undermining her management authority. In August 2020, the dealership abruptly informed the employee that her sales manager position was being eliminated and she was terminated. Shortly thereafter, Vicars Powersports posted a message on Facebook announcing a less experienced male employee's promotion to the woman's former position, according to the EEOC.

***EEOC v. Chipotle Services, LLC*, Civil Action No. 2:23-cv-02439 (D. Kan.)** The EEOC has filed a Title VII lawsuit against Chipotle Services, LLC, a national restaurant chain. The Complaint states the company employed a teen as a line server. During the summer of 2021, an assistant manager began repeatedly asking her to remove her hijab, or headscarf, pressuring her to show him her hair. Despite the teen's rejections and complaints to management, Chipotle failed to take action to stop the manager's harassment. Chipotle's inaction resulted in the manager escalating his abuse, ultimately grabbing and forcibly removing part of the teen's hijab. After the teen reported the incident, Chipotle again failed to take prompt remedial action, and she was forced to submit her two weeks' notice. Additionally, Chipotle retaliated against the teen by refusing to schedule her to work additional shifts unless she agreed to transfer locations, while allowing her harasser to continue working at the same location, according to the EEOC.

KEY SETTLEMENTS SECURED IN FY 2023

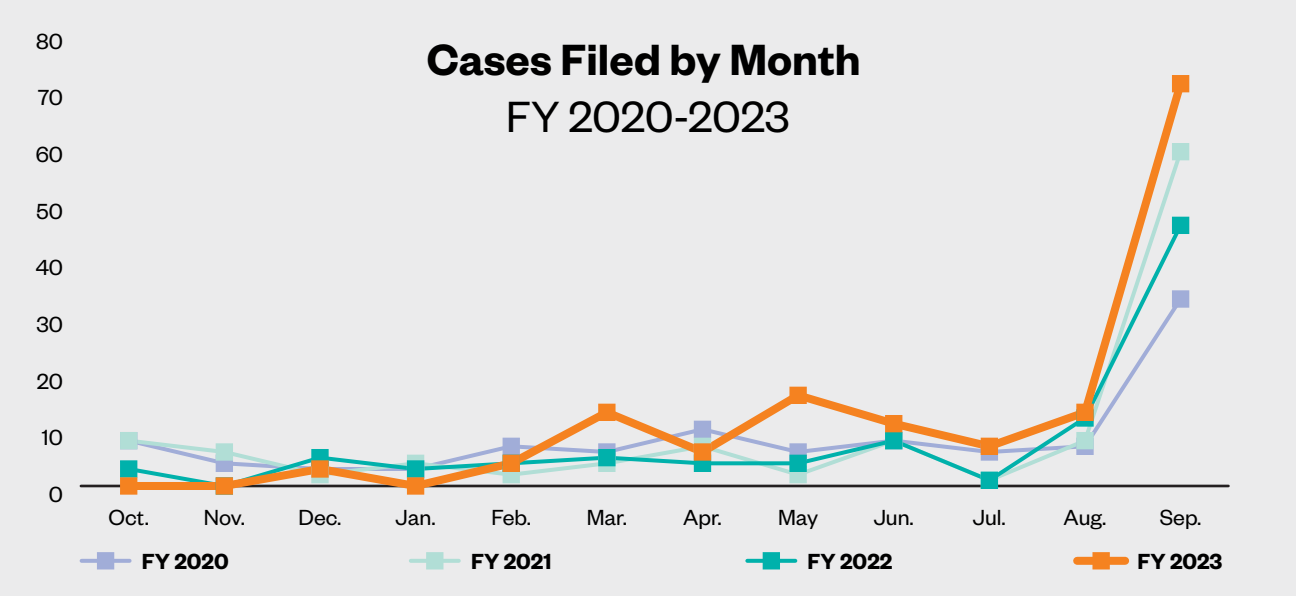
***EEOC v. Hiland Dairy Foods Company, LLC*, Civil Action No. 5:21-cv-00483 (W.D. Okla.)** The Company, a producer and distributor of dairy products, has agreed to pay $140,000.00 to settle an ADA lawsuit brought by the EEOC alleging the Company refused to hire an applicant with a vision impairment. The Company did not consider whether any assistive devices or other reasonable accommodations could have mitigated the potential safety concerns. Pursuant to the five-year Consent Decree requires Hiland Dairy to pay $140,000 to adopt policies, enact procedures, and provide employee training to ensure future compliance with the ADA. The decree also requires Hiland Dairy to notify employees of their right to reasonable accommodation under the ADA and periodically report to the EEOC.

PART IV: By The Numbers: EEOC Data Analysis

A. Trends in EEOC Federal Court Filings In FY 2023

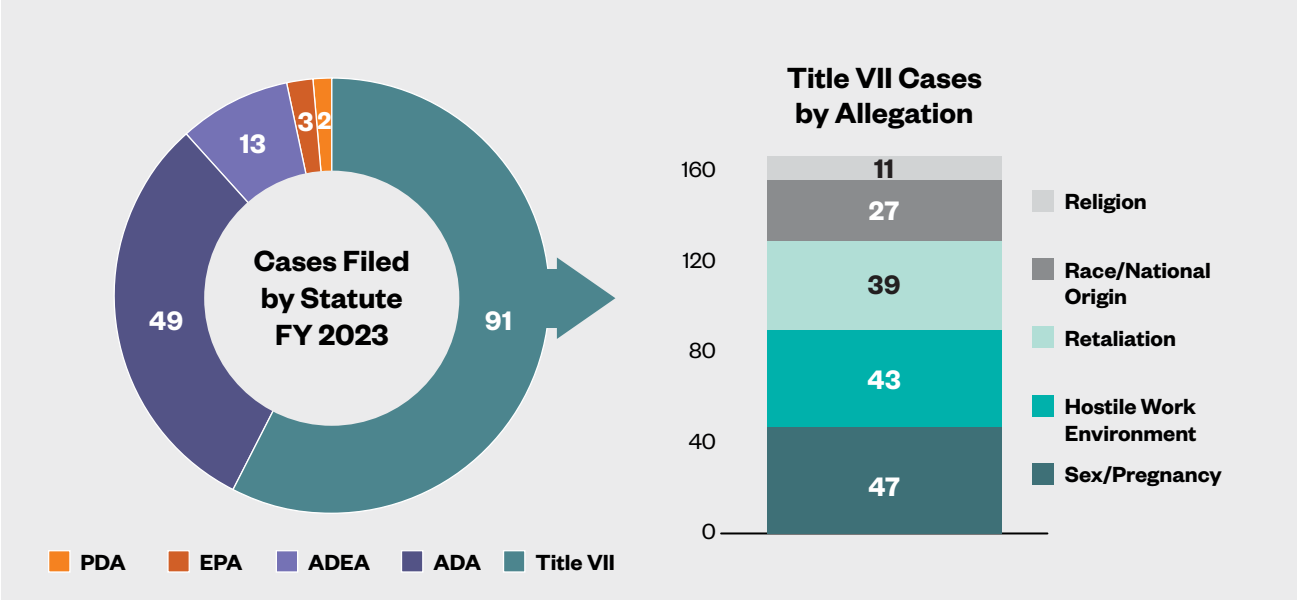
Each fiscal year we analyze the types of lawsuits the EEOC files, in terms of the statutes and theories of discrimination alleged, as well as when the cases were filed. In FY 2023, we saw the total number of filings—144—increased a sizable amount from FY 2022's 95 total filings. This spike in merit lawsuits aligns with the EEOC's heightened levels of litigation activity in pre-pandemic years and suggests a return to this approach under the Commission's new Democratic majority.

Beginning with the timing of these filings, the EEOC once again ramped up its litigation activity at the end of its fiscal year by filing 71 cases in September alone. In addition to its active September, the EEOC was particularly active in the spring of 2023, as it filed 13 lawsuits in March and 16 lawsuits in May. Both figures represent 5-year high marks for EEOC filings for each month. The graph below show the number of EEOC lawsuits filed per month over the last four fiscal years.



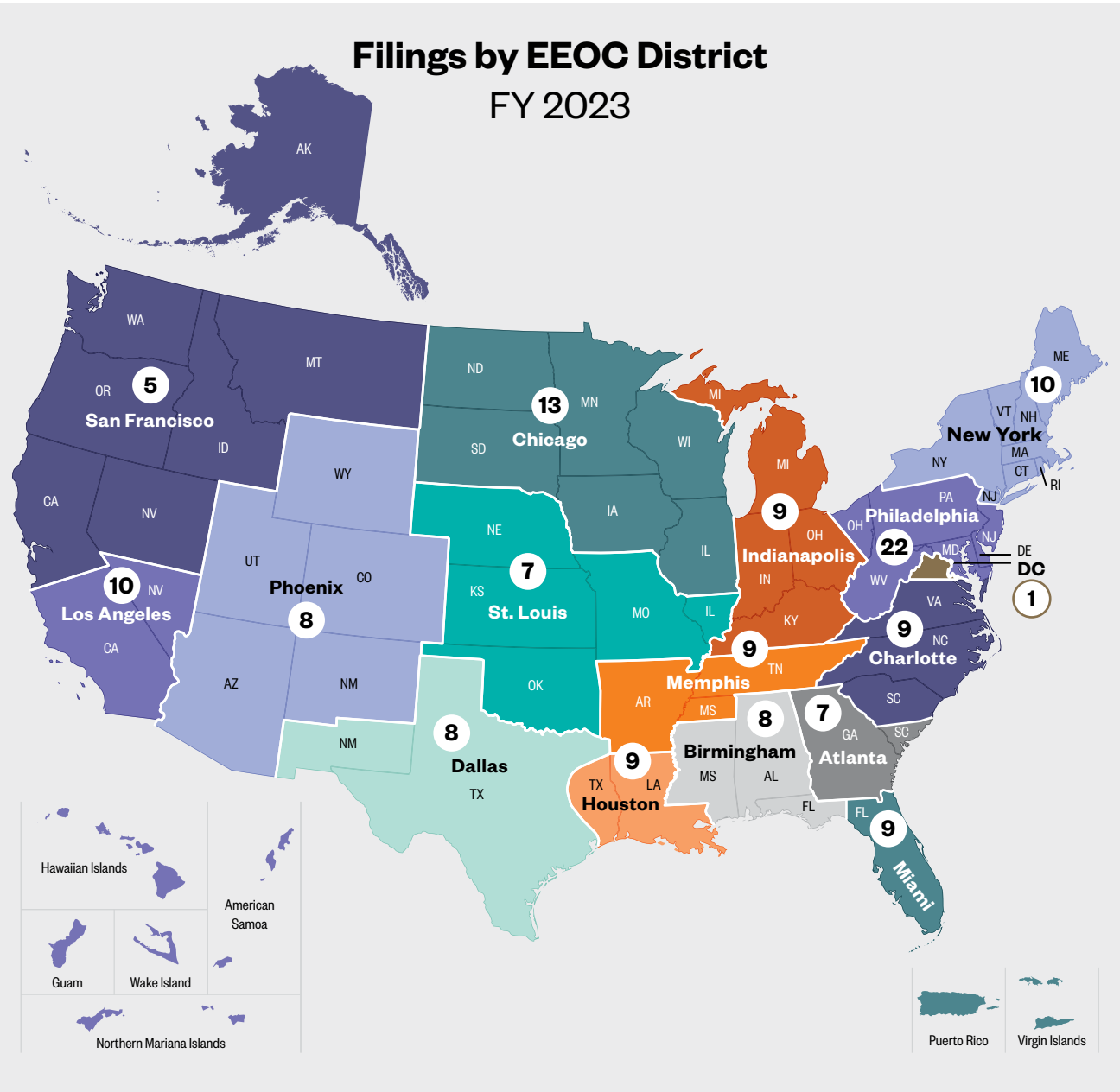
With respect to the types of claims asserted, the graphs below show the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act, etc.) and, for Title VII cases, the theory of discrimination alleged. This analysis can often reveal how the EEOC is shifting its strategic priorities.

