

EEOC Puts The Pedal To The Metal: FY 2018 Results

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With a full fiscal year under its belt, the Trump administration's impact on U.S. Equal Employment Opportunity Commission-initiated litigation is still uncertain. With two Republican commissioners and the general counsel position still unconfirmed, it is difficult to discern if things will truly be "business as usual" under Trump or if those appointments, once confirmed, will change agency course. One thing is certain: The EEOC's litigation program is not slowing down any time soon. Just as the waning months of fiscal year 2017 showed a marked increase in filings, FY 2018 turned up the heat even more. Filings are up more than ever, with sex discrimination filings and #MeToo filings — i.e., complaints of sexual harassment — eclipsing previous years.

The total number of filings in FY 2018 demolished FY 2015 and 2016, and even surpassed FY 2017. (Compare [here](#) to [here](#) and [here](#)). This year, the EEOC filed 220 actions, 200 merit lawsuits and 20 subpoena enforcement actions.



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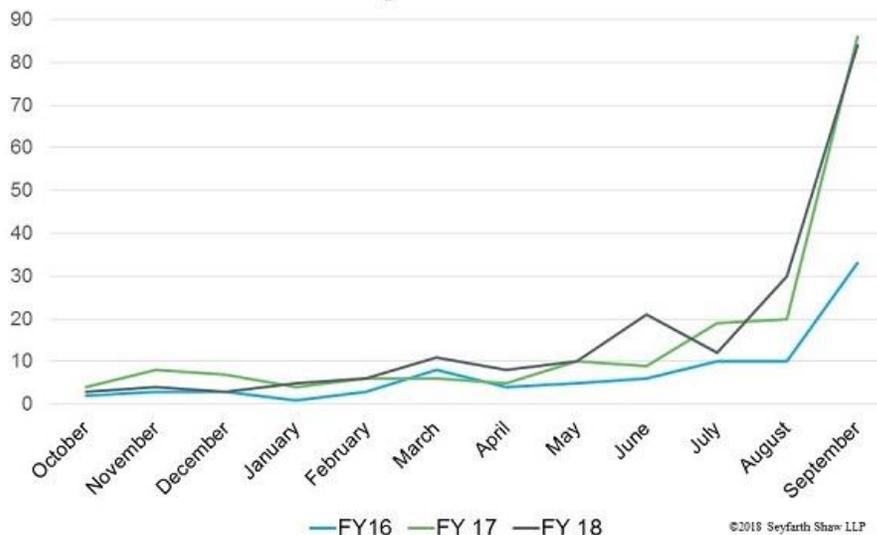


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Cases Filed By Month FY 2016-2018



Predictably, the EEOC waited until the last minute to push filings, with September showing the most filings compared to any other month this fiscal year. At the time of publication, 84 lawsuits were filed in September, including 45 in the last three days alone. Notable this year, however, was the "ramp up" period in June, July and August, which accounted for 63 of

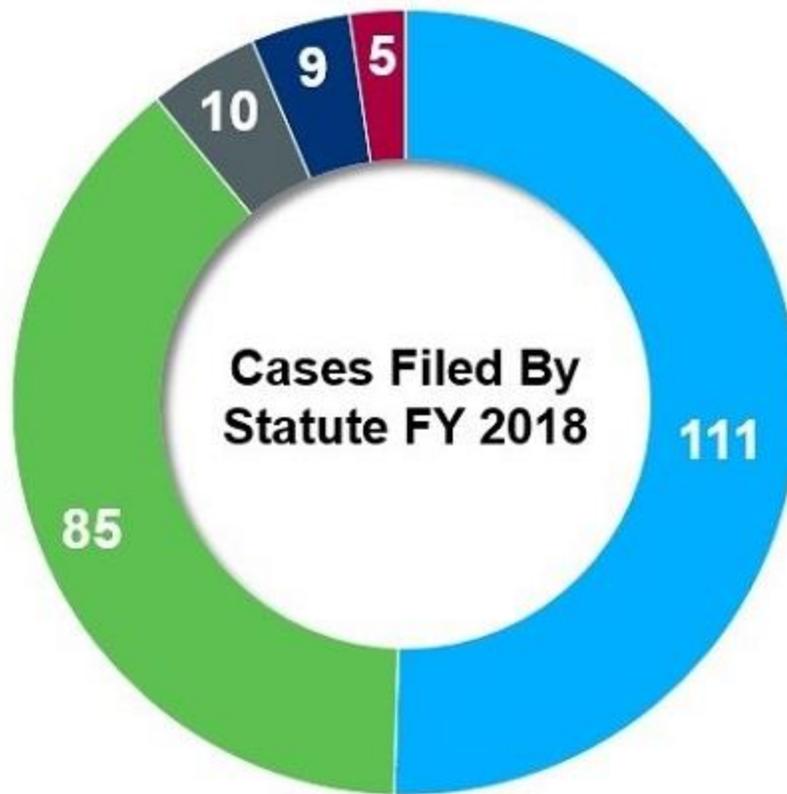
the total filings. Almost half of those cases were brought in August. The total filings for the remaining months remain low, with the number of filings in October through February failing to hit double digits.



