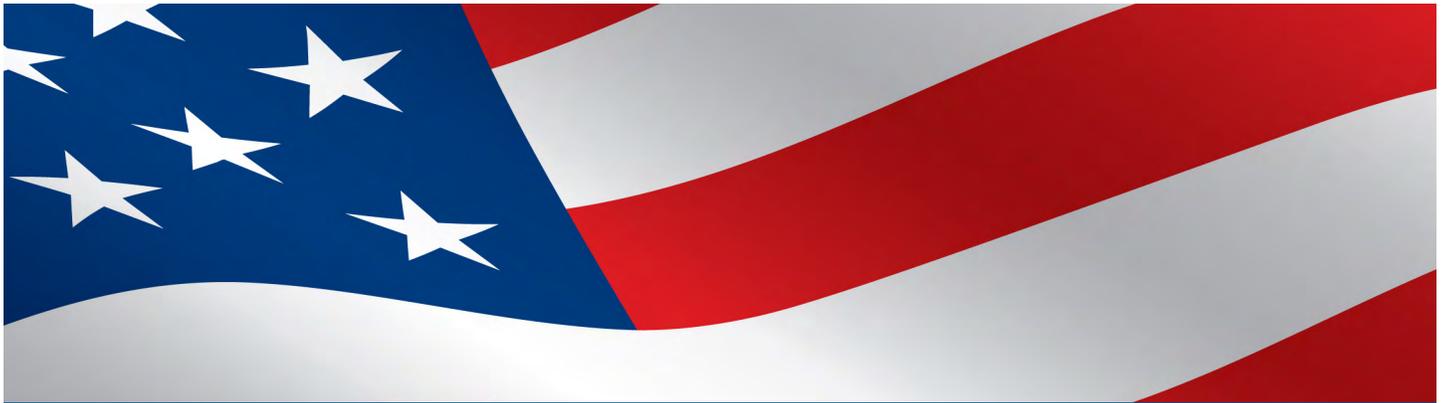




A REVIEW OF THE EEOC'S SYSTEMIC INITIATIVE:
Tracking its Progress, Current Priorities,
and Key Developments in FY 2016

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On November 16, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued its annual Performance and Accountability Report (“FY 2016 PAR”), which highlights key EEOC developments over the past fiscal year, ending September 30, 2016, including review of the EEOC’s current priorities and systemic initiative. On July 7, 2016, the EEOC also published “*A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*,” looking back over the past decade. Based on these publications, the EEOC has been far more transparent than ever in shedding greater light on its systemic initiative.

This article reviews key aspects of these recent reports and highlights key developments over the past year as the agency continues to devote a significant amount of its limited resources to “systemic discrimination,” which it defines as “pattern-or-practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”

A comprehensive review of key EEOC statistics, regulatory developments and litigation initiated by the EEOC will be discussed in Littler’s upcoming *Annual Report on EEOC Developments: Fiscal Year 2016*, which will be published in early 2017.

Setting the Stage

The EEOC’s FY 2016 PAR underscores that the agency has “continued to focus on those activities likely to have strategic impact in advancing equal employment opportunity in the workplace.”¹ In order to maximize its impact, the EEOC has been focusing on systemic discrimination.²

The EEOC’s recent report on *A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission* (“2016 Systemic Report” or “Report”), as published by the EEOC in July 2016,³ underscores the EEOC’s view that the “Commission cannot effectively combat discrimination without a strong nationwide systemic program,” and reviews the progress of the EEOC’s systemic initiative since

issuance of the EEOC’s *Systemic Task Force Report* in April 2006.⁴

An important cornerstone of this initiative has been the Commission’s 2012 Strategic Plan and related Strategic Enforcement Plan (“SEP”), which “reaffirmed the agency’s commitment to the goals set forth by the Systemic Task Force.”⁵ As many readers are aware, the SEP “identified six national priority areas to focus the agency’s work, identifying key areas for systemic enforcement to increase the impact of the agency’s efforts across the country.”⁶ On October 17, 2016, the EEOC announced adoption of its SEP for 2017-2021, which slightly modifies the initial SEP, but generally continues the same six priorities initially announced in its 2013-2016 SEP.⁷

EEOC Priorities Based on 2017-2021 SEP⁸ (Excerpts from SEP)

The following are the EEOC's current priorities:

1. **Eliminating Barriers in Recruitment and Hiring.**

EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks affecting African Americans and Latinos, date-of-birth inquiries affecting older workers, and medical questionnaires affecting individuals with disabilities).

The growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing, are also areas of particular concern. This priority typically involves systemic cases.

2. **Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.**

EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, and persons perceived to be members of these groups, and against members of underserved communities.

3. **Addressing Selected Emerging and Developing Issues.** Under this SEP, EEOC will continue to prioritize issues that may be emerging or developing. These issues fall within this category:

- a) Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- b) Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- c) Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
- d) Clarifying the employment relationship and the application of workplace civil rights protections in

light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and

- e) 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.

4. **Ensuring Equal Pay Protections for All Workers.**

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

5. **Preserving Access to the Legal System.** EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts. Specifically, EEOC will focus on: 1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); 2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and 3) significant retaliatory practices that dissuade others in the workplace from exercising their rights.

6. **Preventing Systemic Harassment.** Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency. Forty-three percent of the complaints filed by federal employees in fiscal year 2015 raised harassment. This priority typically involves systemic cases.

While there has been a recent focus on systemic and class-type claims, the EEOC's enforcement authority to file such claims is not a new development.

The EEOC has been armed with such power since the 1972 amendments when the EEOC was given authority based on Section 707 of Title VII to file "pattern-or-practice" discrimination lawsuits in support of class-based claims.⁹ Previously, such actions could be brought only by the U.S. Attorney General. As an example, *International Brotherhood of Teamsters v. United States*,¹⁰ one of the leading pattern-or-practice lawsuits that serves as a guidepost in dealing with the applicable burdens of proof in pattern-or-practice cases, was initiated by the U.S. Attorney General.

In 1980, the U.S. Supreme Court in *General Telephone Company v. EEOC*¹¹ eased the EEOC's burden in bringing class-type claims. The Court held that the requirements under Rule 23 of the Federal Rules of Civil Procedure did not apply to the EEOC making it easier to file class-type discrimination claims against employers.¹² As significantly, in *General Telephone*, which involved claims of sex discrimination on behalf of a group of female workers, the Court clarified that the EEOC could seek relief under Section 706 of Title VII on behalf of a "person or persons aggrieved."¹³ These early developments could not have foreshadowed the close scrutiny the Court would place on broad-based employment discrimination claims, as best evidenced by the Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.¹⁴ Such developments undoubtedly have contributed to the EEOC's increased focus on pattern-or-practice and class-type litigation based on the view that the Commission is not constrained by the procedural requirements for bringing class actions as set forth in Rule 23 of the Federal Rules of Civil Procedure.¹⁵

In bringing actions under Title VII, particularly pattern-or-practice claims, additional complexity has been added to the mix because Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate



sections in Title VII: Section 706 and Section 707. Only Section 707 expressly refers to pattern-or-practice claims, and there are significant distinctions between these sections because jury trials and compensatory and punitive damages are available under Section 706, but not under Section 707 of the Act.¹⁶ Notwithstanding, as highlighted in the 2016 Systemic Report, while employers have challenged the EEOC's authority to pursue pattern-or-practice suits under Section 706 of Title VII, only two appellate courts have addressed the issue,¹⁷ and both courts have ruled in favor of the EEOC. From the EEOC's perspective, "[t]he significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination."¹⁸ These decisions avoid the anomalous result that a victim of an individual instance of discrimination would be entitled to relief greater than victims of structural discrimination.¹⁹

Review of Systemic Claims Discussed in 2016 Systemic Report

The 2016 Systemic Report highlights that in fiscal year 2015, "more than 80 percent of the EEOC's systemic investigations and lawsuits raised SEP issues, including hiring, systemic harassment, immigrant and vulnerable workers, equal pay, leave policies, and access to the legal system."²⁰

The Report also reviews both successful conciliations and lawsuits over the past five fiscal years “by basis” and “by issue” and provides the following data:

Successful Conciliations of Systemic Investigations by Basis (FY 2011-2015)²¹

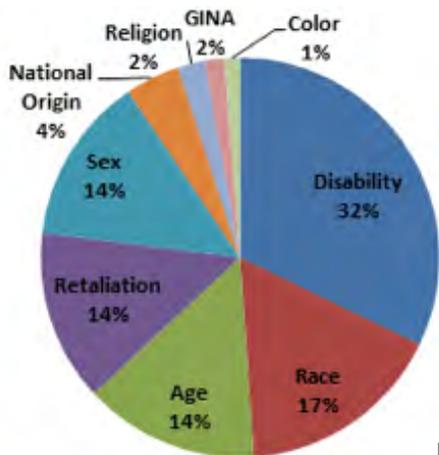


Figure 1

Systemic Lawsuit Resolutions by Basis (FY 2011-2015)

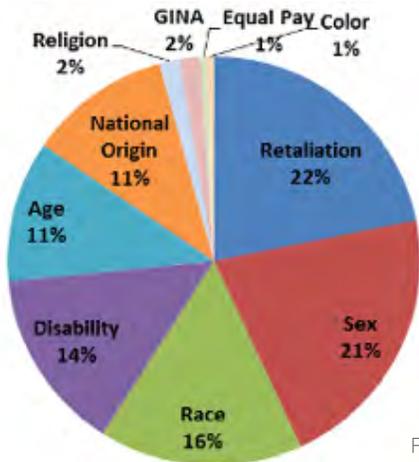


Figure 2

Successful Conciliations of Systemic Investigations by Issue (FY2011-2015)²²

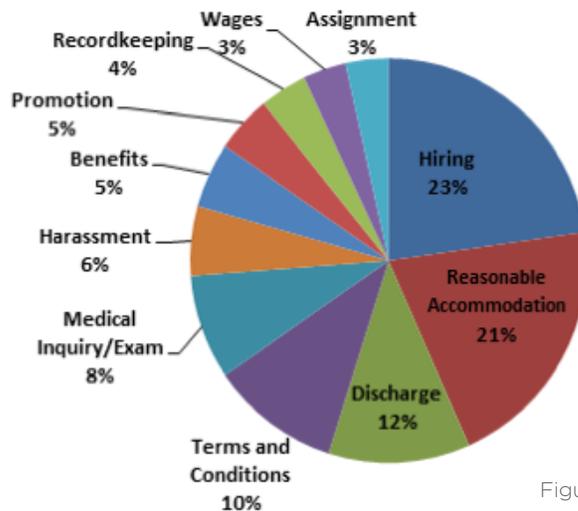


Figure 3

Systemic Lawsuit Resolutions by Issue (FY2011-2015)