Despite the overall increase in lawsuits, when considered on a percentage basis, the distribution of cases filed by statute remained roughly consistent compared to the last few years. The graphs below show the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act) and, for Title VII cases, the theory of discrimination alleged.



When considered on a percentage basis, the distribution of cases filed by statute remained roughly consistent compared to FYs 2022 and 2021. Title VII cases once again made up the majority of cases filed, accounting for 63% of all filings (on par with the 65% in 2022 and 62% in FY 2021). ADA cases also made up a significant percentage of the EEOC's filings, totaling 34% this year, generally aligning with prior levels of 29% in 2022 and 36% in FY 2021. In terms of pure filings, however, ADA lawsuits rose from just 27 cases last fiscal year to 49 cases in FY 2022. Age discrimination filings are also on the rise, with 13 filings in FY 2022 compared to 7 filings in FY 2022 and just one filing in FY 2021.

One of the most noticeable trends of this fiscal year is the prominent levels of litigation activity by the Commission's East Coast District Offices. Philadelphia led the way with a total of 22 lawsuits filed in FY 2022, outpacing the next closest District Office (Chicago) by nine filings. Other active Districts on the East Coast include New York (10), Charlotte (9), and Indianapolis (9). Conversely, the Commission's West Coast Districts were relatively quiet in FY 2022, with the Los Angeles and San Francisco Offices combining for only 15 total years this fiscal year.


Filings by EEOC District
FY 2023
AK
WA
OR
5
San Francisco
CA
NV
ID
MT
WY
UT
CO
10
NV
Los Angeles
CA
Phoenix
8
AZ
NM
ND
SD
13
MN
Chicago
WI
MI
IA
IL
NE
KS
7
St. Louis
MO
OK
NM
8
Dallas
TX
AR
MS
9
TX
LA
Houston
9
MI
OH
IN
KY
Indianapolis
TN
Memphis
8
Birmingham
MS
AL
FL
7
GA
Atlanta
SC
NC
9
Charlotte
VA
WV
PA
OH
22
Philadelphia
NJ
MD
DE
DC
1
ME
10
VT
NH
MA
CT
RI
NY
New York
FL
9
Miami
Hawaiian Islands
American Samoa
Guam
Wake Island
Northern Mariana Islands
Puerto Rico
Virgin Islands

B. EEOC Charge Data Analysis

In addition to the EEOC's annual merit filings, an in-depth analysis of EEOC charge statistics can also provide an interesting perspective on the status of the employment discrimination space. While merit filings reflect more on the Commission's priorities, the EEOC's charge data represents how American workers themselves feel they are being treated in the workplace.

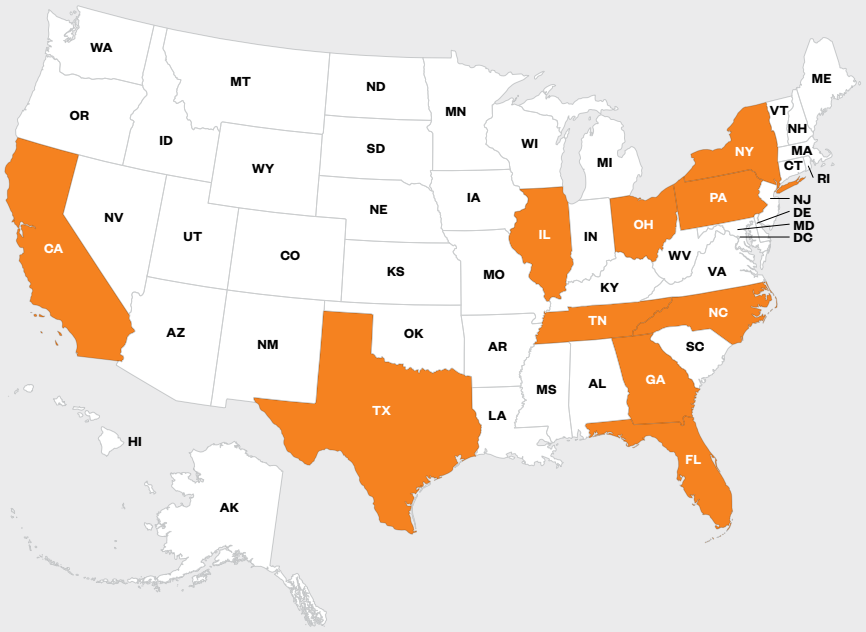
Because filing an administrative charge with the EEOC is a prerequisite to filing a lawsuit under federal antidiscrimination law, employees throughout the country regularly file between 60,000-80,000 EEOC charges per year. To that end, the Commission received 72,559 charges in FY 2022. This number represented a substantial increase of more than 10,000 charges as compared to FY 2021, in which the EEOC saw 61,331 charges filed. While the EEOC's amount of charges received had been consistently declining since FY 2017, this fiscal reflects a return to prior levels of EEOC activity and thus aligns with the Commission's increase in merit filings as well.

With respect to where these charges are being filed, there are certain geographic "hot spots" in which employees consistently file the most EEOC charges. These states are highlighted by the map graphic below. In FY 2022, Texas outpaced the rest of the country by nearly 2,000 charges. Following Texas, which saw 6,990 charges filed in FY 2022, Florida (5,192), Illinois (4,909), California (4,404), and Pennsylvania (4,058) rounded out the top five most popular filing locations.

Top 10 States in EEOC Charges Received
FY 2022

CHARGES RECEIVED BY STATE

- Texas: **6,990**
- Florida: **5,192**
- Illinois: **4,909**
- California: **4,404**
- Pennsylvania: **4,058**
- Georgia: **3,729**
- New York: **3,534**
- North Carolina: **3,506**
- Tennessee: **2,599**
- Ohio: **2,342**

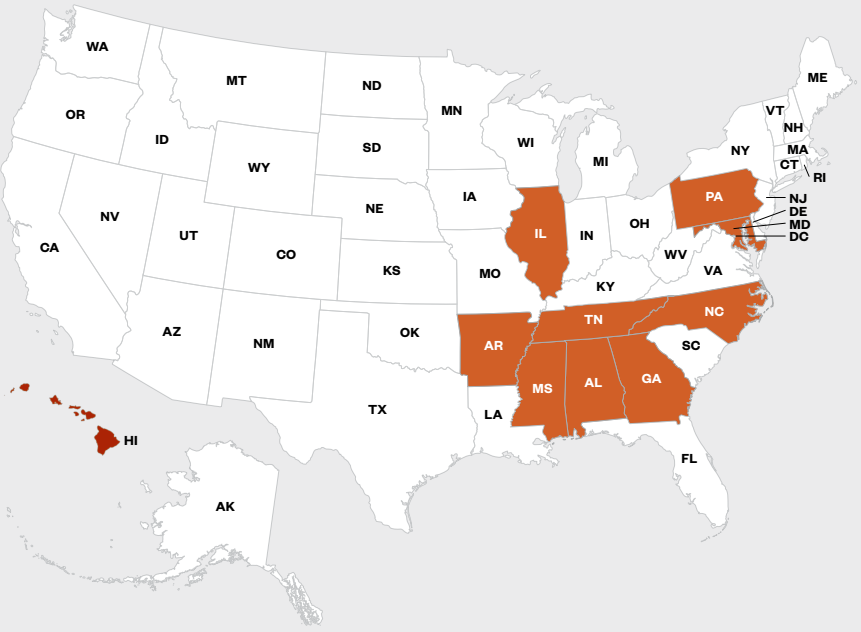


However, when adjusted to account for state population, the Southeast region of the country stands out in terms of EEOC charge filings per capita. As demonstrated by the map graphic below, in FY 2022, Mississippi led the way with over four EEOC charges filed for every 10,000 people living in the state. Other popular states in this per-capita category include Hawaii (3.92 charges per 10,000 residents), Illinois (3.9), Arkansas (3.8), and Tennessee (3.69).

Top 10 States in EEOC Charges Received Relative to State Population FY 2022

CHARGES RECEIVED PER 10,000 POPULATION

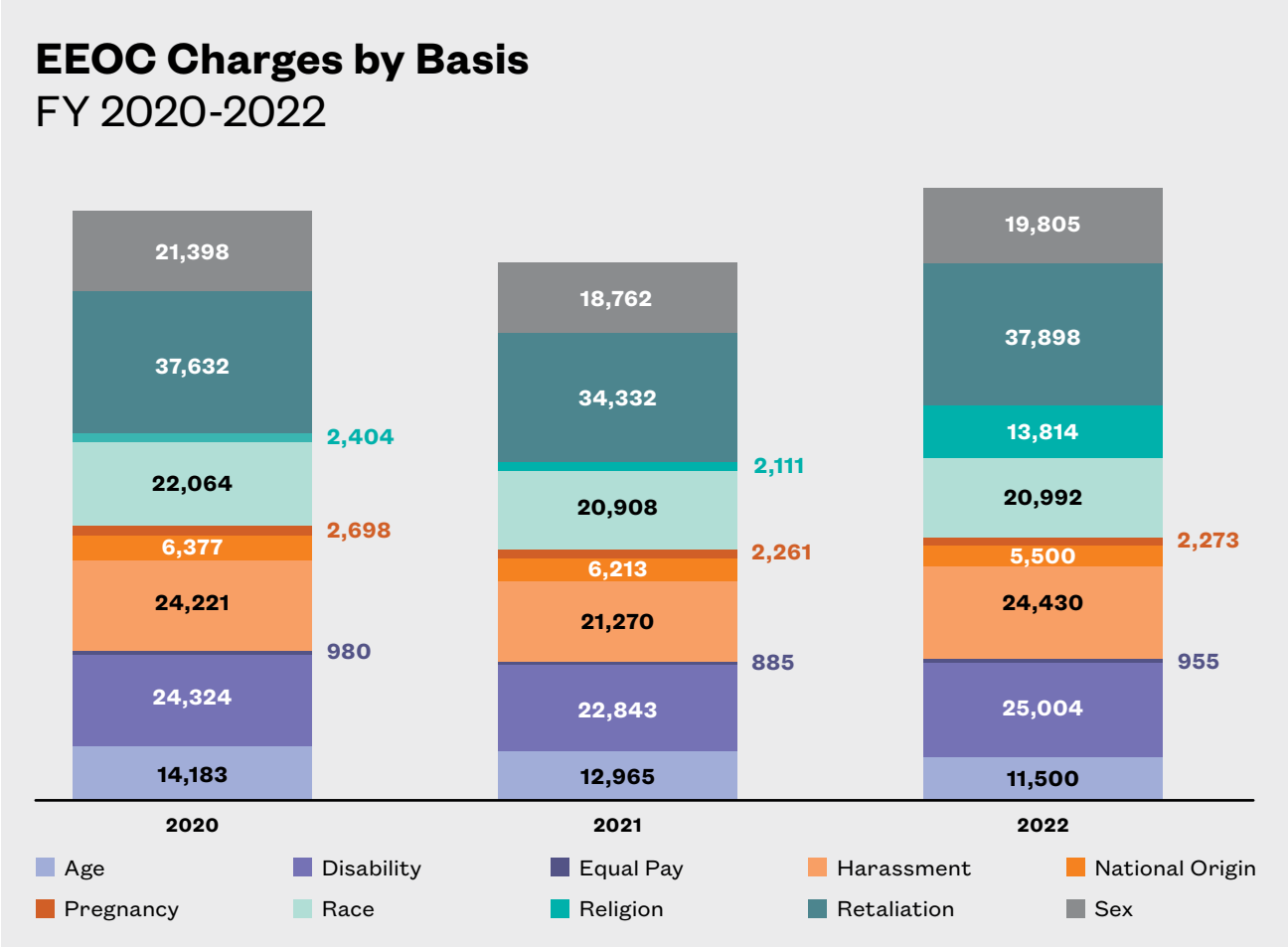
- Mississipp: **4.08**
- Hawaii: **3.92**
- Illinois: **3.90**
- Arkansas: **3.80**
- Tennessee: **3.69**
- Georgia: **3.42**
- Alabama: **3.30**
- North Carolina: **3.28**
- Pennsylvania: **3.13**
- Maryland: **3.01**



2023 state population data courtesy of census.gov.