Filings in Chicago, Philadelphia and Los Angeles continue to top the charts, with 21, 21 and 17 total filings, respectively. These numbers remain relatively consistent to FY 2017, which showed 21 filings in Chicago, 19 in Philadelphia and 22 in Los Angeles. On the lower end, the St. Louis and Memphis numbers were modest, with only seven filings in St. Louis and nine filings in Memphis. Of the remaining districts, the Phoenix and New York district offices rebounded after a slow FY 2017, each filing six more lawsuits in FY 2018 as compared to last year.

Sex Discrimination Takes Center Stage

Each fiscal year we analyze what substantive theories the EEOC is targeting. This year, Title VII claims remained the largest category of filings, on par with FY 2017, which boasted 53 percent of all filings. In FY 2018, Title VII filings accounted for 56 percent of all filings. Although FY 2016 showed a dip in Title VII filings at 41 percent, this year's Title VII filings beat out FY 2015 and FY 2014 as well.



■ Title VII ■ ADA ■ ADEA ■ PDA ■ EPA

Title VII Breakdown

Sex/Pregnancy	82
Retaliation	43
Race	19
Religion	9
Nat. Origin	8

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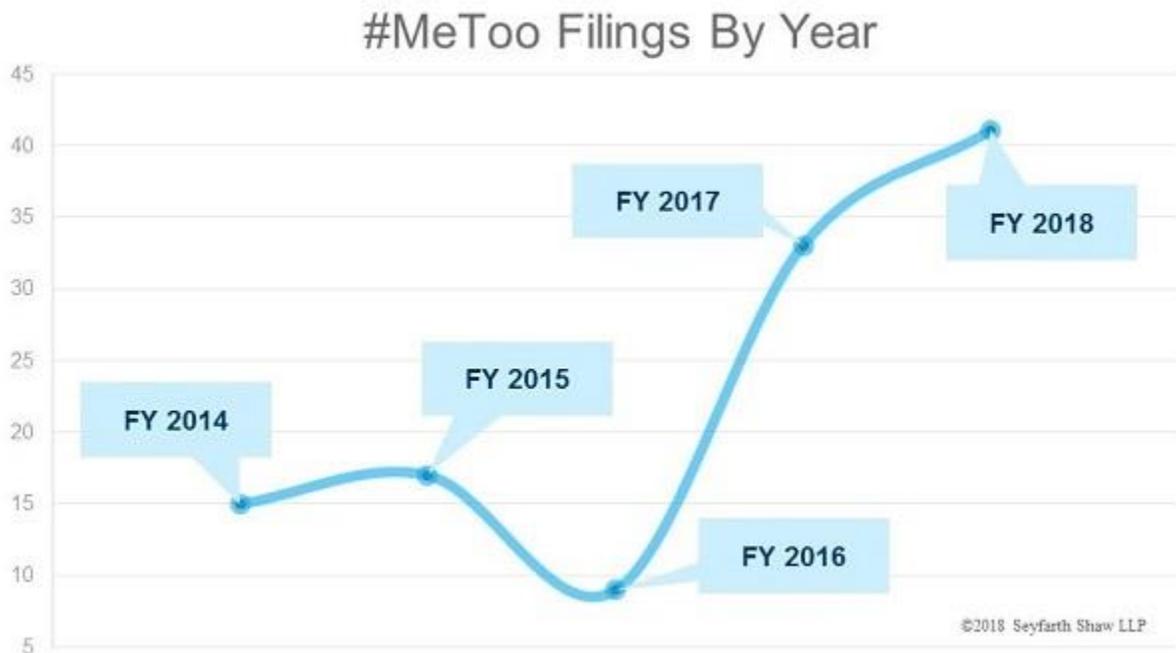
By maintaining adherence to the Strategic Enforcement Plan, or SEP, for FY 2017-2021, the EEOC set out to cover the same substantive areas of law in FY 2018. However, in the first full year under the Trump administration, the commission took a few SEP priorities in significantly different directions as compared to FY 2017.