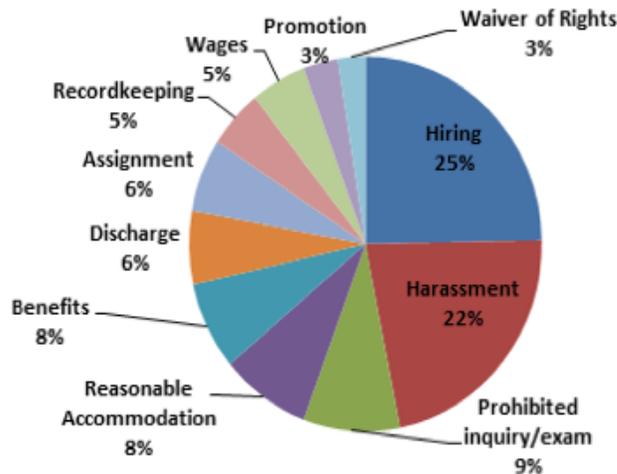


Figure 4

The above charts, prepared by the EEOC, show that charges and litigation involving hiring barriers, harassment claims and reasonable accommodation claims under the ADA have been a primary focus of the agency. Otherwise, litigation involving race and

sex discrimination, plus retaliation claims, have been areas of focus based on the EEOC's systemic initiative.

Genesis of Systemic Investigations

Systemic investigations typically can arise based on one of the following: (1) a charge is filed as a pattern-or-practice claim and/or the EEOC expands an individual charge into a pattern-or-practice investigation; (2) the EEOC initiates on its own authority a "directed investigation" involving potential age discrimination or potential equal pay violations; (3) or the EEOC commences an investigation based on the filing of a "Commissioner's Charge."²³



The 2016 Systemic Report reviews the numerous decisions in which the courts have upheld the right to expand an individual investigation to "uncover evidence suggesting a broader policy or practice affecting individuals in addition to the charging party," in exploring potential systemic discrimination.²⁴ Yet, the Report elects to omit two significant federal appeals court decisions in the Tenth and Eleventh Circuits, which limited expansive investigations based on individual charges of discrimination.²⁵

The 2016 Systemic Report also focuses on the important role of Commissioner charges²⁶ and directed investigations²⁷ in systemic investigations. The EEOC made three significant disclosures in the Report regarding Commissioner charges: (1) more

than 75 percent have been opened during the investigation of an individual charge when a policy or practice suggested broader application to other workers; (2) approximately 75 percent of the Commissioner charges have focused on discrimination in hiring (i.e., based on the view that such victims are frequently unaware of a discriminatory hiring policy); and (3) since 2006, the EEOC has found reasonable cause to believe that discrimination occurred in 81 percent of the Commissioner charges (84 out of 104 investigations).²⁸

Although the 2016 Systemic Report did not provide any statistical data on "Directed Investigations," in which the EEOC can initiate an Equal Pay Act or ADEA investigation on its own authority in the complete absence of a charge, the Report did disclose that "investigative staff can access EEO-1 data easily to understand workforce demographics of an employer."²⁹ Based on the current scheduled changes to EEO-1 Reports, in which employers will be required to prepare EEO-1 Reports that include pay data and hours worked by race, ethnicity, sex and job category—assuming these changed requirements for EEO-1 Reports remain in effect—this dramatic change involving required reporting of pay practices most likely would increase the risk of directed investigations involving potential equal pay claims, and Commissioner charges involving potential pay discrimination investigations based on race, ethnicity and sex.

The Report also provided no overall statistics regarding the outcome of systemic investigations, but employers need to be aware of the troublesome statistics regarding the increased likelihood of a reasonable cause finding based on a systemic investigation. While not highlighted by the agency or published on its website, there is nearly a 40 percent likelihood of a reasonable cause finding when faced with a systemic investigation, as compared to the fact that the EEOC historically has issued reasonable cause findings in less than five percent of the charges filed with the agency.³⁰

Resolution of Systemic Claims

The 2016 Systemic Report also discusses the resolution of systemic claims both at the conciliation stage, following a reasonable cause finding, and based on litigation with the EEOC.

In first addressing the “success rate” in resolving matters in conciliation, the Report states it “tripled the success rate of systemic conciliations from 21.4 percent in FY 2007 to 64.2 percent in FY 2015, which the EEOC asserts demonstrates the agency’s “strong commitment to voluntary resolutions.”³¹

When faced with litigation, the Report reviews resolutions from fiscal year 2007 through 2015 and refers to a “favorable outcome in 192 of 205 systemic resolutions, or approximately 94 percent of systemic resolutions,” explaining that the suits generally have been resolved by consent decree “providing for substantial monetary and injunctive relief.”³² The EEOC does not provide a detailed list of its so-called “successes,” nor does it explain the “small number of cases” in which the EEOC “received adverse judgments or sought voluntary dismissal,”³³ but the Report conveys the impression that that it considers any consent decree to be a “favorable outcome.”

Key Statistics for FY 2016

As discussed at the outset, on November 16, 2016, the EEOC issued its annual Performance and Accountability Report (referred to as the EEOC’s “PAR”) for Fiscal Year 2016.³⁴ The FY 2016 PAR reviews overall achievements of the agency over the past fiscal year, and significant attention is placed on the EEOC’s systemic initiative.

While various systemic investigations stem from expansion of individual investigations, the FY 2016 PAR also discloses the risk of Commissioner’s charges and Directed Investigations leading to a systemic investigation. In FY 2016, the EEOC initiated 15 investigations based on a Commissioner’s charge, and at the close of FY 2016 there were approximately 74 ongoing investigations initiated by a Commissioner

charge. The nature of these systemic investigations also are reviewed in the PAR, which include failure-to-hire claims, disability claims, harassment charges, broad-based discriminatory terms and conditions of employment, claims of segregated facilities and a broad range of other concerns.³⁵

Similarly, at the close of FY 2016, there were approximately 57 ongoing investigations initiated by a directed investigation, which involves investigations of potential violations under the Age Discrimination in Employment Act (ADEA) or Equal Pay Act (EPA).³⁶ According to the PAR, “[t]hese investigations alleged age discrimination in advertising, hiring, assignment, referral, benefits, retirement pensions, wages, terms and conditions, promotion, discipline, discharge, constructive discharge, involuntary retirement, involuntary retirement incentive, lay off and recall, waivers, and unequal pay based on sex.”³⁷

Regardless of how systemic investigations were initiated, employers faced significant risks based on the outcome of such investigations. Unlike overall EEOC statistics which indicate that the EEOC issues a reasonable cause finding in less than 5 percent of the charges filed with the agency,³⁸ the likelihood of a reasonable cause is far greater when faced with a systemic investigation. In FY 2016, the EEOC issued reasonable findings in 41 percent of the systemic investigations resolved by the agency (*i.e.*, 113 reasonable cause findings based on 273 systemic investigations).³⁹ This result is in a range similar to the percentage of reasonable cause findings in fiscal years 2015, 2014 and 2013 (36%, 45% and 35%, respectively).⁴⁰

Even so, the EEOC has reported a favorable success rate in conciliation of systemic investigations. While the agency has successfully conciliated only 44 percent of EEOC charges following a reasonable cause finding over the past two fiscal years, the agency has had greater success with resolution of systemic investigations. During FY 2016, the success rate for conciliation of systemic charges was

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57 percent; this was a slight decrease from FY 2015 when the EEOC resolved 67 percent of systemic charges through conciliation.⁴¹

In dealing with litigation by the agency, while there was a dramatic decrease in the number of lawsuits filed by the EEOC in FY 2015, the EEOC actually increased the number of systemic lawsuits filed by the EEOC in FY 2016. The EEOC filed only 86 “merits”⁴² lawsuits challenging alleged discriminatory practices, but this included 31 multiple victim suits (36%) – 13 non-systemic suits with multiple victims and 18 systemic suits (cases impacting 20 or more individuals).⁴³ While the total number of suits represented a significant decrease from the 142 “merits” lawsuits filed in FY 2015,⁴⁴ the EEOC increased from 16 to 18 systemic lawsuits filed between FYs 2015 and 2016. As significantly, at the end of FY 2016, among the 165 EEOC lawsuits on the court dockets, approximately 48 percent

of the lawsuits were multiple victim lawsuits – 32 (19.4%) were non-systemic multiple victim cases and 47 (28.5%) involved challenges to systemic discrimination.⁴⁵

The EEOC also disclosed the type of systemic lawsuits filed by the EEOC over the past fiscal year. The breakdown of the 18 systemic lawsuits filed in FY 2016 are: (1) 11 lawsuits involve ADA claims; (2) sex discrimination and religious discrimination claims are the focus of 2 lawsuits, respectively; and (3) race discrimination, GINA violations and Equal Pay Act claims each are the focus among the remaining systemic lawsuits initiated by the EEOC in FY 2016. Among these lawsuits, 11 suits involve claims on behalf of applicants and the balance involved lawsuits focusing on alleged discriminatory practices affecting current or terminated employees.⁴⁶ A description of systemic lawsuits filed over the past fiscal year is included below.