In terms of the types of charges filed with the EEOC, retaliation is consistently the most common allegation, outpacing the next most popular category (typically race or disability discrimination) by at least 10,000 charges per year. Following with that trend, retaliation claims accounted for approximately 23% of all charges filed in FY 2022. The next most popular charge types in FY 2022 were disability discrimination, race discrimination, and harassment.

The bar graph below represents the types of charges filed with the EEOC between fiscal years 2018-2022. As this graph demonstrates, the amount of disability, race, and sex-based discrimination charges have remained relatively steady over the past five years. However, one type of charge that saw a notable decline in FY 2022 was age discrimination. While ADEA charges typically encompass about 9-10% of annual EEOC charges, they only accounted for 7% of total charges in FY 2022 and experienced a year-over-year decrease of approximately 1,500 charges.



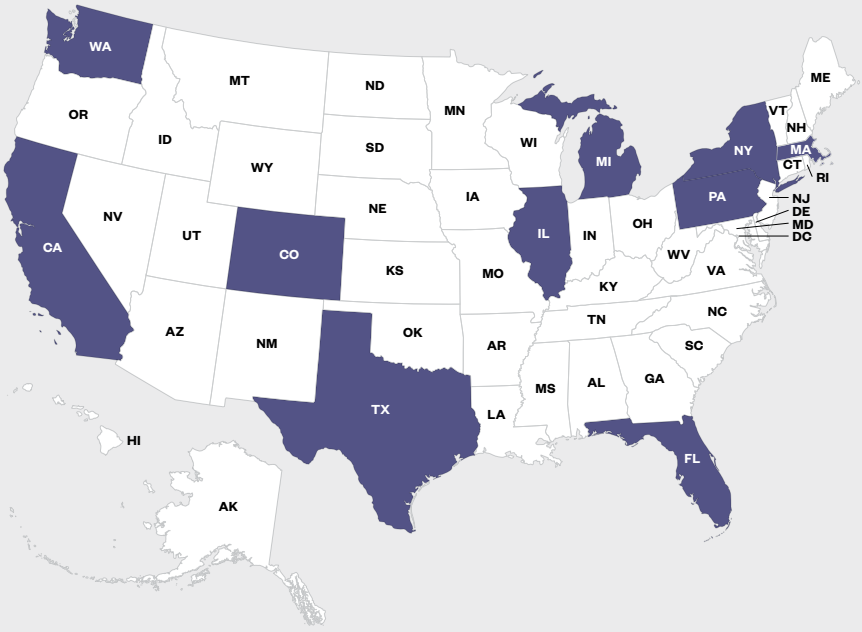
On the other hand, the EEOC experienced a striking increase in religious discrimination charges in FY 2022. In fact, American workers filed more religious-based EEOC charges in FY 2022 than ever before, lodging 13,814 such charges during the FY. This represented an eye-popping spike of over 600% compared to FY 2021, in which the EEOC received only 2,111 religious discrimination charges. This spike is a direct result of the COVID-19 pandemic, as the EEOC's own website notes that the increase in these charges is related to COVID-19 vaccine mandates imposed by governments and employers in FY 2022.

The graph below offers further context on where these religious-based charges were filed relative to state population. Specifically, while larger states such as California and New York received the most religious discrimination charges in FY 2022, factoring in state population tells a slightly different story. On a per capita basis, Hawaii received by far the most religious discrimination charges this FY at 2.24 per 10,000 residents, followed by Washington (1.37), Illinois (1.14), and Massachusetts (1.05). The East coast in particular stands out here, as four of the top 10 states in per capita religious discrimination charges in FY 2022 are in the Eastern region of the U.S.

Top 10 States in EEOC Religious Discrimination Charges Received FY 2022

RELIGIOUS DISCRIMINATION CHARGES RECEIVED BY STATE

- California: **1,550**
- Illinois: **1,434**
- New York: **1,143**
- Washington: **1,069**
- Massachusetts: **733**
- Texas: **600**
- Pennsylvania: **537**
- Michigan: **510**
- Colorado: **465**
- Florida: **367**



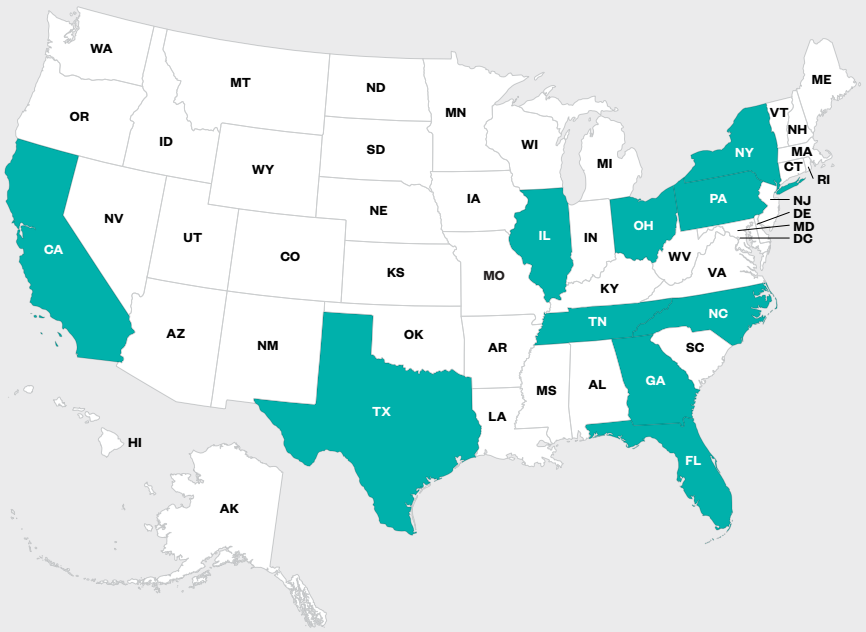
Preventing sexual harassment in the workplace remains a top priority for the EEOC. Indeed, one of the six EEOC priorities is "Preventing Harassment" (and has been since 2013). The EEOC also launched a Select Task Force on the Study of Harassment in the Workplace in 2015. To this end, harassment charges made up over 15% of all charges filed in FY 2022, as employees filed 24,430 EEOC charges alleging some type of workplace harassment.

The map graphic below highlights the top 10 states in terms of the amount of Title VII sexual harassment charges received during FY 2022. Similar to the state-by-state breakdown of overall charge filings above, Texas was also the leader in sexual harassment charges received in FY 2022. After Texas, the next most popular filing locations for sexual harassment charges were Florida, Georgia, Pennsylvania, and New York.

Top 10 States in EEOC Sexual Harassment Charges Received FY 2022

SEXUAL HARASSMENT CHARGES RECEIVED BY STATE

- Texas: **734**
- Florida: **538**
- Georgia: **413**
- Pennsylvania: **372**
- New York: **363**
- Illinois: **329**
- Tennessee: **278**
- North Carolina: **243**
- California: **225**
- Ohio: **219**



PART V: Industry Focus

As described in Part II in its SEP, the EEOC identifies particular industries on which it intends to focus its enforcement activity. And as described in Part III, the EEOC's District Offices approach litigation and settlement activity in their own idiosyncratic ways.

Part V provides an overview of industries hit repeatedly by EEOC-initiated litigation in FY 2023, the number and bases of the complaints, which District Offices were mostly likely to bring those cases, and summaries of notable lawsuits filed.

A. Hospitality Industry Profile

Hospitality Industry Merit Cases Filed in FY 2023

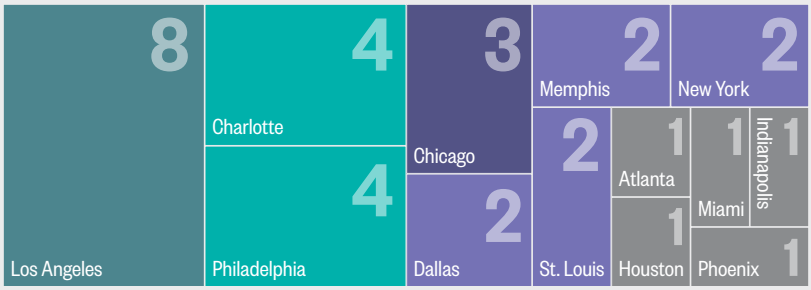
32

Statutory Basis for Suit

25: Title VII **1:** PDA

9: ADA

EEOC District Offices Bringing Suit & Number of Lawsuits Brought by Each District



The EEOC's litigation efforts reflect its view that hospitality workers are vulnerable workers to discrimination and harassment. In FY 2023, the EEOC initiated a steady stream of litigation focused on protecting young and/or diverse low-wage workers, often those working restaurants, who the EEOC views as lacking work-experience, having a perceived lack of knowledge regarding available workplace protections, or being reluctant to challenge authority figures.[91]

KEY CASES FILED IN FY 2023

***EEOC v. Chipotle Services, LLC*, 2:23-cv-02439 (D. Kan.)** The EEOC filed a lawsuit on behalf of a teenage employee working in a restaurant, asserting claims of religious discrimination and harassment and retaliation in violation of Title VII. Specifically, the EEOC alleged that an assistant manager repeatedly pressured the teen to remove her hijab, and the company failed to act when she refused and complained to management. According to the EEOC, the assistant manager later forcibly removed the teen's hijab, and the company again failed to take corrective action, prompting her to resign.

***EEOC v. R& G Endeavors Inc., d/b/a Culver's of Cottage Grove*, 0:23cv1501 (D. Minn)** The EEOC's complaint alleges that multiple workers endured harassment at a restaurant. According to the EEOC, a gay and African-American employee was subjected to racial and homophobic insults by managers and other employees who discussed his sex life and referred to him as the restaurant's "adopted African child." The EEOC also alleged that female employees, some as young as 14, experienced sexual harassment, including unwanted sexual touching, jokes, and propositions.

[91] For additional analysis of EEOC sexual harassment claims focused on teens working in the restaurant industry, *see* Christopher DeGroff, Andrew Scroggins, and Christopher Kelleher, *EEOC's Crosshairs Locked On Harassment of Teens In Restaurant Industry*, Workplace Class Action Blog (May 24, 2023), https://www.workplaceclassaction.com/2023/05/eeocs-crosshairs-locked-on-harassment-of-teens-in-restaurant-industry/.

***EEOC v. Simply Slims, LLC dba Slim Chickens*, 6:23-cv-6090 (W.D. Ark.)** The EEOC alleged that a restaurant shift manager made inappropriate sexual comments to a young female employee. According to the EEOC, the employee immediately reported the conduct to the general manager, but the company failed to address the harassment, and the shift manager continued to harass other young female employees, including teenagers. The EEOC alleged that the inappropriate conduct included the unwelcome, intentional touching of employees' shoulders, breast, bottom, and inner thigh, leading forced several of the employees to resign.

