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The Big Picture Behind the Numbers – New EEOC Data Continues a Heightened Trend

By Kevin P. O'Neill

With the recent release by the Equal Employment Opportunity Commission (EEOC) of its charge statistics for fiscal year 2009, the realization emerged for many that an increased number of employment-related claims may be more than a blip on the radar screen. Indeed, 2009 saw the second highest level of workplace discrimination complaints ever filed with the EEOC – 93,277.¹ This number is up 12.7% from 2007 and is just slightly lower than the record amount filed in 2008 (95,402).

According to EEOC officials, there is little relief in sight. From an enforcement perspective, the commission has never been more active. For example:

- more charges alleging unlawful harassment were resolved in 2009 than ever before;
- resolution of charges alleging Title VII violations were similarly at historic levels;
- a record high of \$294 million was recovered through administrative enforcement and mediation; and
- the total amount recovered through all enforcement measures, including EEOC litigation – \$376 million – has never been higher.

The challenge to forward-thinking employers has, thus, never been greater. The gravity of that challenge is reinforced by a recent statement from Acting EEOC Chairman Stuart Ishimaru:

The latest data tells us that, as the first decade of the 21st century comes to a close, the Commission's work is far from finished....Employers must step up their efforts to foster discrimination-free and inclusive workplaces, or risk enforcement and litigation by the EEOC.²

Notably, three types of discrimination complaints increased during the 2009 fiscal year period (October 1, 2008 to September 30, 2009): disability, national origin and religion. The largest increase was in the amount of disability claims, which rose 10% from 19,453 to 21,451. Looking at the recent history of ADA discrimination claims, the trend

is somewhat staggering: there has been a 21% increase in charges filed since 2007, and an almost 45% increase since 2005. National origin claims increased 5% in 2009, from 10,601 to 11,134 (with a 19% increase since 2007, and a 39% increase since 2005). Religious discrimination claims showed a 3% boost in 2009 – from 3,273 to 3,386 – and the steady increase in filings within that category over recent years has also been noteworthy. Overall, a review of the EEOC data from the last decade demonstrates exponential growth: in the five-year period (1999-2004) the number of charges filed increased only 2%; in the next five-year period (2004-2009) the number of charges filed increased 17%. It is difficult to say what the next five-year period will bring.

Continuing another long-term trend, two categories remain fixed atop the list of most frequently filed charges: race-based discrimination claims and retaliation claims were each alleged in 36% of all EEOC charges filed. Sex-based allegations were alleged in 30% of all charges. The amount of retaliation claims may be the cause for greatest concern because the number of charges filed in 2009 (33,615) is the highest on record. On the heels of recent U.S. Supreme Court rulings that have expanded retaliation protections in employment-related matters,³ this provides a strong indication that there may be a blind spot in organizational response strategies. “Individuals don’t realize that some of the things they are doing are probably retaliatory,” said Herbert Brown, an EEOC official in Virginia. “More training needs to be brought about.”

When asked why certain areas of bias were on the rise, EEOC spokesman David Grinberg responded that it “may be an outgrowth of the fact that the American workplace has become more ethnically, linguistically, and religiously diverse.” From our perspective at Littler Learning Group the rationale might be a bit more complex. First, employees nowadays are better educated about their legal protections than ever before. Second, technology and the omnipresent media – big and small – have radically blurred the distinction between work-related behavior and social interaction. Third, the downturn in the economy has introduced into many people’s lives a level of work-related stress that cannot help but to inform workplace dynamics.

Last year, upon release of the 2008 EEOC charge statistics, Acting Chairman Ishimaru observed that he “[did] not know if the increased number of charges signifi[ed] a trend.” Upon release of the 2009 statistics, it appears that this hesitance to recognize a trend may need to yield to the current data. The spike in discrimination claims reported in 2008 may represent the floor – not the ceiling – concerning the number of EEOC complaints to anticipate in years to come.