Nature of Discrimination	Applicant/Employee	Description	Court
ADA	Applicant	EEOC alleges that defendant car dealership rescinded a job offer to an individual with a disability based on its policy of excluding applicants who test positive for certain lawful prescription drugs.	D. Ariz.
ADA	Applicant	EEOC alleges that defendant automotive parts manufacturer denied employment to a class of individuals with disabilities based on their record of sick or FMLA leave use.	N.D. Miss.
ADA	Applicant	EEOC alleges that defendant farm service company made health inquiries of applicants.	W.D. Mo.
ADA	Applicant	EEOC alleges that defendant casino rescinded a job offer to an individual with a disability based on its policy of excluding applicants who test positive for certain lawful prescription drugs.	D.S.D.
ADA	Applicant	EEOC alleges that defendant staffing firm made health inquiries of applicants.	M.D. Fla.
ADA	Employee	EEOC alleges that defendant convenience store maintained a policy of refusing to provide more than three days of leave or available light duty assignments to individuals with disabilities.	W.D. Okla.
ADA	Employee	EEOC alleges that defendant home improvement chain refused to grant additional medical leave as a reasonable accommodation to employees with disabilities.	C.D. Cal.
ADA	Employee	EEOC alleges that defendant fast food restaurant maintained a policy of requiring employees to disclose use of certain prescription medication.	W.D. Ark.

Nature of Discrimination	Applicant/Employee	Description	Court
ADA	Employee	EEOC alleges that defendant farm refused to make exceptions to its inflexible attendance policy as a reasonable accommodation for employees with disabilities.	N.D. Ala.
ADA	Employee	EEOC alleges that defendant transportation company failed to accommodate and discharged individuals with disabilities and retaliated against employees who opposed discrimination.	D. Colo.
GINA	Applicant	EEOC alleges that defendant mining equipment manufacturer made genetic information inquiries of conditional hires.	W.D. Pa.
Religion	Employee	EEOC alleges that defendant hospital failed to accommodate the religious beliefs of employees by refusing to grant them an exemption from its flu immunization policy.	W.D.N.C.
Religion	Employee	EEOC alleges that defendant hospital failed to accommodate the religious beliefs of employees by refusing to grant them an exemption from its flu immunization policy.	W.D. Pa.
Sex	Applicant	EEOC alleges that defendant engaged in a pattern-or-practice of refusing to hire women into entry-level warehouse jobs at two facilities in the Midwest.	N.D. Ohio
Sex	Applicant	EEOC alleges that defendant employee leasing service refused to hire a class of female applicants to assist with transition of waste management services.	S.D. Miss.
Race	Employee	EEOC alleges that defendant nightclub systematically assigned African American dancers only to a club patronized primarily by African American patrons.	S.D. Miss.
EPA	Employee	EEOC alleges that defendant university paid female law professors less than similarly situated male professors for substantially similar work.	D. Colo.

The EEOC also resolved 21 systemic lawsuits in FY 2016. According to the PAR, six settlements included at least 50 victims and two settlements included over 1,000 victims.⁴⁷ The EEOC reported that it obtained approximately \$38 million in relief for alleged “victims” of systemic discrimination, and the PAR highlighted 8 settlements:

- A nationwide consent decree involving an \$8.6 million settlement of an ADA lawsuit that challenged an employer’s maximum leave policy.
- A \$5.26 million settlement involving Indian workers brought to the United States under the H-2B visa program, who worked in “man camps” and allegedly were promised lawful permanent residency but thereafter subjected to racial slurs, poor working conditions and threatening conduct.
- Payment of \$4 million to a class of 74 African American workers allegedly subjected to a racially hostile work environment that included racial slurs, racist graffiti and the least favorable and most hazardous jobs at the employer’s Texas production facility.
- Following a summary judgment ruling in favor of the EEOC based on an alleged company policy of only assigning applicants for over-the-road driver jobs to trainers of the same sex, the parties agreed to a settlement that included payment of \$250,000 to the charging party, and \$2.9 million in compensatory damages to the 69 female class members.
- A consent decree involving settlement of sex discrimination claims against a retailer with operations in four states, which allegedly

excluded females from various positions, the employer agreed to payment of \$2.1 million to 46 female applicants who had been denied employment.

- Settlement of a sex discrimination suit in which the EEOC intervened 10 years ago, which included payment of \$1.5 million in backpay to 1,870 women who were denied employment as sales service representatives at facilities throughout the state of Michigan for a supplier of work uniforms and other products for businesses.
- A consent decree of approximately \$1 million paid into a qualified settlement fund for payment to African American and non-Hispanic applicants for entry-level production jobs at a commercial bakery in Texas that also included a preferential hiring list for such persons before hiring other applicants.
- Settlement of a Title VII/ADEA lawsuit against a Minnesota medical devices and equipment company, which included claims of failing to hire women for sales representative jobs because of their sex, denying employment to applicants over the age of 40 and retaliating against a human resources manager who opposed the reported unlawful practices, and the consent decree included \$1 million to be distributed to alleged victims of the alleged discriminatory practices.

Progress Report on Systemic Initiative

Key Procedural Developments

The 2016 Systemic Report pointed to the EEOC's success in *EEOC v. Mach Mining*⁴⁸ as the reason that "Circuit courts addressing these procedural challenges have returned the focus of the cases to the merits of the discrimination claims."⁴⁹ The Report highlights the Second Circuit's decision *EEOC v. Sterling Jewelers*,⁵⁰ which reportedly "explicitly rejected" the Eighth Circuit's ruling in *EEOC v. CRST Van Expedited, Inc.*,⁵¹ "holding that a court may not review the sufficiency of EEOC's systemic

investigation, citing the Supreme Court's *Mach Mining* decision."⁵² The Report also cites a recent favorable ruling from the Ninth Circuit's in *State of AZ and EEOC v. Geo Group*,⁵³ which ruled that in class claims the EEOC is not required to identify specific class members and it is sufficient if the EEOC has conciliated on behalf of the "identified class."

The Fifth Circuit adopted the view of the Ninth Circuit in *Geo Group* and reached a similar decision.⁵⁴

The Ninth and Fifth Circuit decisions are at odds with the above-referenced Eighth's Circuit's *CRST* decision, which held that "the issue in *Mach Mining* was to what extent a court may inquire into the EEOC's conciliation process," and "(t)he class definition was not a contested issue." Because there was no investigation of 67 claims, "dismissal could still be an appropriate remedy even in light of *Mach Mining*."⁵⁵

While not cited in the Report, in *EEOC v. College America*,⁵⁶ a district court in an ADEA case also reviewed the impact of *Mach Mining* and held that the failure to ever engage in conciliation regarding certain separation agreements also barred the EEOC from proceeding on such claims.

As significantly, the EEOC's 2016 Systemic Report completely omits any reference to the Seventh Circuit's opinion in *EEOC v. CVS*,⁵⁷ which rejected the EEOC's view that it was excused from any conciliation required when pursuing pattern-or-practice claims under Section 707 of Title VII.

One final procedural issue worth mention is that the U.S. Supreme Court has granted certiorari in *EEOC v. McLane Co., Inc.*,⁵⁸ and the Court will address "(w)hether a district court's decision to quash or enforce a subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do."⁵⁹

Key Litigation Developments—Impact of EEOC's Strategic Enforcement Plan

Over the past year, the EEOC has continued its focus on systematic investigations and related litigation

based on the EEOC's Strategic Enforcement Plan.⁶⁰ In the 2016 Systemic Report, the EEOC focuses on its efforts and achievements in the following areas: (1) Recruitment and Hiring; (2) Systemic Harassment; (3) Pay and Promotion; (4) Policies Failing to Accommodate Individuals with Disabilities; (5) Access to the Legal System; (6) Protecting Immigrant, Migrant and Other Vulnerable Workers; and (7) Mandatory Retirement and Benefits. These various topics and other priority issues are discussed below.

Eliminating Barriers in Recruitment and Hiring

The EEOC's 2016 Systemic Report places special emphasis on EEOC investigations and litigation involving hiring barriers. From the EEOC's perspective, "[b]ecause most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination."⁶¹ Thus, the EEOC believes that it is "uniquely situated to identify hiring and recruitment issues and to address and remedy" such discriminatory practices either through conciliation or lawsuits filed by the agency.⁶²

The EEOC reviewed a substantial number of EEOC settlements over the past the past 10 years involving hiring-related claims, both through conciliation and litigation, in which it achieved favorable results for a broad range of workers involving challenges based on race, sex, national origin, age or absence of disability. (See chart on pages 12-13). The EEOC also highlighted its impact on removing hiring barriers, particularly focusing on criminal conviction background screens, which included issuing updated guidance on criminal history in 2012,⁶³ and asserting in its Criminal History Guidance:

For example, as the agency was investigating numerous charges alleging discrimination from background screens, EEOC issued an updated policy statement in 2012 on the use of criminal conviction background screens. The updated guidance brought heightened attention to the issue and contributed to

significant changes in employer policies and state and local laws limiting the use of such screens. A year after EEOC issued this guidance, a survey of nearly 600 HR professionals reported that just 32 percent of their organizations had applied EEOC's updated guidance to their hiring process. After extensive outreach by EEOC and the filing of two lawsuits in June 2013 challenging the use of background screens as discriminatory, the same survey of HR professionals conducted one year later reported that 88 percent of employers had adopted EEOC's guidance.⁶⁴

Over the past fiscal year, the EEOC also has added a new dimension to its litigation involving criminal background checks, asserting that an employer violates Title VII based on the failure to maintain records disclosing the adverse impact based on race, sex or ethnic group in using criminal history as a screening tool in the hiring process.⁶⁵ Further, although the EEOC favorably settled one major lawsuit involving a challenge to the use of background checks in *EEOC v. BMW Mfg. Co.*,⁶⁶ based on a \$1.6 million settlement and related injunctive relief, the EEOC continues to be embroiled in similar litigation in federal court in Chicago, which initially was filed on the same day as the *BMW* lawsuit.⁶⁷

While the EEOC highly publicizes its successes in its 2016 Systemic Report, it omits reference to the fact that it has suffered stinging losses in most of its key disparate impact litigation challenging the use of background checks by employers. In *EEOC v. Peoplemark*,⁶⁸ the Sixth Circuit affirmed the district court's assessment of more than \$750,000 in attorneys' fees and costs for continuing to pursue a lawsuit challenging criminal background checks, despite failing to timely produce an expert report supporting its claims. In *EEOC v. Freeman*,⁶⁹ the Fourth Circuit affirmed summary judgment for an employer where the EEOC challenged background and credit checks based on a disparate impact

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theory, agreeing with the district court's exclusion of the EEOC's expert's report to support its claims. The district court later awarded \$900,000 in attorney's fees to the employer.⁷⁰ The loss in *Freeman* was on the heels of a similar loss by the EEOC in *EEOC v. Kaplan Higher Learning Education Corp.*,⁷¹ in which the EEOC relied on the same expert in a disparate impact challenge to an employer's reliance on credit history in the hiring process.