B. Healthcare Industry Profile

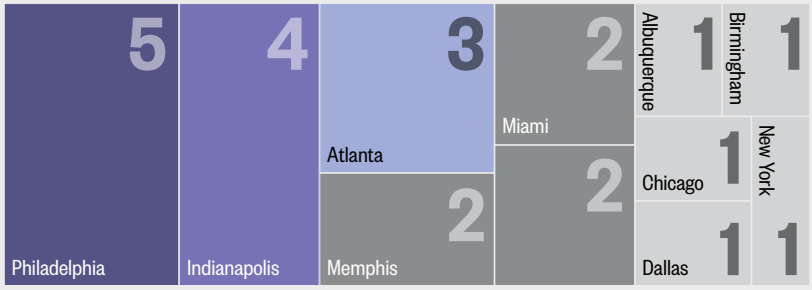
Health Care Industry Merit Cases Filed in FY 2023

23

Statutory Basis for Suit

12: Title VII
4: PDA
7: ADA
1: ADEA

EEOC District Offices Bringing Suit & Number of Lawsuits Brought by Each District



The EEOC hit the healthcare industry with a wide-ranging and geographically dispersed set of complaints in FY 2023, with a significant emphasis on ADA failure to accommodate, pregnancy discrimination, and hostile work environment. Perhaps reflecting employee demographics in the healthcare industry, all but two of the cases were initiated by the EEOC on behalf of one or more female employees. Most cases were brought on behalf of a single employee, but two were brought on behalf of multiple employees and/or all similarly-situated employees.

KEY CASES FILED IN FY 2023

***EEOC v. Inova Home Health and Alternate Solutions Health, et al.*, 1:23-cv-00264-PTG-IDD (E.D. Va)** The EEOC alleged that two healthcare employers paid female Post-Acute Care Coordinators (PACCs) less than male PACCs, in violation of Title VII and the Equal Pay Act. According to the EEOC's lawsuit, male and female PACCs performed equal work under similar working conditions, but females were paid less. The EEOC alleged that current female PACCs were paid less than their newly-hired male counterparts, despite having excellent performance, more job-related experience, and more seniority in the PACC position. The EEOC also alleged the employers refused to adjust wages after receiving a complaint of pay discrimination.

***EEOC v. William Beaumont Hospital*, 2:23cv11560 (E.D. Mich.)** The EEOC alleged that the healthcare employer denied the request of a registered nurse to work fewer than 32 hours a week as an accommodation for her medical work restriction. According to the EEOC, the employee expressed interest in several jobs she believed she could have performed within her work hours restriction and asked to be placed in any of them, but the employer refused to transfer her to a vacant position for which she was qualified and instead forced her to apply and compete for openings. Striking a familiar position for the agency, the EEOC alleged that reassignment to a vacant position is required under the ADA when an employee can longer perform the essential functions of her current job, as long as the disabled employee is minimally qualified – without regard to whether the employee is the most qualified candidate.

***EEOC v. The Phoenix Center Inc.*, 1:23cv592 (S.D. Ohio)** The EEOC alleged that the employer violated the ADA in multiple respects. The EEOC alleged that the employer subjected one applicant to a pre-offer medical inquiry and failed to hire her because of her disability, chronic migraine disease, or because she was regarded as disabled, and alleged that the company terminated a former employee because she was regarded as disabled or because of her record of disability, alcoholism. The EEOC also made the broader allegation that the employer had subjected all applicants to unlawful pre-offer medical inquiries.

C. Construction Industry Profile

Construction Industry Merit Cases Filed in FY 2023

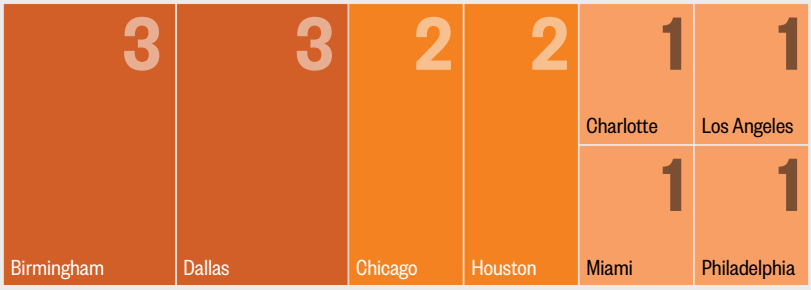
14

Statutory Basis for Suit

11: Title VII **2:** ADA

4: ADEA

EEOC District Offices Bringing Suit & Number of Lawsuits Brought by Each District



The EEOC's Strategic Enforcement Plan highlights as an area of "particular concern" the "continued underrepresentation of women and workers of color in certain industries and sectors," "especially in industries that benefit from substantial federal investment," including construction. Not surprisingly, then the majority of cases filed against businesses in this industry arise under Title VII and are brought on behalf of groups of employees, rather than just one individual. The EEOC also has litigated claims that certain return from leave policy requirements violate the ADA.[92]

KEY CASES FILED IN FY 2023

***EEOC v. TKO Construction Services*, 23-cv-3010 (D. Minn.)** The EEOC's complaint alleges that the employer, a staffing company servicing construction clients, instructed one of its recruiters not to hire women for construction jobs, Blacks in certain areas, and individuals who were over 40 years old because some clients do not want them. According to the EEOC, the recruiter resigned rather than engage in this conflict. The EEOC's suit is brought on behalf of the recruiter, as well as a class of aggrieved individuals who the company allegedly failed to recruit, hire, assign or refer because of they are female, Black, or age 40 or older. The EEOC further alleges that the company made assignments based on protected traits, resulting women and Black employees working fewer hours and receiving less pay than their counterparts not in protected groups.

***EEOC v. Asphalt Paving Systems, Inc.*, 8:23-cv-02169 (M.D. Fla.)** According to the EEOC's lawsuit, African American employees were subjected to a hostile work environment through the open use of racial slurs and racist comments, including use of the "n-word" by employees and managers. The EEOC also alleged that Black employees were subjected to demeaning working conditions, such as being required to work without breaks while white employees watched, and being forced to relieve themselves outdoors

[92] For additional analysis of the EEOC's focus on the construction industry, *see* Meghan A. Douris and Andrew L. Scroggins, *The EEOC Targets Construction Industry For Heightened Enforcement,* Seyfarth News & Insights (Feb. 24, 2023), https://www.seyfarth.com/news-insights/the-eeoc-targets-construction-industry-for-heightened-enforcement.html.

while white employees were taken to indoor bathrooms. The complaint allegations also assert that the employer prevented Black members of a crew from finding alternative employment by contacting a future employer and requesting that they not hire them.

***EEOC v. Public Service Company of New Mexico, et al.*, 1:23-cv-00848 (D.N.M.)** The EEOC filed suit on behalf of all employees impacted by one of three policies of the employer. First, the EEOC alleged that the employer violated the ADA by implementing a practice of not allowing employees to return from medical leave unless they are released to return to "full duty" or "without medical restrictions." Second, the EEOC alleged that the company placed employees who were unable to return to work without restrictions within 90 days into unpaid leave status and removed them from their current jobs. And finally, the EEOC alleged that the employer refused to reassign employees with disabilities to vacant positions they were qualified for as a possible reasonable accommodation.

D. Retail Industry Profile

Retail Industry Merit Cases Filed in FY 2023

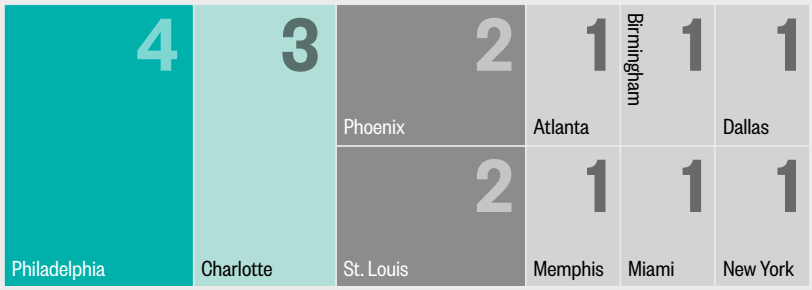
17

Statutory Basis for Suit

10: ADA **1:** ADEA

7: Title VII

EEOC District Offices Bringing Suit & Number of Lawsuits Brought by Each District



The EEOC filed a number of lawsuits against retail companies in 2023, with an emphasis on disability claims. The ADA claims focused (as many do) on discipline due to attendance and pre-employment qualifications. There also was an increase in cases related to cognitive and hearing impairments, including cases related to pre-hiring standardized tests and the availability of ASL interpreters during daily employee meetings. This is an area of interest for the EEOC, which released updated guidance on hearing-related accommodations in January 2023.

KEY CASES FILED IN FY 2023

***EEOC v. Walmart Inc.*, Case No. 2:23-cv-02395 (D. Kansas)** The EEOC filed suit on behalf of two deaf employees working as overnight stockers at the same store. The employees requested ASL interpreters to be present at safety and department meetings but were told the employer could not afford to provide qualified interpreters. An assistant manager attempted to translate, but the suit alleges this effort was ineffective and at times information was only communicated verbally. According to the EEOC, the employees were unable to understand the purpose and content of meetings, nor could they understand directions or counseling on numerous occasions, and both resigned. The EEOC alleges a failure to accommodate and constructive discharge.

***EEOC v. Wal-Mart Stores East LP*, Case Nos. 5:23-cv-218, 5:23-cv-160 (E.D. North Carolina)** In separate suits involving two different stores, the EEOC alleged that two employees (one a manager, the other a cashier) were disciplined and eventually terminated for attendance violations, despite each employee informing the store that the absences were related to their epilepsy. These two cases, as well as another seizure-related case in Arizona, suggest a focus area for the EEOC on epilepsy-related accommodations.

***EEOC v. Lori's Gifts*, Case No. 2:23-cv-03175 (N.D. Ohio)** The EEOC alleges that Lori's Gifts subjected applicants to discriminatory qualification standards and asked unlawful pre-employment inquiries, including whether applicants can walk or stand for up to five hours and if applicants can lift up to 30 pounds. According to the EEOC, applicants who answered "No" to either question were deemed not to be qualified for employment and were rejected.

PART VI: EEOC Case Resolution

All EEOC matters eventually come to an end. How a matter ends will dramatically impact an employer's future interaction with the EEOC. As with most civil litigation, most matters are settled, but as we describe below, there is significant meaning to *when* resolution is achieved.

A. Resolution Through Conciliation

Congress originally conceived that the EEOC would remedy discrimination in a non-adversarial manner by conducting neutral investigations and reaching agreements with the employer to voluntarily correct any discriminatory practices. Congress settled on a framework that "preferred" cooperation and voluntary compliance over litigation, rather than simply affording victims a cause of action for damages like other statutes provide. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted). As the Supreme Court has explained, Title VII was designed to encourage "`…`voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

This notice of voluntary compliance through conciliation remains. When the EEOC issues a letter of determination, it must then invite the employer to explore the potential for a negotiated, pre-suit resolution. As the Supreme Court has described in *Mach Mining*, the EEOC must demonstrate that it has satisfied its statutory duty of "conference, conciliation, and persuasion" before filing suit.

For employers, there are often benefits to resolving a matter through conciliation rather than proceeding to litigation. The most notable is the opportunity to avoid having the EEOC go public with its allegations. The EEOC is prohibited by law from sharing information about charges that it settles through conciliation unless an employer agrees to publicize the resolution. In contrast, the EEOC frequently publicizes its litigation matters through press releases, briefs and evidence will posted to the court's docket, and litigation can only be resolved through Consent Decrees, which are public.

Unfortunately, it is common for the EEOC to approach conciliation in a one-sided manner. Investigators in the EEOC's District Offices frequently refuse to explain the bases for their findings, decline to consider additional argument from employers, and remain vague about the relief they are seeking in order to resolve the charge. This lack of transparency can frustrate employers, who often feel that they lack information at the conciliation stage to meaningfully evaluate risk and make decisions about settlement.