For example, one notable addition to the FY 2017-2021 SEP was to address “discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent.” Yet, in comparison to FY 2017, both religious and race discrimination cases decreased in FY 2018. The EEOC filed 11 religious discrimination suits in FY 2017,

as compared to just nine in FY 2018. Furthermore, the commission's race discrimination numbers went down from 24 filings in FY 2017 to 19 filings in FY 2018. With national origin discrimination suits only increasing by a difference of two this year, the EEOC's priority subset experienced a significant overall decrease in activity in FY 2018.

Additionally, the FY 2017-2021 SEP aimed to expand the EEOC's equal pay priority to include compensation discrepancies for race, ethnicity, age and disability — moving beyond the EEOC's focus on sex-based pay disparities. This was not the case in FY 2017, however, as the commission filed 11 Equal Pay Act, or EPA, cases, up from six in FY 2016. In FY 2018, though, the EEOC limited its enforcement in this area and only filed five cases under the EPA. With a full year under the new administration, this trend could reflect the EEOC's renewed focus on equal pay issues that affect other protected groups, which would not fall under the jurisdiction of the EPA.

EEOC's #MeToo Harassment Filing Surge



Perhaps the most striking trend of all is the substantial increase in sex-based discrimination filings, primarily the number of sexual harassment filings. As predicted, #MeToo added fuel to this area of the EEOC's agenda, with 74 percent of the EEOC's Title VII filings this year targeting sex-based discrimination. Compare this to FY 2017, where sex based discrimination accounted for 65 percent of Title VII filings. Of the FY 2018 sex discrimination filings, 41 filings included claims of sexual harassment. 11 of those filings were brought in the last three days of the fiscal year alone. The total number of sexual harassment filings was notably more than FY 2017, where sexual harassment claims accounted for 33 filings.

Outside of EEOC-initiated litigation and administrative enforcement, the commission maintained its focus on sexual harassment through the use of press releases. Whenever a case is filed or settled, the EEOC has the option to publish a press release discussing the issues at hand. While this decision has no impact on the case itself, the collection of press releases provides an alternative view into the EEOC's set of priorities.

Throughout FY 2018, the EEOC posted 65 press releases related to sexual harassment cases. While the majority of these press releases documented either the filing or settlement of a sexual harassment case, a few noteworthy press releases took it a step further. For example, in June and August, the EEOC posted two rare statements highlighting groups of correlated filings entitled "EEOC Files Seven Suits Against Harassment"[1] and "EEOC Files Seven More Suits Against Harassment." [2] In addition, just four days after the fiscal year had ended, the EEOC took the unprecedented move of releasing the sexual harassment portion[3] of its enforcement statistics. By comparison, the EEOC did not release any of its enforcement data for FY 2017 until November, and this statement included only general statistics.

How to Stay Off the EEOC's Radar

The dramatic increase in filings should be an eye-opener for employers in an era when many thought the EEOC might be hitting the brakes. Instead, the EEOC is increasing its enforcement activity, with a particular focus on sex discrimination and sexual harassment.

The EEOC still strongly advises that employers should update and aggressively enforce their equal employment opportunity policies. In light of the commission's increased filing activity, employers should seriously consider sharpening their written policies to clarify inappropriate conduct, emphasize nonretaliation provisions, and emphasize commitment to being a "zero-tolerance" workplace. To be able to properly handle potential employee complaints, businesses should also ensure multiple, wide-open reporting channels and robust response protocols.

Another proactive measure that will reduce risk for employers is conducting comprehensive employee training. Respectful workplace cultures can be fostered and maintained through consistent in-person and interactive training for all employees, including company executives. Furthermore, bystander intervention techniques can be especially helpful given the EEOC's focus on workplace harassment. Training should not be a "check the box" approach, but rather a genuine company effort toward inclusion and equal employee treatment.

Now, more than ever, employers need to be on top of their game to avoid becoming the next target of EEOC-initiated litigation.

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[1] <https://www.eeoc.gov/eeoc/newsroom/release/6-14-18.cfm>

[2] <https://www.eeoc.gov/eeoc/newsroom/release/8-9-18h.cfm>

[3] <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>