Most of the EEOC's successes attacking hiring barriers have involved large-scale systemic disparate treatment claims, as cited below. Some of the EEOC's pending lawsuits also involve similar claims

attacking hiring barriers, including lawsuits alleging discrimination based on race and national origin,⁷² gender,⁷³ and age.⁷⁴ It is anticipated that the EEOC will continue to focus on hiring barriers, and expand its reach by closely reviewing pre-employment testing practices and potentially challenging any reliance on "big data" in the hiring process.⁷⁵

As shown below, some of the EEOC's significant settlements arose over the past fiscal year, which involved large-scale litigation spanning a period of many years. Except as indicated below, each of these settlements was based on consents decrees after litigation was initiated by the EEOC.

Date	Nature of Company	Basis of Alleged Discrimination	Focus of Claims and Settlement Amount
6/16/05	Car Manufacturer ⁷⁶	Race Discrimination	Aptitude Tests \$8.55 million
8/8/06	Trucking Company ⁷⁷	Sex Discrimination	Truck Driver and Dockworker Jobs \$2.4 million
4/2/07	Automotive Dealership Company ⁷⁸	Sex Discrimination	Sales Positions \$2.3 million
12/20/07	Car Manufacturer ⁷⁹	Race Discrimination	Aptitude Test for Skilled Trade Apprenticeship Program \$2.3 million
4/15/08	Staffing Company ⁸⁰	Race and Age Discrimination	Alleged Failure to Refer to Temporary Jobs \$575,000
9/14/09	Insurance Company ⁸¹	Age Discrimination	Reorganization Plan Barring Reemployment \$4.8 million
3/1/10	Big Box Store ⁸²	Sex Discrimination	Order-Filler Jobs at Distribution Center \$11.7 million
3/10/10	Tire Company ⁸³	Sex Discrimination	Tire Changing Jobs \$2 million
8/19/10	Staffing Company ⁸⁴	Race Discrimination	Alleged Preferential Hiring of Hispanics Over African Americans for Temp Jobs \$585,000
1/11/12	Beverage Company ⁸⁵	Race Discrimination (Conciliation Agreement)	Criminal Background Checks Disproportionately Excluded African Americans \$3.13 million
4/30/13	Metal Forging Company ⁸⁶	Sex Discrimination	Entry Level Laborer Jobs \$700,000

Date	Nature of Company	Basis of Alleged Discrimination	Focus of Claims and Settlement Amount
9/12/14	Restaurant ⁸⁷	Race Discrimination	Front of the House Positions \$1.3 million
12/5/14	Staffing Company ⁸⁸	Race Discrimination	Alleged Preferential Treatment to Hispanic Workers Over African America Workers \$580,000
5/6/16	Staffing Company ⁸⁹	Sex and Disability Discrimination	Alleged Exclusion Based on Gender (female) and Unlawful Medical Inquiries \$800K
8/24/15	Big Box Store ⁹⁰	Race, Sex and Disability Discrimination (Conciliation Agreement)	Employment Assessments Screening Out Applicants \$2.8 million
9/8/15	Car Manufacturer ⁹¹	Race Discrimination	Criminal Background Checks \$1.6 million
11/8/15	Uniform Delivery ⁹²	Sex Discrimination	Uniform Delivery Driver Jobs \$1.5 million
3/4/16	Sales Company ⁹³	Age and Sex Discrimination	Sales Positions \$1.02 million
3/24/16	Tire Company ⁹⁴	Sex Discrimination	Managers, Mechanics and Tire Changer Positions \$2.1 million
4/22/16	Commercial Bakery ⁹⁵	Race Discrimination	Alleged Exclusion of African Americans as Commercial Bakery Workers \$1.042 million
5/27/16	Trucking Company ⁹⁶	Sex Discrimination	Same-Sex Training Policy for Drivers \$3.1 million

Systemic Harassment

The 2016 Systemic Report highlights the EEOC's efforts in addressing systemic harassment, including discussion of the EEOC's recent Task Force on harassment in the workplace. From the EEOC's perspective, "[h]arassment based on race, sex, disability, age, national origin, and religion continues to be a persistent problem in the workplace, which is why addressing systemic harassment through systemic enforcement and targeted outreach is a national priority for the agency."⁹⁷ The Report sends a very strong message that attacking harassment remains an important priority at the EEOC.⁹⁸

In January 2015, shortly after Jenny Yang was appointed EEOC Chair, the EEOC held a Commission meeting that focused on harassment.⁹⁹ This was followed by the March 2015 announcement of the "EEOC Select Task Force on the Study of Harassment in the Workplace,"¹⁰⁰ in which it was further explained, "[c]omplaints of harassment span all industries, include many of our most vulnerable workers, and are included in 30% of the charges that we receive."

The EEOC announced the findings of a "panel of experts" in October 2015 and referred to a "multi-prong strategy essential to preventing workplace harassment," which included "[p]lacing

pressure on companies by buyers, empowering bystanders to be part of the solution, multiple access points for reporting harassment, prompt investigations, and swift disciplinary action when warranted, along with strong support from top leadership, are some of the measures employers can take to prevent workplace harassment.¹⁰¹ These findings were followed by issuance of the EEOC's Task Force Report on Harassment, issued in June 2016, which was authored by Commissioners Victoria Lipnic and Chai Feldblum.¹⁰²

The Task Force Report, as referenced in the 2016 Systemic Report, is comprehensive in nature and underscores the importance of “top down” leadership and key components for an effective anti-harassment policy and appropriate training to prevent harassment in the workplace.¹⁰³ Employers need to be mindful of the findings and recommendations of the Task Force Report, particularly because it includes the recommendation that the “EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined [in the Report].”¹⁰⁴

Notwithstanding, the Task Force Report attempts balance based on its finding that in any anti-harassment training, the substance of the training can also address the conduct that does not constitute harassment in the workplace, particularly focusing on actions by managers and supervisory personnel:

Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because

of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments-‘I like your jacket’- constitute workplace harassment, but rather reflect the reality of human experience and common courtesies.¹⁰⁵



The 2016 Systemic Report also highlights significant exposure for employers when faced with systemic harassment claims, relying on EEOC lawsuits that resulted in significant settlement payments by employers:

- A \$21 million dollar settlement in 2015 based on an EEOC lawsuit alleging that African Americans, Native Americans, Hispanics, Asian Americans, and biracial individuals at an oil drilling company were subjected to racial and ethnic slurs, assigned to the lowest level jobs, denied training and promotions, disproportionately disciplined and demoted, and were retaliated against;¹⁰⁶
- An \$11 million settlement in a race harassment case against a trucking company on behalf of 309 African American employees, who reportedly were subjected to racially hostile displays such as nooses and racist graffiti, as well as being disciplined more severely than their peers of other races;¹⁰⁷

- A similar race harassment case settled with a trucking company for \$10 million for 250 African American, which included new anti-harassment policies, and consultants to examine discipline and assignment procedures;¹⁰⁸
- Settlement payment of \$2.5 million, plus significant revisions to company policies, affecting 79 female employees based on alleged sexual harassment of teenagers employed at a fast food chain;¹⁰⁹ and
- Settlement payment of \$2 million, plus similar revisions to policies, on behalf of 79 female employees involving another fast food chain¹¹⁰

Recent harassment litigation by the EEOC continues to underscore the risks of such claims, as evidenced by a recent \$1.4 award based on alleged egregious harassment of numerous female farm workers by two supervisors¹¹¹ and a settlement of over \$1 million in early 2016 against a condominium complex based on allegedly allowing a housekeeping manager to sexually harass a group of female employees, which included attempted rape.¹¹²

While such litigation can be costly and lengthy for employers, the EEOC also faced one of its more embarrassing losses in pursuing harassment litigation in *EEOC v. CRST*.¹¹³ This case stemmed initially from an individual charge of discrimination and expanded into a systemic harassment lawsuit, spanning a period of over 10 years from its initial filing in 2005 and still remains in the courts. After the EEOC's pattern-or-practice claim was dismissed by the district court, the EEOC continued to seek relief on a class basis of 270 employees. Ultimately, and after many years of wrangling and favorable judgments in favor of the employer, except for two claimants, the EEOC dropped the claim of one claimant and was left solely with the claim of the initial charging party, which was settled for \$50,000. Following an award of over \$4 million in attorneys' fees in favor of the employer, the case was appealed to the Eighth Circuit and remanded, and most recently was before the

U.S. Supreme Court, which remanded the case for further proceedings regarding the attorneys' fee award.

Pay and Promotion

In its 2016 Systemic Report, the EEOC referred to its systemic efforts dealing with "pay and promotion practices," but the focus of the discussion was on EEOC litigation and settlements dealing with promotion claims. Even so, recent events make it abundantly clear that pay discrimination, including Equal Pay Act issues, will receive significantly increased attention by the EEOC.