There have been attempts to change this state of affairs. At the close of FY 2020, we reported that new EEOC leadership had been pushing to make substantive changes to how the EEOC approaches its litigation and enforcement programs.[93] On July 7, 2020, the EEOC officially announced a new pilot program intended to improve conciliation procedures at the Commission.[94] The program was built "on a renewed commitment for full communication between the EEOC and the parties, which has been the agency's expectation for many years."[95] On October 8, 2020, the EEOC, in a Notice of Proposed Rulemaking, acknowledged that, historically, it had elected not to adopt detailed regulations relative to its conciliation efforts based on its belief that

[93] *See* Christopher DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *EEOC Update: The Commission Releases Its FY 2020 Litigation Performance Report Card*, Workplace Class Action Blog (Jan. 20, 2021), https://www.workplaceclassaction.com/2021/01/eeoc-update-the-commission-releases-its-fy-2020-litigation-performance-report-card/; see also Christopher DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *EEOC Update: The Commission Issues New Litigation Delegation And Amicus Curiae Procedures*, Workplace Class Action Blog (Jan. 14, 2021), https://www.workplaceclassaction.com/2021/01/eeoc-update-the-commission-issues-new-litigation-delegation-and-amicus-curiae-procedures/.

[94] Press Release, U.S. Equal Employment Opportunity Commission, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020) www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions.

[95] *Id.*

retaining flexibility over the conciliation process would "more effectively accomplish its goal of preventing and remediating employment discrimination."[96] The notice also acknowledged that the EEOC's conciliation efforts had not been terribly successful at resolving charges.[97]

In an effort to improve the effectiveness of the conciliation process, the notice included proposed amendments meant to establish "basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful."[98] The changes proposed by the EEOC were seen by many as a welcome attempt to address this issue, the Republican-led Commission adopted the Final Rule in January 2021, just before the new Biden administration was sworn in.

The new rule went into effect on February 16, 2021, but while it was lauded by employers, it did not survive long. Congress exercised its authority under the Congressional Review Act to overturn executive branch regulations within 60 legislative days of when they were issued.[99] Before June 2021 ended, both[100] houses[101] of Congress passed resolutions to rescind the rule, which the White House signed the resolutions into law.[102]

Short of any explicit requirements for the EEOC to follow, employers must be diligent and sometimes creative about drawing the EEOC into meaningful and productive settlement discussions. For employers, a longer conciliation process generally is better, as it suggests that the EEOC is more engaged in a give and take process about how to resolve the dispute without resort to litigation. In contrast, a short conciliation suggests that one or both parties are unwilling to bend their positions to negotiate a mutually acceptable outcome.

Conciliation agreements that the EEOC accepts commonly include requirements such as posting a notice of non-discrimination; reviewing and revising policies; providing training; and submitting reports to the EEOC for a period of time. Employers can negotiate the specific terms, though, such as the content of any notice, or where it is posted; which employees must complete the training; the contents and frequency of submission of any reports; or the duration of the agreement. The EEOC may also ask the employer whether they will agree to make the settlement public via a press release. Experienced counsel may be able to save an employer significant sums of money not just through the economic relief, but by understanding how to agree on points important to the EEOC while ensuring that programmatic relief does not needlessly burden the employer.

Timing and Statistics in Conciliation. The EEOC does not report detailed statistics about its process and timelines for moving an investigation from determination, to conciliation, to litigation. However, following the Supreme Court's *Mach Mining* decision, the EEOC began to include information in its complaints about how the process played out in each particular case. Seyfarth collects and analyzes that information annually, and as a result we are able to describe how long it takes for the EEOC to move from step to step, as well as the relative pace of the EEOC District Offices.

Duration of Conciliation. If you are an employer that has responded to a charge and just received a letter of determination, how long can you expect the EEOC to engage in conciliation? According to our analysis, the median time spent in conciliation is 53 days. For most employers, the EEOC will declare that conciliation has failed in three months or less. In some instances, however, conciliation has lasted for years.

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[96] Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64079 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pt. 1601 and 1626).

[97] *Id.* Over the last several years, the EEOC's conciliation efforts resolved less than half of the charges where a reasonable cause finding was made. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC's conciliations with employers were successful.

[98] *Id.*

[99] *See* Congressional Review Act, 5 U.S.C. § 801.

[100] S.J. Res., 117th Cong. (2021).

[101] H.R.J. 33, 117th Cong. (2021).

[102] Remarks on Signing Legislation Regarding Methane Pollution, Predatory Lending, and Employment Discrimination, Daily Comp. Pres. Doc. DCPD-202100551 (June 30, 2021).

As described above, a longer conciliation process is likely to benefit employers, because it generally reflects that both sides are trying to reach an agreement. Employers are more likely to spend longer in conciliation when dealing with the EEOC's District Offices in Los Angeles, St. Louis, Charlotte, and Washington DC. Conciliation moves faster in the EEOC's District Offices in Memphis, Birmingham, Philadelphia, and Miami.

Time from the Failure of Conciliation to Filing a Complaint. The common assumption among employers is that it is a race to the courthouse once the EEOC deems conciliation failed, but our analysis suggests otherwise. Only about 7% of complaints are filed within the first month, and the median time from the notice of conciliation failure to filing of a complaint is nearly four times that: 116 days.

The quickest to file are the EEOC District Offices in Birmingham, New York, St. Louis, and Dallas. The EEOC moves most slowly in its District Offices in Los Angeles, San Francisco, Houston, and Indianapolis.

Time from Determination to Litigation. Taking both of these together, how much time can an employer expect to pass from determination to the start of litigation? Our analysis found that employers can expect to have more than a month before the complaint is filed, and that short timeline is uncommon. The median time from determination to complaint is 238 days.

Charges move most quickly to court in the EEOC's District Offices in Birmingham, Miami, New York and Dallas. The EEOC moves most slowly in its District Offices in Los Angeles, San Francisco, Houston, and Charlotte.

According to our analysis of complaints filed in EEOC District Offices in FY2023:

99

Average days spent in conciliation

Most Time for Conciliation:

- Los Angeles (**183** days)
- St. Louis (**155** days)
- Charlotte (**149** days)
- Washington DC (**145** days)

Least Time for Conciliation:

- Memphis (**38** days)
- Birmingham (**40** days)
- Philadelphia (**58** days)
- Miami (**58** days)

B. Consent Decrees

1. General Description of a Consent Decree

If conciliation fails and the EEOC chooses to file a federal court complaint, the *only* way a matter can be mutually resolved is a Consent Decree. A Consent Decree is a legally binding agreement, negotiated between the EEOC and the employer defendant, and ordered by the presiding Court. The proposed Decree and the Order entering the Decree are filed in open court and are a matter of public record. Critically, a Consent Decree cannot be confidential. The public nature of the settlement of an EEOC-initiated case is one of the biggest differences between an agency action and private litigation, and can be a source of surprise and frustration for employer defendants, where confidentiality is typically an essential term of any settlement.

Adding to the concern is the EEOC's standard procedure of issuing a press release at the conclusion of a lawsuit. With rare exceptions, soon after a Consent Decree is entered, the EEOC issues a press release on its website at EEOC.gov. The press release is ordinarily composed of 1) a recitation of the allegations in the complaint, 2) a summary of the terms of the Decree (both monetary and non-monetary), 3) one or more quotes by the District leadership/attorneys emphasizing the importance of complying with civil rights statutes, and 4) a discussion of how individuals can contact the EEOC if they feel they are victims of discrimination or retaliation. The EEOC takes the uniform position that employers cannot be part of the press release process, and will flatly reject demands to preview and/or edit the press release. Naturally, an employer may issue its own counter-press release, but that carries with it certain risks of compounding the exposure of the Decree. EEOC press releases and media issues are described in Part VII, below.

2. Common Provisions of a Consent Decree

Consent Decrees can differ significantly based on a host of factors, including the claims alleged, the size and nature of the employer, the strategic importance of the issue litigated, and the scope of alleged victims impacted by the employer's action or policy. Decrees can also differ significantly depending the EEOC District bringing the action, and can even differ by the EEOC lawyer negotiating the settlement. There are, however, certain features common to most Decrees:

- **Injunctive "Follow-the-Law" Provision:** A term appearing in virtually any Decree is a requirement that the employer not violate the particular statute at issue in the case for the term of the Decree. While this may seem like an innocuous provision, it technically creates a new cause of action against the employer for any alleged violation of statute during the term of the Decree. For example, if an employee feels they were a victim of discrimination during the Decree, and the EEOC believes that claim is substantiated, not only could the employee file an individual action under the particular statute, but the EEOC could also claim the employer defendant violated the Decree as well, and pursue a separate enforcement action. The impact of these provisions can be so great that certain Courts have, in very rare circumstances, refused to enter a Decree unless the provision is removed. *Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000) (citing *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) ("An injunction must be framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law."); *see, e.g., Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999) (invalidating an injunction which prohibited a municipality from discriminating on the basis of race in its annexation decisions because it "would do no more than instruct the City to 'obey the law'…"); *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 897 (5th Cir. 1978) (invalidating injunction that prohibited defendant from violating Title VII in its employment decisions).

- **Scope and Duration of the Decree:** Consent Decrees necessarily include provisions outlining the organizational and/or geographical scope to which it applies, and how long the Decree will remain in effect. The scope can range from as small as a particular department in a single facility to a coast-to-coast scope if the alleged offending policy or practice was nationwide. The length of Decrees typically range from as short as one year to as long as five years (and, in some rare instances, even longer). The most typical Decree length demanded by the EEOC is three years.

- **Monetary Relief:** The Decree will include the details of any monetary settlement, both for individual claimants and for class relief where applicable. The monetary relief section of a Decree can be as simple as outlining where and how checks will be sent, to pages of complicated instructions as to how a class settlement will be funded, managed, and issued to a large group of alleged victims. In some instances, employers and the EEOC engage a settlement administrator to assist in the monetary relief distribution process (at the employer's expense).

- **Modification of Internal Practices and Procedures:** The EEOC typically requires employers to ensure their internal processes, policies and procedures comply with the law. In an employment discrimination case, these changes generally impact recruitment, promotion, compensation, training, and other human resources policies. A diverse assortment of institutional changes may be required by the EEOC. In some cases, the EEOC will demand changes to an employer's policies that go beyond what is necessarily required by law.

- **Mandatory Anti-Discrimination Training:** Most Decrees also include mandatory EEO training programs. The programs most often consist of diversity, racial/gender sensitivity, and non-harassment training. Training of senior executives and management is nearly always required, but an employer also may be directed to train nearly all of its employees. The scope and cost of such training can be substantial.

- **Reporting and Monitoring:** Virtually all Decrees have some ongoing reporting and monitoring requirements. At a minimum, an employer ordinarily will be required to notify the EEOC when it has complied with certain provisions (*e.g.*, a report on when payment was issued, when training has been conducted, the timing of policy revisions, etc.). The reporting provisions, however, can be far more invasive, requiring employers to update the EEOC on any similar internal claims of discrimination and how they were resolved, providing applicant flow and hiring data in a recruiting case, and detailed reports of any discipline that has been administered if discipline was at issue in the underlying case. The Decree often includes a commitment that the employer will retain and produce documents concerning Decree compliance, will make employees available for interviews, and could even allow the EEOC to access the employers worksites.

- **Posting:** In almost all cases, the employer is required to post a notice visible to all employees that the EEOC brought a lawsuit, that it was resolved via a Consent Decree, explaining that the employer is forbidden from violating certain EEO laws, and providing contact information for the EEOC.

There are, of course, other more "exotic" forms of relief found in Decrees, including set hiring efforts, public statements by company leadership encouraging diversity, letters of apology to alleged victims, the hiring of outside experts to guide policy review, the formation of new internal organizations and positions to ensure Decree compliance, and so on. All terms of a Consent Decree are subject to negotiation, and employers are not compelled to agree to any provision. As will be discussed below, the terms the EEOC demands in settlement are often far broader than injunctive relief that is typically ordered by a District Court even when the EEOC is successful a trial.