In light of the challenge that is afoot, farsighted employers would be well served to take proactive steps to protect themselves from becoming a statistic reflected in future EEOC reports. We recommend that employers “**RETROFIT**” their employment relations infrastructure to internally solidify response strategies and policy awareness while outwardly demonstrating their organization’s commitment to prevention, compliance and employee concerns:

- **Resources.** What resources can be tapped into to enhance an organization’s efforts at prevention and compliance? Consider updating policies, performance standards, coaching models, along with mission statements and values upheld by your organization. This exercise can open a broad dialogue and enhance awareness about the enterprise-wide commitment to a discrimination-free and harassment-free workplace.
- **Educate.** Get the word out! An organization’s commitment to discrimination – and harassment – prevention training needs to keep pace with the rising tide of EEOC charges. Employment law and compliance training can have universal relevance in all phases of an organization’s operation and training objectives are best met when the underlying message proliferates throughout the workplace. The more the message can get out about awareness, prevention, response strategies and reporting options, the less likely such concerns will remain hidden or unaddressed.
- **Train efficiently.** There remains a vast opportunity to cost-effectively enliven discrimination and harassment training measures through blended solutions and combining topics. Can an employee or manager be appointed to contribute to a training program as a role-player, to develop authentic case studies, or to participate as a group spokesperson? If an organization is conducting performance evaluation training, why not include a segment that brings a message of compliance and policy awareness into the discussion? Creativity advances efficiency!

- **Revise policies.** Reexamine EEO policies, antiharassment policies and codes of conduct to ensure they comply with the law as well as an organization’s culture and values. In areas where the number of charges filed is on the rise, or if oversight measures (both formal and informal) reveal particular insensitivities – address them. Make policies and procedures meaningful and relatable.
- **Observe.** Few skills are more powerful than the ability to genuinely take in what is happening. Encourage managers to listen – to “MBWA” (Manage By Walking Around) so they can catch and address warning signs (not to mention the opportunity to catch an employee doing something right). An “open door” policy means more than leaving the door to an office open. It implies that managers are responsive, interested and accessible (and that they get out of it once in a while).
- **Fix what doesn’t work.** When dynamics in a team or work group begin to go awry, think of natural – but firm – ways to correct misconduct at the outset. The value of saying something as simple as “Alright everyone, let’s not go down that road,” cannot be overstated. Many times, in both employment law training and in providing litigation defense, we have seen that managers reserve a strong response only for those incidents that “hit them over the head” as obvious harassment. Waiting until a pattern of misconduct reaches fever pitch only serves to escalate the problem and compounds the risks associated with resolving the problem.
- **Innovate.** Mix up the manner in which an organization’s commitment to prevention and compliance is reflected. Sponsor theme events related to tolerance and diversity or establish complaint “help-lines” (along with hotlines), so employees develop a genuine comfort level with raising an issue when it can best be addressed – at the outset.
- **Team Up.** Marshal the sometimes disparate resources within the organization to work together as much as possible. Encourage opportunities for that collaboration to occur outside of the “reaction-zone” (into which HR, legal and compliance departments are, all too often, first introduced). Littler’s experience informs us that the more visible the profile that HR or the legal department has within the organization, the more seamless the communication to and between those departments often is. Encourage representatives of those departments to participate in a variety of staff events and even in the occasional team meeting. When those departments generate policy, have them ask for general staff input when revisiting compliance objectives. The resulting interdepartmental goodwill can be the difference between an employee’s concern remaining squelched (and unresolved) and a concern coming to the surface with the best opportunity for satisfactory internal resolution.

The trend has become a standard: the ongoing increase in discrimination charge filings accompanied with an increase in EEOC enforcement requires that employers broaden their efforts to maintain a discrimination-free workplace. What can your organization do to pioneer new initiatives that set strong boundaries, strengthen mutual respect, and generate tolerance within your workforce? RETROFIT your internal systems now for the employment challenges that lie ahead and you will likely see positive results reverberate throughout all facets of your organization.

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¹ EEOC, *Enforcement and Litigation Statistics*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.
² Press Release, EEOC, *Job Bias Charges Approach Record High in Fiscal Year 2009, EEOC Reports; Commission Obtains \$376 Million for Victims of Discrimination*, Jan. 6, 2010, available at <http://www.eeoc.gov/eeoc/newsroom/release/1-6-10.cfm>.
³ *Crawford v. Metropolitan Gov’t of Nashville & Davidson County, Tenn.*, 129 U.S. 846 (2009) (federal anti-discrimination law protects employees from retaliation when they cooperate with internal investigations of harassment); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (in retaliation claims, an employee’s burden to establish a “materially adverse employment action” occurred is merely to show that he or she suffered some action that would dissuade a reasonable worker from exercising protected rights).