The 2016 Systemic Report highlights: (1) a \$21.3 million conciliation agreement, which included denial of promotion claims impacting over 200 African American employees;¹¹⁴ (2) a \$19 million systemic settlement involving a national restaurant chain impacting 3,000 female workers that included denial of promotion claims;¹¹⁵ (3) payment of \$25.3 million to settle a lawsuit involving denial of promotions at a national retail pharmacy involving 10,000 African American management and pharmacy employees;¹¹⁶ and (4) a \$5 million settlement of a systemic lawsuit against an Illinois manufacturing operation impacting 259 African American workers that included alleged denial of promotional opportunities.¹¹⁷

Not surprisingly, the 2016 Systemic Report makes no mention of any recent EEOC recent successes in pursuing systemic Equal Pay Act claims because the EEOC's efforts in this area have been limited, and the agency has suffered stinging setbacks on this issue. One of the more highly publicized losses involved *EEOC v. Port Auth. Of N.Y. & N.J.*,¹¹⁸ in which the EEOC asserted that female attorneys were paid less than male attorneys for "jobs the performance of which requires equal skill, effort, and responsibility." In ultimately dismissing the Complaint, following limited discovery, the court took sharp exception with the EEOC's mere "conclusory allegations...despite a three-year investigation—to state an EPA claim upon which

relief may be granted.” On appeal to the Second Circuit, the EEOC did not fare any better, and in a sharply worded opinion, the appeals court stated, “[w]e conclude that the EEOC’s failure to allege any facts concerning the attorneys’ actual job duties deprives the Court of any basis from which to draw a reasonable inference that the attorneys performed ‘equal work,’ the touchstone of an EPA claim.”¹¹⁹

The EEOC suffered another setback in *EEOC v. True Oil LLC*,¹²⁰ in which the district court in Wyoming struck down an EPA claim in a summary judgment ruling and rejected the view that female accounting clerks were paid less than male employees performing “substantially equal work.” The court found that the employees performed distinctly different duties at the subsidiary companies, essentially finding that similar job titles were not dispositive of an EPA claim. Although the EEOC filed a notice of appeal on September 16, 2016, the appeal was dropped on October 12, 2016.¹²¹

The EEOC’s recently published Strategic Enforcement Plan (SEP) for 2017-2021, as announced on October 17, 2016, makes clear that pay discrimination claims will not be limited to equal pay claims under the EPA, explaining:¹²²

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.¹²³

During FY 2016, the EEOC also has announced revisions to the annual EEO-1 Report to collect pay data as part of a joint effort with the U.S. Department of Labor’s Office of Federal Contract

Compliance Programs (OFCCP), which monitors equal employment efforts of federal government contractors. Announcement of this planned change initially occurred on January 29, 2016, as part of a White House Equal Pay event, during which Chair Yang stated, “the EEOC is taking a significant step forward to address pay inequality in the workplace.”¹²⁴ Chair Yang explained that the EEOC “will use this data to more effectively focus investigations, assess complaints of discrimination and identify existing pay disparities that may warrant further investigation.” Employers also were encouraged to use this data to “help evaluate their own pay practices.”¹²⁵

As most employers are aware, the final announcement of the updated EEO-1 form occurred on September 29, 2016, at which time the EEOC stated that starting March 2018, it will collect pay data from employers covered by the EEO-1 reporting requirements.¹²⁶ This change would affect government contractors and employers with over 100 employees.

In view of the recent federal election, it is now unclear whether the announced change to the EEO-1 forms will remain in effect. Notwithstanding, employers should anticipate that the EEOC will continue to focus on pay discrimination as part of its updated Strategic Enforcement Plan.

Policies Failing to Accommodate Individuals with Disabilities

In recent years, the EEOC consistently has brought more ADA lawsuits than any other claim.¹²⁷ While a substantial number of the EEOC’s ADA lawsuits have involved failure-to-accommodate claims, a key focus of the EEOC’s systemic initiative has involved challenging employer leave policies, including both leave policies with maximum caps and no-fault attendance plans that failed to make reasonable accommodations for employees with disabilities.

First, in dealing with leave policies, the EEOC has repeatedly challenged employers that are viewed



as having inflexible maximum leave policies and failing to provide reasonable accommodations to employees seeking to return from leave, taking the view such policies violate the ADA. As an example, for the past several years, the EEOC has been deeply entrenched in a nationwide ADA pattern-or-practice lawsuit in *EEOC v. United Parcel Service*,¹²⁸ pending in the Northern District of Illinois.

The EEOC's 2016 Systemic Report also highlights a recent \$8.6 million settlement involving a national retail home improvement and appliance chain involving similar allegations in which the employer allegedly failed to provide reasonable accommodations to individuals with disabilities and terminating their employment when their medical leaves of absence exceeded the employer's maximum leave policy. As part of the May 2016 settlement, the employer agreed to retain a consultant with ADA experience to review and revise company policies, implement effective training for both supervisors and staff on the ADA, develop a centralized tracking system, and regularly report compliance to the EEOC.¹²⁹ The 2016 Systemic Report also points to the EEOC's issuance of a May 2016 resource guide to assist employers dealing with leave policies¹³⁰ that describes numerous successful settlements involving similar challenges to inflexible leave policies.¹³¹

The EEOC has taken a similar approach in its attack on no-fault attendance policies. Aside from a pending lawsuit in the Northern District of Illinois,¹³² the 2016 Systemic Report points to a \$1.7 million settlement in November 2015 based on a conciliation agreement with an employer that had a nationwide policy of issuing attendance points for medical-related absences and not excusing points based on absences stemming from disability-related absences. The significant risk of such no-fault policies was also underscored based the EEOC's highlighting a \$21 million nationwide settlement based on a 2011 consent decree entered into between the EEOC and a telecommunications firm.¹³³

Key provisions in the 2011 consent decree,¹³⁴ coupled with statements by the EEOC in guidance issued by the agency,¹³⁵ underscore that any no-fault attendance policy requires reference to reasonable accommodation under the ADA and (generally) not receiving an adverse action stemming from an absence based on a protected disability. Both the consent decree and EEOC guidance make clear that an employer is required to approach such accommodations on an individualized basis, but limits can be placed on such accommodations to the extent that an employee's absences would be "unreasonably unpredictable, repeated, frequent or chronic."

While not addressed in the 2016 Systemic Report's discussion of the EEOC's systemic initiative, an important ADA issue the EEOC has focused on involves "voluntary" participation in wellness plans. Aside from issuing rules to address the EEOC's view in this area,¹³⁶ the EEOC also has initiated broad-based litigation, although the EEOC's results to date have been mixed.¹³⁷ However, in an unusual turn of events, the U.S. Chamber of Commerce recently joined forces with the EEOC in filing an Amicus Brief to support the EEOC's opposition to a motion for a preliminary injunction to enjoin implementation of the EEOC's recent wellness rules in *AARP v. United States Equal Employment Opportunity Commission*.¹³⁸

Access to the Legal System

The EEOC's stated priority involving "preserving access to the legal system" has involved challenges to employer practices that "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts." Based on the 2016 Systemic Report, the EEOC referred to these employer "barriers" as taking many forms, "including widespread retaliatory employment actions against those who take the step of reporting unlawful discrimination, threats of harm against individuals who act as witnesses in EEOC proceedings, or employment agreements that interfere with the right to file a charge or communicate with EEOC."¹³⁹

Most employers are aware that retaliation claims are closely scrutinized by the EEOC, and the agency recently outlined the specific types of concerns that create employer risk, as reviewed in the EEOC's *Enforcement Guidance on Retaliation and Related Issues*, issued on August 25, 2016.¹⁴⁰ Topics covered include: (1) the scope of employee activity protected by the law; (2) legal analysis to be used to determine if evidence supports a claim of retaliation; (3) remedies available for retaliation; (4) rules against interference with the exercise of rights under the ADA; and (5) detailed examples of employer actions that may constitute retaliation.¹⁴¹

As significantly, the EEOC's 2016 Systemic Report underscores that systemic retaliation claims also create significant risk for employers. As an example, 14 percent of successful conciliations and 22 percent of successful lawsuit resolutions involve retaliation claims.¹⁴² The Report focused on several significant settlements:¹⁴³

- In one suit against a nationwide grocery store, the EEOC found a pattern of retaliation against employees who complained of discrimination, including harder assignments, denials of promotion, and discharge. The EEOC settled the case and obtained \$8.9 million for 168

employees, plus intensive training for company employees and four years of monitoring to ensure compliance.¹⁴⁴

- In another case, the EEOC obtained a judgment that a labor contractor's repeated threats to deport guest farmworkers constituted a pattern-or-practice of unlawful retaliation.¹⁴⁵
- In two other cases, the EEOC obtained preliminary injunctive relief after discovering that the employer was instilling extreme fear among charging parties or witnesses through acts such as bribes, vandalism, solicitation to commit criminal acts, and death threats.¹⁴⁶

One of the most controversial issues based on the EEOC's reported effort to "preserve access to the legal system" has involved the EEOC filing suit in the absence of a discrimination charge or allegations of retaliatory conduct in which the EEOC has challenged releases and arbitration agreements (collectively referred to as "employment agreements"). Recent EEOC lawsuits have relied on the authority of Section 707(a) of Title VII involving an alleged "pattern-or-practice of resistance to the full enjoyment of any of the rights" secured by Title VII.¹⁴⁷ The 2016 Systemic Report referred to "the use of employment agreements that materially interfere with the right to file a charge or participate in an EEOC proceeding as an unlawful pattern-or-practice of resistance to Title VII rights," specifically relying on *EEOC v. Doherty Enterprises, Inc.*¹⁴⁸

In *Doherty*, the EEOC focused on applicants and employees being required to sign an arbitration agreement that prohibited filing of discrimination charges with the EEOC and instead required the parties to resolve their disputes through arbitration.¹⁴⁹ The employer moved to dismiss based on the EEOC suing without an underlying charge of discrimination and the EEOC's failure to engage in conciliation prior to suing the employer. The employer also submitted that the EEOC could proceed against the employer only if the EEOC

was asserting an “unlawful employment practice” covered within the prohibitions of Title VII (*i.e.*, discriminatory employment practices and/or retaliatory conduct).