NOTABLE FY 2023 RESOLUTIONS THROUGH CONSENT DECREES

***EEOC v. Fischer Connectors Inc.*, 1:22-cv-03884 (N.D. Ga.)** Fischer Connectors, Inc., a Swiss-based national manufacturer of circular connectors used in medical devices, agreed to pay $460,000 to settle an EEOC suit claiming the company fired a human resources director who raised concerns that the company was systematically terminating older workers in favor of younger, less-experienced hires in violation of the Age Discrimination in Employment Act (ADEA). According to the EEOC, the human resources director witnessed the company turn down qualified older employees in favor of less-qualified younger employees, attempted to inform the company about anti-discrimination laws in the U.S., and was subsequently terminated. In addition to monetary damages, Fischer signed a 2-year Consent Decree that requires Fischer to train all U.S. employees and managers on the ADEA, distribute its ADEA policies to all employees, post a notice about federal anti-discrimination laws and employee rights in the workplace, and allow the EEOC to monitor how Fischer handles future ADEA discrimination complaints.

***EEOC v. Focus Plumbing, LLC, et. al.*, 2:21-cv-01758 (D. Nev.)** Focus Plumbing, LLC agreed to pay $500,000 and, along with other defendants Focus Electric, LLC, Focus Concrete, LLC, Focus Fire Protection, LLC, and Focus Framing, Door & Trim, LLC, agreed to provide injunctive relief to settle an EEOC suit claiming that a class of Spanish-speaking female employees were subjected to a hostile work environment. According to the EEOC, the alleged harassment included unwanted touching, groping,

sexual advances, and sexually offensive comments and requests. The lawsuit alleges that the employees were threatened if they rejected sexual advances and were offered better work assignments and hours if they acquiesced to the advances. The defendants signed a 2.5-year Consent Decree which requires them to provide specialized training on sexual harassment to human resources officers and managers post a notice about the lawsuit. The Consent Decree also requires the defendants to hire an external equal employment opportunity monitor.

***EEOC v. USF Holland LLC*, 3:30-cv-00270 (N.D. Miss.)** USF Holland LLC agreed to pay $490,000 to settle an EEOC suit claiming that the company refused to hire female drivers at its Olive Branch, Mississippi terminal in violation of Title VII. In addition to the monetary payment, USF Holland signed a three-year Consent Decree, which, among other things, requires that USF Holland establish a $120,000 scholarship fund. USF Holland will award scholarships four times annually for $10,000 each throughout the duration of the decree to female applicants who seek to obtain their truck driver certifications through USF Holland's truck driver apprenticeship program. The Consent Decree also requires USF Holland to revise its anti-discrimination policy, and to conduct annual training designed to prevent discrimination at its Olive Branch, Mississippi facility.

***EEOC v. Hooters of Louisiana LLC et al.*, 2:23-cv-02864 (E.D. La.)** Hooters of Louisiana LLC and associated companies ("Hooters") agreed to pay $650,000 to settle an EEOC suit claiming that the company discriminated against African-American employees on the basis of race since 2017. The EEOC also alleged that Hooters did not rehire any of the restaurant's African American employees after laying off staff due to the COVID-19 pandemic in 2020. The EEOC's suit also included a claim for retaliation. In addition to the monetary payment, Hooters signed a three-year Consent Decree which requires training, revised policies, and regular reporting to the EEOC. Under the Consent Decree, Hooters must also post a notice affirming its obligations under Title VII.

***EEOC v. Kenneth O. Lester Co. Inc. d/b/a PFG Customized Distribution - Indiana,* 1:22-cv-00329 (N.D. Ind.)** Kenneth O. Lester Company, Inc. doing business as PFG Customized Distribution - Indiana (PFG) agreed to pay $709,971 to settle an EEOC suit claiming that the company refused to hire female job applicants on the basis of sex at its Kendallville, Indiana warehouse. The EEOC also claimed that certain decision-making personnel expressly stated to female applicants that the company prefers to hire men in the order selector positions at issue. The EEOC also alleged that the company assigned females to various duties on a discriminatory basis. In addition to the monetary payment, PFG signed a three-year Consent Decree which distributes the $709,971 as follows: $650,000 in monetary relief to the class of female applicants who were not hired; $39,971 to a female applicant who filed the underlying EEOC charge; and $20,000 to a class of female workers who were subjected to work assignments based on their sex. The Consent Decree includes equitable relief, including giving hiring preference to qualified female applicants who were denied order selector positions, revising PFG's hiring policies and procedures, and conducting equal employment opportunity training. PFG is also subject to ongoing reporting and monitoring to ensure company compliance with law.

***EEOC v. Orange Treeidence OPCO, LLC dba Riverwalk Post Acute, et al.*, 5:22-cv-00425 (C.D. Cal.)** Orange Treeidence OPCO, LLC, doing business as Riverwalk Post-Acute, Providence Group, Inc. (PGI), and Providence Administrative Consulting Services, Inc. (PACS) agreed to pay $865,000 to settle an EEOC suit claiming that the defendants subjected a class of African American employees to racial harassment by residents, co-workers, and a supervisor. The alleged harassment included repeated, frequent, and offensive race-based remarks directed at staff. According to the EEOC's lawsuit, the defendants failed to adequately respond to complaints of harassment, and employees were told to tolerate certain remarks. The EEOC's suit also included a claim for retaliation. In addition to the monetary payment, the defendants signed a three-year Consent Decree requiring injunctive relief aimed at preventing workplace harassment and retaliation. The Consent Decree also requires: retention of an equal employment opportunity monitor; a review and revision of the defendants' policies and procedures on discrimination, harassment, and retaliation; and the creation of a structure for employees to report discrimination and harassment. The defendants must also provide training on anti-discrimination laws, with an emphasis on racial harassment.

***EEOC v. The Whiting-Turner Contracting Co.* 3:21-cv-00753 (M.D. Tenn.)** The Whiting-Turner Contracting Company, a construction management and general contracting company, agreed to pay $1,200,000 to settle an EEOC suit claiming that Whiting-Turner subjected a class of former African-American workers to a racially hostile work environment. The suit also alleged that Whiting-Turner retaliated against two employees who complained about race discrimination. The alleged discriminatory treatment included referring to African-American employees with derogatory phrases, various areas in the workplace defaced with racially offensive graffiti, and a noose displayed in the workplace on Martin Luther King Jr.'s birthday. According to the EEOC, African American employees reported the issues to Whiting-Turner several times, and the company failed to investigate the complaints and fired two employees after they complained about discrimination. In addition to the monetary payment, Whiting-Turner signed a two-year Consent Decree requiring incorporation of a strict prohibition against racial graffiti, racial jokes, racial slurs, racial epithets, and hate symbols into Whiting-Turner's anti-harassment policy. The Consent Decree also assigns an equal employment opportunity liaison to each of Whiting-Turner's construction sites and requires semi-annual training on Title VII.

***EEOC v. R&L Carriers Shared Services LLC, et al.*, 1:17-cv-00515 (S.D. Ohio)** R&L Carriers Shared Services, LLC, a nationwide trucking company headquartered in Wilmington, Ohio, agreed to pay $1,250,000 to settle an EEOC suit claiming that R&L discriminated against a class of female applicants by failing to hire them for loader positions from 2010 through 2017. According to the EEOC, a few women were hired as loaders, but most female applicants were rejected or recommended for different positions on the basis of sex. In addition to the monetary payment, defendants signed a three-year Consent Decree requiring R&L to pay for a claims adjuster to manage the settlement fund. The Consent Decree also requires R&L to train its hiring officials in legal hiring procedures and requires R&L to notify its recruiters and employees not to discriminate against women in hiring for loader positions. R&L also must invite previously rejected female applicants to reapply for loader positions and engage in outreach and recruitment efforts related to employing women as loaders.

***EEOC v. Scottsdale Healthcare Hospitals d/b/a HonorHealth,* 2:20-cv-01894 (D. Ariz.)** Scottsdale Healthcare Hospitals, doing business as HonorHealth, which provides medical care at hospitals and medical facilities in the Phoenix, Arizona area, agreed to pay $1,750,000 to settle an EEOC suit claiming that HonorHealth failed to provide reasonable accommodations to employees with disabilities, including failing to provide reassignment as an accommodation. In addition to the monetary payment to former employees who sought reasonable accommodations from HonorHealth in the past, HonorHealth agreed to review and update its equal employment and reasonable accommodation policies as necessary to ensure that the policies comply with the Americans with Disabilities Act (ADA) and EEOC guidance. HonorHealth also agreed to provide training on the ADA and its revised reasonable accommodation policies to its employees.

***EEOC v. AMTCR, Inc., et. al.*, 2:21-cv-01808 (D. Nev.)** AMTCR, Inc., AMTCR Nevada, Inc., and AMTCR California, LLC (AMTCR), a Kingman, Arizona headquartered franchise owner operating approximately 18 McDonald's restaurants in Nevada, Arizona, and California, agreed to pay $1,997,500 to settle an EEOC suit claiming that the defendants were aware of, perpetuated, and tolerated sexual harassment in their restaurants since at least 2017. The lawsuit also alleges that the harassment was focused on both male and female teenage employees and included frequent unwanted touching, offensive comments, unwelcome sexual advances, and intimidation. According to the EEOC, AMTCR failed to adequately address complaints of sexual harassment, and many employees found the working conditions so intolerable that they had no choice but to quit. In addition to the monetary payment, AMTCR signed a three-year Consent Decree requiring franchise-wide injunctive relief aimed at preventing discrimination and harassment in the workplace. AMTCR agreed to: retain a third-party equal employment opportunity monitor to conduct internal audits of AMTCR's practice in processing harassment and retaliation complaints; establish a tracking system for discrimination, harassment, and retaliation complaints; and ensure accountability and appropriate disciplinary action. AMTCR also agreed to conduct climate surveys within the workplace, update policies and procedures regarding discrimination and retaliation, and conduct training.

C. EEOC Settlement Agreements

Most practitioners and employers are at least generally aware of case resolutions through conciliation agreements and Consent Decrees, but some EEOC investigations can also be resolved through a Settlement Agreement. Settlement Agreements were quite uncommon for years, but have been gaining popularity in EEOC Districts around the country.

A Settlement Agreement is an instrument used to resolve a Charge *before* a Cause Determination is issued. Thus, the negotiations leading up to a Settlement Agreement are not formally "conciliation" and—importantly—are not automatically confidential. Settlement Agreements are typically used by the EEOC to detach from an investigation before it is required to expend additional resources in further fact gathering or conciliation discussions. Settlement Agreements are typically short, with only a handful of provisions, and address targeted non-monetary relief important to the Commission. A feature of a Settlement Agreement is almost always an agreement that the EEOC will not pursue the claims raised by the Charging Party in federal court. Thus, a Settlement Agreement is often proposed in conjunction with the issuance of a right to sue letter to the Charging Party; the Charging Party can still move forward with their claims in federal court. The attraction for an employer is that it can foreclose any possibility of the EEOC pursuing a matter on a Charging Party's behalf, and focus instead on a more traditional federal court action with the Charging Party as a private litigant.

Settlement Agreements can be a valuable tool to take the specter of EEOC-initiated litigation off the table. The terms are often far more modest than a conciliation agreement or Consent Decree, and the agency is often significantly more flexible in negotiations. As a practice pointer, employers are reminded that these Agreements are not confidential, and a confidentiality provision must be affirmatively proposed (but is routinely accepted).

D. Trial Judgment

Although EEOC trial victories are widely publicized by the agency, they are, in reality, quite rare. This, not necessarily because of the merits of any given action, but because the EEOC tries very few cases to verdict. As with the broader universe of employment law actions, the uncertainty of trial often drives the parties to pre-trial resolution. Indeed, according to Lex Machina's 2023 Employment Litigation Report, only 1.3% of all employment cases are actually tried to verdict.

Monetary relief awarded by juries vary widely, depending on the number of claimants, the nature of the action, and the type of position at issue. Some of these trial verdicts are highlighted in Part III. The monetary relief in an EEOC-initiated action is no different than what a private litigant could be awarded in individual action, with the important exception that the EEOC cannot be awarded attorneys' fees as a prevailing litigant.

A more important distinction is non-monetary relief. Although non-monetary/injunctive relief can theoretically be sought in private litigation, few private litigants seek relief beyond backpay, front pay and compensatory, punitive and/or liquidated damages (depending on the statute at issue). The EEOC, on the other hand, routinely seeks non-monetary relief after a trial victory. The District Court Judge, and not a jury, awards any non-monetary relief. The injunctive relief demanded by the EEOC often mirrors the elements sought in Consent Decrees (see above).

A District Court considers a variety of factors when deciding what injunctive relief is proper after an EEOC trial win. To determine whether a post-trial award warrants the imposition of injunctive relief, courts primarily consider "whether the facts indicate a danger of future violations" of unlawful employment practices. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1250 (10th Cir. 1999) If an employer intentionally engages in a practice whereby a "danger of future violations" exists, a court may find it necessary to grant injunctive relief. *Id.* "The likelihood of future violations is inferred from the totality of the circumstances, including the commission of past illegal conduct." *Barrington v. United Air Lines, Inc.*, No. 15-CV-00590-CMA-MLC, 2018 WL 2322070, at *2 (D. Colo. May 22, 2018). Moreover, the danger of recurrent violations must

be "something more than a mere possibility, which serves to keep the case alive." *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). But injunctive relief is not appropriate "when there is no proof of a pattern or practice of discrimination. *E.E.O.C. v. RadioShack Corp.*, No. 10-CV-02365-LTB-BNB, 2012 WL 6090283, at *6 (D. Colo. Dec. 6, 2012). A District Court in Colorado did not grant injunctive relief where there was "no reason to believe that the single unlawful act 'will likely occur again.'" *Id.* Indeed, as one court noted, a finding that an employer "discriminated against one individual on the basis of disability" was not "standing alone, sufficient to warrant mandating the entire Department of Commerce post an anti-discrimination notice." *Id.*

Although the EEOC often seeks wide-ranging injunctive relief, Seyfarth's survey of post-trial injunctive relief awards demonstrates that District Courts simply do not tend to award the breadth and depth of relief demanded by the Commission. In fact, in the past 10 years, most grants of injunctive relief after an EEOC trial victory consisted of a general prohibition on future discrimination, and training or policy modifications, if warranted. The majority of the injunctive relief imposed by the courts have been limited to two or three year period. Courts imposed an injunction period of more than three years in only a few cases, and these five year periods were not unexpected given the large compensatory or punitive damages involved.

NOTABLE EEOC TRIAL VICTORIES IN FY 2023

***EEOC v. Drivers Management, LLC and Werner Enterprises, Inc.*, Case No. 8:18-cv-00462 (D. Ne.)** On September 1, 2023, a jury awarded a deaf applicant $36 million in punitive damages and $75,000 in compensatory damages in a disability discrimination case filed by the EEOC. In the suit, the EEOC claimed that the defendants, truckload carriers, failed to hire the applicant because of his hearing impairment. The EEOC further claimed that the applicant had obtained his commercial driver's license and was otherwise qualified for the position. Defendants argued, however, that they could not hire the applicant because he could not complete the required training program, which purportedly required a two-way conversation with a trainer, that it was unsafe for a driver, like the applicant, to take his eyes off of the road to read sign language or to communicate in another non-verbal way, and that defendants continued to fail to hire new deaf drivers. The jury ostensibly rejected Werner's argument that its failure to hire the applicant was based on 'business necessity.'

***EEOC v. Coastal Drilling East LLC,* 2:21-cv-01220 (W. D. Pa)** On December 5, 2022, a jury awarded $24,000 in compensatory damages to a Black former employee who was forced to resign his employment with defendants. The EEOC argued that the Black employee was subjected to severe race-based harassment by coworkers, including the persistent use of racial slurs, including the n-word, and multiple instances of displaying nooses. The EEOC further argued that the employee's supervisor participated in, and tolerated this harassment, and that the defendant failed to stop the harassment, which compelled the employee to resign. On August 16th, 2023, the presiding District Judge further ordered that the defendants pay the Black employee an additional $56.093.62 in back pay and other relief, and ordered a two-year permanent injunction barring the defendants from engaging in or tolerating racial harassment and requiring them to implement other measures to prevent further violations of federal law.

***EEOC v. The Ohio State University,* 2:20-cv-04624 (S.D. Oh)** Defendant The Ohio State University defeated the EEOC in a jury trial on March 6, 2023. The EEOC sued The Ohio State University and alleged that it fired and then failed to re-hire an employee based on his age. The EEOC also alleged that he was replaced by a younger employee. The University argued that the employee's position was eliminated, and that his duties were divided between two other employees, both of whom were over 40 years old, and that the fact that he was not rehired for another position was for legitimate, non-discriminatory reasons, including a COVID-19 pandemic-related hiring freeze, and the presence of more qualified candidates. After a five-day trial, the jury returned a verdict in favor of The University.

***EEOC v. St. Joseph's/Candler Health System Inc.*, 4:20-cv-00112 (S.D. Ga.)** Defendant St. Joseph's/Candler Health System Inc. defeated the EEOC in a jury trial on January 12, 2023. The EEOC sued St. Joseph's, a hospital system based in Savannah, Georgia, in May 2020 because St. Joseph's revoked an individual's job offer for a safety officer position because of a medical evaluation that revealed that

he is HIV-positive. The hospital argued that the decision was not discriminatory because the individual could not perform his role safely because his HIV-positive status could pose a risk to others. The EEOC countered with the argument that the individual had a small rate of transmission because of a low viral load. According to the verdict form, the jury found that the prospective safety officer could not perform the safety officer job without posing a direct threat to the health and safety of patients and staff, meaning he was not qualified for the role.

***EEOC v. West Meade Place LLP*, 3:18-cv-00101 (M.D. Tenn.)** On October 25, 2022, after a four-day trial, a jury awarded $6,000 in compensatory damages after determining that an employee was terminated because West Meade Place LLP regarded the employee as having a physical or mental impairment. According to the EEOC, employee Carma Kean received treatment for anxiety for over a decade and regularly took prescription medication and received treatment from a doctor. Nine months after Kean was hired as a laundry technician at West Meade Place, she requested intermittent leave under the Family and Medical Leave Act (FMLA). Because she had not worked for the nursing home for a year, her request was denied. According to the lawsuit filed by the EEOC, after Kean rejected West Meade Place's offer of unpaid leave, the nursing home told Kean to seek a note from her doctor clearing her to return to work or face termination because she was unable to perform her job duties. The EEOC stated that though Kean's doctor contacted West Meade Place to find out what was needed in order for Kean to return to work, the nursing home terminated her without engaging in the interactive process required by the Americans with Disabilities Act (ADA). According to the verdict form, the jury determined that the EEOC proved that West Meade Place terminated Carma Jean because it regarded her as having a physical or mental impairment and awarded $6,000 in compensatory damages, but also determined that punitive damages were not appropriate.

***EEOC v. Phoebe Putney Memorial Hospital Inc.*, 1:17-cv-00201 (M.D. Ga.)** On November 2, 2022, after a three-day trial, a jury determined that Phoebe Putney Memorial Hospital was not liable for violating the Americans with Disabilities Act (ADA) when terminating an employee. The EEOC alleged that Wendy Kelley was terminated because she missed a meeting due to an anxiety attack which caused her to faint and the meeting to be cancelled. The EEOC also argued that Kelley asked for two weeks of leave to receive treatment for the medical condition that purportedly caused her to faint. Kelley's doctor restricted her from working during that time to manage an increase in her prescription dosage. Phoebe Putney Memorial Hospital argued that general anxiety and the side effects of Kelley's medication did not rise to the level of a disability covered under the ADA. The hospital also asserted that Kelley was terminated because she would not commit to working on certain Saturdays to cover for a colleague on maternity leave. The hospital also argued that Kelley refused an accommodation that it offered, which it was not legally obligated to do because Kelley was not disabled as considered under the ADA. The jurors concluded that the EEOC failed to produce sufficient evidence to show that Kelley had a disability covered by the ADA. The jury also concluded that the hospital did not illegally fire Kelley in retaliation for her having sought a reasonable accommodation.

PART VII: Media and Publicity Elements of an EEOC Case

Preceding sections touched on the EEOC's public statements concerning case resolution, but given the brand and reputation impact these cases may carry for employers, a specific word on the issue is warranted. The EEOC has become quite savvy at leveraging the press as a pulpit for publicizing its agenda, especially in litigation. An employer need only visit the EEOC's website to understand the role of media statement's in the Commission's enforcement process.[103]

This section discusses what employers can expect from these releases, including typical language, elements, and timing.

EEOC's Publicity Philosophy. The EEOC has acknowledged that press coverage is part of its deterrent message and mission. Notably, in sources as early as the Commission's 2006 Systemic Task Force report, the EEOC has announced that the "EEOC engage[s] in high impact litigation *and publicity efforts* that change the workforce status of affected groups and/or improve employment policies, practices, or procedures in affected workplaces."[104] (*See also* opening statement of Sen. Alexander regarding the Commission's apparent strategy, in filing certain lawsuits, to "achieve a maximum amount of publicity."[105])

The EEOC's litigation media statement is one of the tools in the Commission's toolbox that it wields with an aim to achieve its strategic enforcement goals.

Often Two Media Statements During The Course Of EEOC Initiated Litigation. In the life of a lawsuit initiated by the EEOC, there will ordinarily be two media statements. The first will be published when the suit is filed, and the second if the case is resolved. Although all media statements published upon filing of a suit will have roughly the same cadence and tone, those published upon resolution can vary greatly. Depending on the posture of the case, whether the case theories align with the EEOC's strategic goals, and even how the EEOC views the employer, media statements can vary dramatically.

Initial Media Statement. A media statement issued at the outset of the litigation tends to have a stern tone, regarding the alleged actions of the employer. The statement will lead off with a general assertion of the legal claims lodged against employer, including the statute at issue. For example, the statement may declare that a female employee suffered through a hostile work environment at the hands of her supervisor, in violation of Title VII. The statement will then go on to recite the key allegations of discrimination, harassment, or retaliation proffered in the complaint. These allegations are often delivered as fact, not issues that will be proven—or not—during the litigation. Often times the statement will also describe the employer, perhaps sharing a website, states of operation, and a brief description of the work done by the business. Finally, the applicable District Director and/or one of the trial attorneys for the matter will offer a quote in the nature of a sound bite concerning the allegations, which will emphasize the Commission policy underlying its prosecution of the lawsuit. Notably, these statements include entirely unproven allegations, many of which are often later proven inaccurate or outright false (and never with an EEOC retraction or modification of the press release). It is not surprising that many employers who have been the subject of the EEOC's media statements have deemed the Commission's tactics to be unfair and designed to apply extra-judicial pressure to settle litigation.

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[103] U.S. Equal Employment Opportunity Commission, *EEOC Newsroom*, https://www.eeoc.gov/newsroom/search.

[104] U.S. Equal Employment Opportunity Commission, *SYSTEMIC TASK FORCE REPORT To the Chair of the Equal Employment Opportunity Commission* (Mar. 2006), https://www.eeoc.gov/systemic-task-force-report-chair-equal-employment-opportunity-commission.

[105] U.S. Government Publishing Office, *Transcript from Senate Hearing 114-165, Examining the Equal Employment Opportunity Commission, Focusing on Examining EEOC's Enforcement and Litigation Programs* (May 19, 2015), https://www.govinfo.gov/content/pkg/CHRG-114shrg94782/html/CHRG-114shrg94782.htm.