In rejecting the employer’s arguments, the court in *Doherty* broadly interpreted Section 707(a) and the “resistance” language. Aside from ruling that the EEOC could sue absent a discrimination charge, the court in *Doherty* ruled that Section 707 was not limited to claims involving “unlawful employment practices,” explaining:

Significantly, Congress chose not to use the term “unlawful employment practices” with respect to section 707(a) which is in stark contrast to the use of the term “unlawful employment practices” in section 706.

The Court can only conclude that because Congress chose to use different language in the two sections, it manifested different intent; namely, that a resistance claim is not limited to cases involving an unlawful employment practice. Instead, a resistance claim may be brought to stop a pattern and practice of resistance to the full enjoyment to Title VII rights.

In *Doherty*, the court also held that the procedures in Section 706 were not required for “resistance” claims, and neither a charge nor conciliation was required prior to suing.¹⁵⁰

It should also be noted, aside from the discussion of the *Doherty* case and the EEOC’s challenge to the employer’s arbitration agreement in that case, the 2016 Systemic Report included critical comments on mandatory arbitration agreements. In the view of the EEOC, “[b]y taking discrimination claims out of the public view, forced arbitration can prevent employees from learning about similar concerns shared by others in their workplace and can impede development of the law.”¹⁵¹ The EEOC further outlined its concern that “[f]orced arbitration can also deter workers from bringing discrimination



claims to the EEOC, leaving significant violations in entire segments of the workforce unreported.”¹⁵²

While the EEOC has pointed to its harsh view of both arbitration agreements and release agreements as interfering with “access” to the EEOC’s legal processes,” the EEOC’s 2016 Systemic Report failed to even mention the Seventh Circuit’s December 2015 opinion, *EEOC v. CVS Pharmacy, Inc.*,¹⁵³ which took strong exception with the EEOC’s approach in challenging an employer’s release.

The *CVS* case involved the EEOC’s challenge to a severance agreement that included a general release in circumstances where the underlying charge involved alleged sex and race discrimination, but involved no attack regarding the severance agreement. The lawsuit arose after the EEOC became aware of the severance agreement and general release and thereafter dismissed the underlying charge, but advised the employer there was “reasonable cause” to believe that based on the severance agreement, the employer was engaged “in a pattern-or-practice of resistance to the full enjoyment of rights secured by Title VII.”¹⁵⁴ The EEOC then sued without engaging in conciliation.

To support its motion to dismiss or for summary judgment,¹⁵⁵ the employer in *CVS* focused on the express terms of the severance agreement, which expressly provided that the agreement did not “interfere with [an] Employee’s right to participate

in a proceeding with any ... government agency enforcing discrimination laws” and did not “prohibit [an] Employee from cooperating with any such agency.”

The employer challenged the EEOC's basis for its “pattern-or-practice” claim in *CVS* and asserted that a lawsuit could only be pursued where there was a claim of a “pattern of discrimination,” and the EEOC had conceded that it was not asserting any claim of discriminatory or retaliatory conduct. In granting the employer's motion to dismiss in *CVS*, the district court did not address the substance of the employer's claim involving the EEOC's challenge to the separation agreement.¹⁵⁶ Instead, the court focused on the procedural issues leading to the lawsuit and dismissed the lawsuit based on the EEOC's failure to conciliate prior to suing. As significantly, the district court rejected the EEOC's attempt to expand the meaning of the term “resistance” in Section 707(a) of Title VII beyond discrimination and retaliation.¹⁵⁷ In the district court's view, based on review of applicable authority, while Congress in 1972 may have transferred authority from the Justice Department to the EEOC to institute pattern-or-practice lawsuits, the EEOC was granted authority “to bring charges of a pattern-or-practice of discrimination and not as creating a separate cause of action.” The district court concluded that the 1972 Amendment to Title VII “did not authorize the EEOC to forego the procedures in Section 706,” including conciliation, and the EEOC was thus “not authorized to file this suit against [the employer] and [the employer] is entitled to judgment as a matter of law.”¹⁵⁸

In affirming the district court's dismissal of the EEOC's lawsuit in *CVS*, the Seventh Circuit rejected the EEOC's view of Section 707(a) and held that: (1) the EEOC could not proceed with a lawsuit in the absence of a charge of discrimination; (2) the EEOC could not circumvent the EEOC's obligation to engage in conciliation prior to filing suit; and (3) the EEOC could not pursue a “pattern-or-practice” claim based on

Section 707(a) in the absence of claim of unlawful discriminatory or retaliatory conduct in violation of Title VII. The Seventh Circuit further emphasized that Section 707(a) did not “create a broad enforcement power of the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII [involving unlawful discrimination or retaliation] in one consolidated proceeding.” On January 28, 2016, the EEOC filed a Petition for Rehearing or Rehearing En Banc, but on March 9, 2016, the Seventh Circuit issued an Order denying the EEOC's Petition.

In the EEOC's 2016 Systemic Report, in discussing its priority of “Access to the Legal System,” the EEOC also omitted any discussion of the release that was upheld by the Third Circuit in *EEOC v. Allstate Insurance Company*.¹⁵⁹ In *Allstate*, based on changing the way it sold insurance, the company reorganized and shifted to an independent contractor model and terminated the at-will employment of its sales agents, offering them the opportunity to work as independent contractors on the condition of waiving their legal claims against the employer, including claims arising under Title VII, the ADEA and the ADA. The EEOC argued that a requirement to execute a release constituted unlawful discrimination on various grounds, including the contention that withholding a privilege of employment (*i.e.*, the conversion option) in exchange for the release was “per se retaliatory,” and the refusal to waive discrimination claims constituted “protected opposition activity.”

In rejecting the EEOC's arguments, the Third Circuit expressly stated “[i]t is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled,” and even the employment discrimination laws contemplate releases may be required, as shown by the Older Workers' Benefit Protection Act. The court also rejected the view that “refusing to sign a release constitutes opposition to unlawful discrimination,” explaining, “[i]n our view,

such inaction does not communicate opposition sufficiently specific to qualify as protected employee activity.”

Protecting Immigrant, Migrant and Other Vulnerable Workers

One area where the EEOC has devoted significant time and resources has involved looking after the interests of immigrant, migrant and other vulnerable workers, particularly because this group of workers has historically received limited support from the private plaintiff’s bar.



The 2016 Systemic Report highlights several cases to dramatize the plight of vulnerable workers and the EEOC’s efforts on their behalf:¹⁶⁰

- The Report reviews the EEOC’s suit against *Henry’s Turkey Service*¹⁶¹ seeking relief for 32 intellectually disabled men at a turkey evisceration plant in Iowa, who reportedly were subjected to years of confinement, abuse, deplorable conditions, and reduced pay after the sister of one of the men filed a charge of discrimination on his behalf. After going to trial in 2013, a jury awarded them \$240 million, although the award was dramatically reduced based on the “damages cap” under Title VII.¹⁶²

- The Report also refers to the EEOC prevailing in cases seeking relief for hundreds of Indian¹⁶³ and Thai¹⁶⁴ workers recruited to work in the United States who were subjected to unfavorable work conditions, and threats of violence and deportation.
- In another case,¹⁶⁵ the Report refers to the EEOC securing increases in wages, benefits and promotion opportunities for 149 Hispanic warehouse workers in New York City who had been denied equal pay and opportunities.
- In one final case scenario, the EEOC refers to having sought relief for EEOC “farmworker women,” who alleged sexual harassment and retaliation by their employer.¹⁶⁶

While not mentioned in the EEOC’s 2016 Systemic Report, the above awards and settlements are in stark contrast to one lawsuit by the EEOC on behalf of vulnerable workers in circumstances where the EEOC’s tactics to protect such workers led the agency to inappropriately expand the scope of its lawsuit, at least in the view of one court. In *EEOC v. Global Horizons et al*,¹⁶⁷ although a default judgment was entered against defendant Global Horizons (the employer of the workers), the district court judge took strong exception with the EEOC’s including the defendant growers in the lawsuit, finding “[t]he evidence and documentation pertaining to the parties’ pre-lawsuit communications and the EEOC’s investigation (or lack thereof) ... shows that the EEOC was not prepared to allege plausible, reasonable, or non-frivolous Title VII claims against the Grower Defendants.”

In challenging the EEOC’s approach to that litigation, the court referred to EEOC investigation notes in which Thai workers provided information that the grower defendants did not treat them unfairly in terms of compensation or in any other manner and treated them the same as Latino workers. In the court’s view, the EEOC was left with a “joint-employer” theory without legal or factual support.

In an opinion extremely critical of the EEOC's approach to the lawsuit, the court awarded legal fees against the EEOC for its conduct and stated:

In summary, this is an exceptional cases where the EEOC failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants.¹⁶⁸

Mandatory Retirement and Benefits/Age Discrimination

Finally, although mandatory retirement and related age discrimination claims were not included among the EEOC's list of priorities in its Strategic Enforcement Plan, the 2016 Systemic Report



demonstrates that the EEOC has been closely scrutinizing such charges for a number of years. Based on many members of the “baby boom” generation approaching the traditional retirement age, employers need to carefully review proposed actions that increase the risk of large-scale age discrimination claims and policies that may have an adverse impact against older workers, particularly hiring and termination practices.