Media Statement Upon Resolution. When a suit is resolved, typically through an agreed upon Consent Decree (but occasionally after confidential conciliation or a rare trial win), the EEOC will publish yet another media statement. The tone and content of this statement, however, can vary from extremely aggressive to fairly measured, and can even verge on "friendly." The direction taken by the EEOC in this statement will depend largely on the resources devoted to the litigation, how contentious the litigation was, as well as whether the claims and allegations at issue align with the Commission's strategic goals. Some insight into the Commission's process can be found in the Regional Attorney's manual.[106] Notably, before the resolution of "significant litigation" a Regional Attorney is required to advise the Office of the General Counsel. The Commission defines "significant" to mean a lawsuit "expected to involve significant monetary or injunctive relief"; "a favorable jury verdict or court decision"; or resolution which "is likely to receive national or significant local attention due to the notoriety of the defendant, ongoing media interest in the lawsuit and/or issues involved, or other factors that may have spurred significant media scrutiny." Whether or not the litigation is deemed "significant" plays a role in the tone of the media release as well.

The more resources expended, and the more closely aligned the claims are with the Commission's strategic goals, the more likely the EEOC will publish an aggressive media statement. The hallmarks of such a statement will be not only the recitation of the most salacious of the allegations (often those that remain contested but offered as fact), but also a detailed description of the monetary and programmatic relief obtained in the Consent Decree. For example, in a representative matter involving an Illinois restaurant, the EEOC's media statement set forth that "numerous employees … were routinely sexually harassed by coworkers and managers, including offensive sexual comments, groping, physical threats, and, in one instance, attempted forced oral sex with a management employee."[107] The statement went on to detail the programmatic relief, followed by harsh admonishments from a Regional Attorney and District Director, specifically:

> "Employers are responsible for preventing workplace harassment—and their failure to do so hurts both their employees and their bottom line," said Andrea G. Baran, Regional Attorney for the EEOC's St. Louis District. "Business owners and CEOs must be proactive and involved in making sure all managers and employees understand that harassment will not be tolerated, harassers will be punished, and those who report harassment will be protected from retaliation. Prevention starts at the top."

Moving down the spectrum, the Commission may take a more measured tone where the litigation is less protracted and the claims are not necessarily consistent with its strategic goals. For instance, in a recent ADA case settled by the EEOC concerning an employer's alleged discriminatory termination of a disabled employee, which had been pending less than a year, the media statement provided few details concerning the claims brought.[108] Further, after a short description of the programmatic relief contained in the lone statement of a Regional Attorney was far more benign:

> "This settlement is both strong and just," said Rudy Sustaita, regional attorney for the EEOC's Houston District Office. "[The employer] has given us every indication that it intends to comply with the ADA in the future."

And on occasion, it will even boarder on "friendly"—including a statement of appreciation to the employer for its cooperation in resolving the litigation.[109] In a suit brought in Wisconsin, filed and settled within five months, the Commission was quoted as stating:

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[106] U.S. Equal Employment Opportunity Commission, *Dissemination of Information to the Public about Cases in Litigation*, https://www.eeoc.gov/regional-attorneys-manual/c-dissemination-information-public-about-cases-litigation.

[107] Press Release, U.S. Equal Employment Opportunity Commission, *Two IHOP Restaurants to Pay Nearly $1 Million to Settle EEOC Sexual Harassment Suit* (July 19, 2018), https://www.eeoc.gov/newsroom/two-ihop-restaurants-pay-nearly-1-million-settle-eeoc-sexual-harassment-suit.

[108] Press Release, U.S. Equal Employment Opportunity Commission, *Otto Candies to Pay $165,000 to Resolve EEOC Disability Discrimination Suit* (Aug. 23, 2018), https://www.eeoc.gov/newsroom/otto-candies-pay-165000-resolve-eeoc-disability-discrimination-suit.

[109] Press Release, U.S. Equal Employment Opportunity Commission, *Silverado to Pay $80,000 to Settle EEOC Pregnancy Discrimination Lawsuit* (Jan. 29, 2018), https://www.eeoc.gov/newsroom/silverado-pay-80000-settle-eeoc-pregnancy-discrimination-lawsuit.

> "We thank [the employer] for its commitment to settle this case before the sides incurred significant costs and its willingness to ensure a level playing field for its pregnant employees seeking job modifications, including light duty work, otherwise available to non-pregnant employees," said EEOC Chicago Regional Attorney Gregory M. Gochanour. "The EEOC will continue to enforce the federal laws so that all pregnant employees have the same opportunities as non-pregnant employees to contribute to our thriving economy," said Julianne Bowman, the EEOC's District Director for the Chicago District Office.

Although "friendly" media statements are the exception, not the rule, the EEOC is more likely to publish such a statement to incentivize other employers to similarly resolve enforcement actions.

A Word On Conciliation Media Statements. Historically, the EEOC has issued media statements primarily for lawsuits, as conciliation is intended to be a confidential process. Indeed, one of the chief reasons for employers to engage in pre-suit conciliation is the carrot of confidential resolution. Interestingly, however, we have seen a trend of the EEOC issuing presumably agreed-upon media statement for matters settled in conciliation. Accordingly, the employer has a degree of leverage in negotiating these publications. As one might imagine, conciliation media statements are, thus, more positive in tone.[110] Further, on occasion, the employer may also make a statement, which at minimum disclaims any liability—something rarely, if ever, allowed in a litigation media statement.

Anatomy Of A Media Statement. Regardless of the tone, EEOC media statements are consistent in their basic elements and structure.

First, there will be a **headline** crafted to be eye-catching, such as "Paramount Mailing Company Punished Female Employees for Complaining About Abuse, Federal Agency Charges."[111] Below is a word cloud, highlighting the most common words and phrases employed by the EEOC in its 2018 headlines. Not surprisingly, in the current environment, "Sexual" and "Harassment" play prominently.

[110] *See, e.g.,* Press Release, U.S. Equal Employment Opportunity Commission, *G4S Secure Solutions Settles EEOC Disability Discrimination Charge for $90,000* (Sept. 4, 2018), https://www.eeoc.gov/newsroom/g4s-secure-solutions-settles-eeoc-disability-discrimination-charge-90000.

[111] Press Release, U.S. Equal Employment Opportunity Commission, EEOC Sues Sierra Creative Systems / Addressers for Sexual Harassment and Retaliation (June 13, 2018), https://www.eeoc.gov/newsroom/eeoc-sues-sierra-creative-systems-addressers-sexual-harassment-and-retaliation.

Second, the media statement will include a **statement of claims**, describing the complained of discrimination, harassment, and/or retaliation, including factual and legal allegations. The more aggressive press releases will set forth the most sensational and detailed allegations, whereas the measured versions may state the allegations in more bland terms, which can sometimes be so vague that it is difficult to divine what the claims were based upon in the first place.

Third, the Commission will include **quotes** from the relevant District Director and possibly a Regional Attorney involved in the litigation. The tone of the EEOC's quotes can vary greatly, depending on, among other things, the importance of the issue to the Commission's strategic goals, the duration of the litigation, and resources expended. Excluding conciliation media statements, on very rare occasions, the EEOC may allow a quote from the employer on the resolution of the lawsuit. Although it is unlikely the Commission will agree to such a statement, if the litigation and settlement proceed amicably, it is certainly worth attempting to negotiate the point.

Finally, the media statement will conclude with a **statement of the EEOC's mission** (*e.g.* "The EEOC advances opportunity in the workplace by enforcing federal laws prohibiting employment discrimination"). Media statements that make note of the SEP are more likely to be among the more aggressive.

Emerging Issues With Media Exposure. As the Commission media strategy has evolved, it has made continued efforts to increase its audience and distribution of these statements for maximum effect. The EEOC has also been known to conduct press conferences announcing a new suit[112] or trumpeting an EEOC victory.[113] But now the EEOC also publishes many of its media statements on social media, like Twitter. It has also taken to issuing relevant media statements in multiple languages depending upon the employees and employer at issue.[114] For as long as the EEOC places a priority on publicity, it will no doubt continue to search for new ways to increase their audience.

Practical Considerations for Employers. For employers who find themselves involved in an EEOC enforcement action, it is important not to lose sight of the Commission's use of its media statement as both carrot and stick. The EEOC places considerable value on shining a spotlight on its enforcement efforts, especially those which advance its strategic goals. While it is unlikely that the EEOC will allow the employer too much say in the issued statement, when negotiating resolution with the EEOC, where possible, employers should use the Commission's goal of publicity as a possible bargaining chip to achieve the best possible outcome for the inevitable media statement. Moreover, by understanding the Commission's strategic goals, employers will gain a greater awareness of what tone and tenor the EEOC's statement will take upon resolution, and can prepare accordingly.

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[112] *See, e.g.,* Press Release, U.S. Equal Employment Opportunity Commission, *EEOC TO ANNOUNCE FILING OF DISABILITY LAWSUIT* (May 22, 1996), https://www.eeoc.gov/newsroom/eeoc-announce-filing-disability-lawsuit.

[113] *See, e.g.,* Press Release, U.S. Equal Employment Opportunity Commission, A*BM Industries Settlement Press Conference*, https://www.eeoc.gov/abm-industries-settlement-press-conference.

[114] *See, e.g.,* Press Release, U.S. Equal Employment Opportunity Commission, *GE Oil & Gas Pagará $5,300 Por Desacato En Citación De La EEOC En El Cumplimiento De Acción* (Feb. 19, 2015), https://www.eeoc.gov/newsroom/ge-oil-gas-pagara-5300-por-desacato-en-citacion-de-la-eeoc-en-el-cumplimiento-de-accion; Press Release, U.S. Equal Employment Opportunity Commission, *Wal-Mart Pagará $150,000 Para Resolver Demanda Por Discriminación a Base De Edad Y La Discapacidad Por la EEOC* (Feb. 19, 2015), https://www.eeoc.gov/newsroom/wal-mart-pagara-150000-para-resolver-demanda-por-discriminacion-base-de-edad-y-la; Press Release, U.S. Equal Employment Opportunity Commission, *EZEFLOW USA, Inc. Pagará $65,000 Para Resolver Demanda por Discriminación A Base De Discapacidad Por La EEOC* (Jan. 9, 2015), https://www.eeoc.gov/newsroom/ezeflow-usa-inc-pagara-65000-para-resolver-demanda-por-discriminacion-base-de-discapacidad.

SEYFARTH'S COMPLEX LITIGATION RESOURCES

Seyfarth takes pride in keeping our clients informed about current developments in a way that is pertinent to their businesses. We believe it is our responsibility to provide expeditious, high-quality products and services that meet our clients' practical needs. Since 2013, Seyfarth's Complex Discrimination Litigation practice group has published an annual report on trends in EEOC litigation. Additionally, when it comes to defending employers in wage and hour collective and class actions, we literally wrote the book on the subject. Our treatise, *Wage & Hour Collective and Class Litigation* is recognized as the definitive resource on this subject and is commonly used by lawyers, academicians, and judges in researching the many complex and evolving procedural and substantive defense issues that may ultimately determine case outcomes. We have also published other authoritative resources, such as the *FLSA Handbook* as well as guides to wage and hour laws in California, Illinois, and Massachusetts.

Together with our blogs (www.employerlaborrelations.com, www.environmentalsafetyupdate.com, www.laborandemploymentlawcounsel.com, www.wagehourlitigation.com, and www.workplaceclassaction.com), legal updates, and webinars, these treatises establish us as the most reliable management thought leaders in this area. Most importantly, we put our thought leadership to good use in our approach to the defense of these cases for our clients. To learn more about our capabilities in this space, please visit our website at www.seyfarth.com.

We sincerely hope this book serves as a valuable reference for you, our clients and friends, and we look forward to delivering up-to-the-minute updates to you throughout the year.

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