The 2016 Systemic Report, however, focused solely on cases in which the EEOC has successfully

challenged retirement and benefit systems that allegedly discriminate based on age.¹⁶⁹

- The Report referred to *EEOC v. Sidley Austin*,¹⁷⁰ in which the EEOC challenged the law firm's policy of forcing out older partners based on age. Based on a consent decree settling the case, the firm paid \$27.5 million to 32 former partners.
- *EEOC v. Baltimore County*¹⁷¹ also was cited in which the Fourth Circuit upheld a district court finding that the Maryland county's pension system treated older new-hires less favorably because of their age by requiring them to make larger contributions than younger new-hires for the same benefits.
- The Report next refers to *EEOC v. Minnesota Dep't of Corrections*,¹⁷² in which the Eighth Circuit affirmed a summary judgment ruling that an early retirement incentive plan that included an age 55 “cliff” (in which a retirement incentive was not available to individuals once they reached age 55) was inconsistent with the purposes of the ADEA. According to the EEOC brief, as cited with approval by the appeals court, “[t]he age 55 cliff meant that, in order to obtain this benefit, employees must retire at 55 or forever lose the opportunity to obtain the benefit. Employees hired after age 55 never could obtain the early retirement benefit.” The court held that the plan “arbitrarily discriminate(s) on the basis of age.” Following that decision, the EEOC resolved a series of similar suits against other Minnesota state agencies.¹⁷³
- The Report highlights a series of lawsuits against New York municipal volunteer fire departments. The EEOC successfully challenged the denial of service credit for volunteer firefighters who worked past the entitlement age for retirement benefits, as evidenced by numerous consent decrees striking down the policy.¹⁷⁴
- Similarly, the EEOC refers to conciliation agreements in four systemic ADEA investigations

alleging that employers stopped allowing volunteer firefighters to accrue points for performing certain duties when they reached age 55 or 60.¹⁷⁵

The EEOC Report points out that in each of the above-referenced cases, the retirement benefits plans discriminated against older workers because the plans reduced the employees' retirement benefits based solely on age. As explained in the Report, "EEOC secured agreements that increased monthly benefits at retirement, provided awards of monetary benefits for current retirees and family members of deceased retirees, and required the employers to change their policies to bring them into compliance with the ADEA."

Recent EEOC litigation also shows that the agency has increased its focus on a broad range of litigation impacting older workers. This includes litigation attacking hiring barriers to older workers¹⁷⁶ as well as large-scale workforce reductions that impact older workers.¹⁷⁷

Concluding Remarks and Anticipated Trends for FY 2017

While the above discussion is intended to provide an update on the EEOC's systemic initiative over the past year as well as review key milestones and other noteworthy developments in recent years, it is difficult to predict with certainty what employers can expect moving forward. Even so, while there may be some changes in EEOC policy, it is unlikely the agency will dramatically shift gears during the coming fiscal year. The following are some of the anticipated trends for FY 2017.

1. **The EEOC Will Continue to Focus on Systemic Investigations and Related Litigation.** Despite the new administration, during the coming fiscal year it is unlikely there will be any significant change in the agency's continued focus on systemic investigations and related litigation. The recently adopted Strategic Enforcement Plan for 2017-2021 clearly shows that the agency

will continue to be strategic based on its limited resources,¹⁷⁸ but the EEOC may be even more careful in cases selected for litigation to limit criticism of the agency, which could have a direct impact on funding and staffing levels. It also is anticipated that the agency will maintain the "new normal" of a reduced case load. As an example, during FY 2016, the EEOC filed the smallest number of lawsuits in recent years, and despite a general decrease in the number of suits filed over the past five years,¹⁷⁹ there was an approximate 35% decrease in the number of lawsuits filed between FY 2015 and FY 2016 (*i.e.*, decrease from 142 to 86 lawsuits). Even so, the EEOC increased the number of systemic lawsuits filed during the past two fiscal years (*i.e.*, from 16 to 18 systemic lawsuits), and the percentage of pending multiple victim¹⁸⁰ suits in the federal courts increased from 40% to 48%,¹⁸¹ which included an increase in the percentage of pending systemic lawsuits from 22% (*i.e.*, 48 out of 218) to 28.5% (*i.e.*, 47 out of 165).

2. **The EEOC will Continue to Focus on Attacking Hiring Barriers.** The EEOC has taken the view that because most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination.¹⁸² Thus, the EEOC believes that it is "uniquely situated" to address hiring and recruitment issues. The EEOC's largest pending lawsuits primarily involve "failure-to-hire" claims, including lawsuits alleging discrimination based on race and national origin,¹⁸³ gender,¹⁸⁴ and age.¹⁸⁵ Disparate impact claims challenging hiring practices, including the ongoing litigation involving criminal background checks, will continue.¹⁸⁶ However, the agency may also challenge an employer's failure to maintain appropriate recordkeeping in determining whether certain hiring practices, such as the use of background checks, have an adverse

impact on those in a protected group.¹⁸⁷ Based on the EEOC's recent meeting that discussed the increased use of data-driven selection devices, such as "big data," the agency may more closely review reliance on such selection practices.¹⁸⁸

3. **The EEOC Will Continue to More Closely Review Alternative Work Arrangements.** As discussed in the EEOC's recently adopted Strategic Enforcement Plan, the EEOC has announced that it will closely monitor various alternative work arrangements for securing workers, such as reliance on staffing firms, independent contractor relationships and the "gig economy." The EEOC already has been closely reviewing staffing firm arrangements, as explained in the EEOC's July 2016 Systemic Report:

As a result of systemic investigations and lawsuits, staffing agencies have agreed to discontinue the practice of referring applicants based on client preferences for employees of a certain race, color, sex, national origin, age or absence of disability, and to provide job placement and resume assistance for persons who had not been previously referred for employment.¹⁸⁹ Employment by staffing agencies has grown seven times more rapidly than overall employment growth, which makes compliance by staffing agencies critical to ensuring equal opportunity for all workers.¹⁹⁰

The EEOC also may follow the lead of the NLRB and U.S. Department of Labor in broadly defining independent contractor relationships in the "gig economy," but there certainly is a possibility that any expansion of the EEOC's view of the employer-employee relationship may be subject to closer review, and most likely, some narrowing in the new administration.¹⁹¹

4. **The EEOC Most Likely Will Pay Increased Attention to Particular Industries.** Based on today's focus on technology, the EEOC has

sent a clear signal that it may more closely review the technology industry. On May 18, 2016, the EEOC held a special meeting on "Advancing Opportunity for All in the Tech Industry."¹⁹² This was one of the first EEOC meetings that ever focused on a particular industry. During the session, the EEOC highlighted a report on *Diversity in the Tech Industry*. The EEOC's director of the research project stated:

The results were stark—in most job categories, the representation of women, African Americans and Hispanics were significantly less than their representation in the overall workforce. For women, Asian Americans, African Americans, and Latinos, their representation diminished markedly at higher levels in the organization, such as Executives and Managers as compared to Professionals and Technicians.

Certain speakers also addressed age discrimination. A representative from the AARP was cited in the press release reporting on the May 18, 2016 EEOC meeting as stating, "[a]ge discrimination in the technology sector is perhaps most evident in companies' hiring policies and practices, which are designed to attract and hire younger employees. 'Job postings declaring a preference for new or recent graduates are common and some companies have actually specified which graduating class they are seeking.'"¹⁹³ Thus, employers should expect that the EEOC will more closely review technology companies, including both the limited number of minorities in the industry as well as limited opportunities for older workers.

5. **Challenges to Unlawful Harassment, Including Systemic Harassment, Will Remain a Key Priority.** There is little doubt that sexual and other forms of harassment in the workplace will continue to be vigorously investigated

and create potential legal risks for employers that do not promptly investigate and address harassment in the workplace. In the EEOC's recently updated Strategic Enforcement Plan for 2017-2021, in which the EEOC stated that "Preventing Systemic Harassment" remained one of its key priorities, the Commission explained, "[h]arassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency."¹⁹⁴

The EEOC's Task Force Report on Harassment, issued in June 2016 and authored by Commissioners Lipnic and Feldblum,¹⁹⁵ is comprehensive in nature and underscores the importance of "top down" leadership and key components for an effective anti-harassment policy and appropriate training to prevent harassment in the workplace.¹⁹⁶ Employers need to be mindful of the findings and recommendations of Task Force Report, particularly because it includes the recommendation that the EEOC:

should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined [in the Report].¹⁹⁷

6. **Disability Discrimination and Related Litigation Will Remain Front and Center**. In recent years, ADA lawsuits have been the most frequent type of lawsuit the agency has filed,¹⁹⁸ and FY 2016 was no different: 35 out of the 86 merits filings (40%) involved ADA claims, which included 11 out of the 18 systemic lawsuits (61%) filed by

the EEOC.¹⁹⁹ In its updated Strategic Enforcement Plan for 2017-2021, the EEOC included among its priorities "developing and emerging issues" that the agency will focus on, and expressly includes "qualification standards and inflexible leave policies that discriminate against individuals with disabilities."²⁰⁰

Employers should expect the agency to continue to focus on ADA claims. In order to minimize risk, employers need to ensure that qualification standards are tied to the essential functions of a job, which an individual can perform with or without reasonable accommodations. As significantly, there is little doubt that employers maintaining maximum leave policies will be vulnerable based on the failure to provide reasonable accommodations for employees with disabilities by extending such leaves based on an individual review of the circumstances involved. Similarly, no-fault attendance policies that fail to accommodate absences based on an employee's disability will create similar risks for an employer as shown by recent ADA litigation. Notwithstanding, the EEOC has provided guidance to address attendance and leave policies to minimize risk in dealing with attendance-related issues. In short, an employer may limit its risk by having in effect a policy in which an individual's disability is reviewed on an individualized basis. An employer generally does not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.²⁰¹ Thus, an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.²⁰²

7. **The EEOC will Carefully Scrutinize Pay Equity.**

Although the Republican members of the Commission opposed the proposed changes to the EEO-1 forms to include pay data, and the required implementation of the revised EEO-1 form may now be subject to serious question based on the outcome of the election, pay equity will remain an important agency priority. The EEOC's updated Strategic Enforcement Plan for 2012-2017 expressly provides:

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.²⁰³



Based on the Equal Pay Act, employers need to be mindful of the risk of a directed investigation in which the EEOC can make broad-based requests for information. Notwithstanding, the EPA is limited to differences in pay based on

gender where the individuals are performing jobs involving equal skill, effort and responsibility under similar working conditions *within the same establishment*.²⁰⁴ An employer can justify pay differentials where the differences are based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.²⁰⁵

In dealing with pay claims based on gender in which Title VII is involved, the same defenses are available, but the EEOC investigation, and any subsequent litigation, may be far broader than the applicable facility, as shown by the EEOC's current nationwide lawsuit in *EEOC v. Sterling Jewelers*.²⁰⁶ A similar approach may be taken with any pay discrimination based on Title VII.

8. **Increased Attention Will Be Placed on Age Discrimination Claims.** Employers also face the risk of broad-based directed investigations under the Age Discrimination in Employment Act. Two of the EEOC's largest failure-to-hire cases in the hospitality industry involve failure-to-hire claims.²⁰⁷ Certain industries, such as the technology industry, are vulnerable to systemic age discrimination claims. The scope of systemic age discrimination claims also remains an issue based on a recent ruling by the Eleventh Circuit in *Villarreal v. R. J Reynolds*,²⁰⁸ which held that disparate impact claims cannot be filed on behalf of applicants when challenging a neutral employment policy (e.g., employment guidelines to target candidates who are "2-3 years out of college" and to "stay away from" candidates with "8-10 years" of sales experience). As significant is a pending case before the Third Circuit, *Karlo v. Pittsburgh Glass Works, LLC*,²⁰⁹ in which rejected applicants in their 50s are trying to carve out a class, alleging that a 2009 reduction-in-force had a disparate impact on them but did not similarly hurt impacted workers in their 40s, thus focusing on the issue whether subgroups

of workers over 40 can carve out class claims. The EEOC filed briefs to support the plaintiff's position in both *Villareal* and *Karlo*.

9. **LGBT Coverage Will Continue to be Vigorously Debated.** Modifying an employer's EEOC policies to prohibit discrimination or harassment in the workplace on the basis sexual orientation or sexual identity is a recommended practice. Yet, Congress has failed to take action to amend Title VII to provide protection under our federal discrimination laws. Based on the lack of clarity in the law, coverage of sexual orientation and gender identify has been one of the most hotly debated issues over the past several years and will continue over the coming year. The EEOC's current position that coverage falls within the express terms of Title VII may shift based on the change in administration, but regardless of the EEOC's view, the courts will continue to wrestle with this issue, since Congress probably will not extend coverage in the immediate future.

The EEOC's current position stems from a July 15, 2015, federal sector decision, *Baldwin v. Department of Transportation*,²¹⁰ in which the Commission, in a 3-2 decision, held that a claim of discrimination on the basis of sexual orientation "necessarily states a claim of discrimination on the basis of sex under Title VII."²¹¹ The EEOC relied on three grounds: (1) sexual orientation discrimination involves sex stereotyping in not conforming to gender norms; (2) such discrimination amounts to gender-based associational-type discrimination; and (3) sexual orientation requires consideration of a person's sex. Republican-appointed Commissioners Barker and Lipnic voted against approval of the decision. After the Commission shifts to a 3-2 Republican majority, it remains an open question whether the Commission's current view will endure.



Notwithstanding, the debate will continue in the courts. One of the most comprehensive summaries of the various theories for and against coverage is included in the Seventh Circuit's recent panel decision in *Hively v. Ivy Tech Community College*.²¹² This decision outlines the history of Title VII and including sex discrimination when Title VII was adopted, which clearly did not contemplate inclusion of sexual orientation within the meaning of sex discrimination. The court then addressed the "intervening Supreme Court case," *Price Waterhouse v. Hopkins*,²¹³ which recognized gender non-conformity claims as cognizable under Title VII, and the numerous cases since that time that have distinguished sexual orientation claims, which are not. While the Seventh Circuit panel decision underscored that there may justifiable reasons for extending protection, the panel concluded that such a change only could occur based on the authority of the U.S. Supreme Court or Congress. However, during the rehearing en banc, held on November 30, 2016, various judges clearly gave the impression that they are giving careful consideration to reversing prior precedent. They took the view that (1) the meaning of sex discrimination is not frozen in time; and (2) the judges are not bound by what Congress thought in 1964 when Title VII was enacted.

This issue continues to be vigorously debated in the courts, and while one recent decision adopted the EEOC's view,²¹⁴ appeals are also pending before both the Second and Eleventh Circuits.²¹⁵

10. **Claims Involving Access to the Legal System May Be More Limited.** The EEOC's restated priority involving "preserving access to the legal system" focuses on "policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts."²¹⁶ The EEOC has taken an expansive view of Title VII and challenged practices, with mixed success, that it believes interfere with the EEOC's processes, such as arbitration policies and severance agreements.²¹⁷ During a Republican

administration, there clearly will be more pressure from Congress to focus on the EEOC's backlog year, rather than "pursuit of novel cases unsupported by law."²¹⁸ A Republican-appointed Chair coupled with a 3-2 Republican majority on the Commission and a new Republican-appointed General Counsel clearly may shift the direction of the agency away from more novel theories and return to more traditional retaliation theories under Title VII.

To further supplement this publication, a comprehensive review of key EEOC statistics, regulatory developments and litigation initiated by the EEOC will be discussed in Littler's upcoming *Annual Report on EEOC Developments: Fiscal Year 2016*, which will be published in early 2017.

- 1 EEOC FY 2016 PERFORMANCE AND ACCOUNTABILITY REPORT (herein "FY 2016 PAR"), at 33 (Nov. 16, 2016), available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.
- 2 *Id.* at 37.
- 3 See Press Release, EEOC, *EEOC's Systemic Program Shows Significant Success in Past 10 Years* (July 7, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-7-16.cfm>.
- 4 SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2006), available at https://www.eeoc.gov/eeoc/task_reports/systemic.cfm.
- 5 See FY 2012-2016 Strategic Plan, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm. See also U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016 (Dec. 18, 2012), available at <https://www.eeoc.gov/eeoc/plan/sep.cfm>.
- 6 *Id.*
- 7 The EEOC's 2017-2021 SEP is available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>. The EEOC Press Release announcing the updated SEP is available at <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>.
- 8 *Id.* at 6-9.
- 9 42 U.S.C. § 2000e-6 (*i.e.*, Section 707).
- 10 *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).
- 11 *General Telephone Company v. EEOC*, 446 U.S.318 (1980).
- 12 FED. R. CIV. P. 23 (a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.
- 13 42 U.S.C. §2000e-5 (*i.e.*, Section 706).
- 14 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011).
- 15 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. See Systemic Task Force Report at https://www.eeoc.gov/eeoc/task_reports/systemic.cfm. Similar provisions exist under § 207(a) of GINA. The Commission also has had authority to pursue class cases under the ADEA and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.
- 16 Based on the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), *codified at* 42 U.S.C. § 1981 *et seq.*, jury trials and compensatory and punitive damages of up to \$300,000 are limited to claims under Section 706 of Title VII. 42 U.S.C. §1981a. Section 707 merely provides for the traditional equitable remedies available under Title VII (e.g. back pay, front pay, attorneys' fees and injunctive relief).
- 17 See EEOC. *Bass Pro Outdoor World, L.L.C.*-2016 WL 3397696 15-20078 (5th Cir. June 17, 2016) and *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2013).
- 18 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. Similar provisions exist under § 207(a) of GINA. The Commission also has had authority to pursue class cases under the ADEA and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.
- 19 See 2016 Systemic Report at 34.
- 20 See 2016 Systemic Report at 18.
- 21 Per the 2016 Systemic Report, "Data is provided for the last five fiscal years in Figures 1-4 for the bases and issues alleged to allow for comparison. Some cases contain multiple bases. See Report at 2, footnote 17.
- 22 Per the 2016 Systemic Report, "The data in Figures 3-4 represent the significant systemic issues raised in conciliations of investigations and in lawsuits resolved in fiscal years 2011 through 2015. Some cases contain multiple significant issues." See Report at 3, footnote 18.
- 23 As discussed *infra*, when discussing the EEOC's priorities and "access to the legal system," over the past couple of years, the EEOC has also begun a practice of initiating an investigation and/or filing suit in the complete absence of a discrimination charge based on Section 707 of Title VII in which the EEOC has alleged that the employer "engaged in a pattern-or-practice of *resistance* to the full enjoyment of any of the rights secured" by Title VII, and this approach has had mixed success in the courts. See *e.g.*, *EEOC v. Doherty Enterprises*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015); *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 2015 U.S. Dist. LEXIS 21963

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- (7th Cir. 2015), *reh'g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).
- 24 See 2016 Systemic Report at 33-34, *citing EEOC v. Aerotek, Inc.*, 815 F.3d 328 (7th Cir. 2016) (rejecting undue burden argument and permitting EEOC to obtain information concerning discriminatory client requests not recorded in staffing company's database where evidence showed such requests were recorded in the database); *EEOC v. McLane Cos.*, 804 F.3d 1051 (9th Cir. 2015) (permitting EEOC to obtain names, social security numbers, addresses and telephone numbers for individuals subject to a strength test in an expanded investigation of an individual sex discrimination charge); *EEOC v. UPMC*, 471 F. App'x 96 (3d Cir. 2012) (permitting the EEOC to discover the identity of all employees fired after 14 weeks of medical leave, noting that the Commission may expand its investigation to include additional claims so long as they might cast light on the underlying charge); *EEOC v. Konica Minolta Bus. Solutions*, 639 F.3d 366 (7th Cir. 2011) (enforcing subpoena relating to applicants for sales personnel at four facilities, where charge contained alleged class allegations of discrimination); *EEOC v. Schwan's Home Serv.*, 644 F.3d 742 (8th Cir. 2011) (enforcing subpoena of list of employees participating in management development program, where EEOC expanded investigation of sex discrimination charge). While not cited in the Report, *see also EEOC v. Maritime Autowash*, 2016 U.S. App. LEXIS 7416 (4th Cir. Mar. 24, 2016) (enforcing subpoena involving investigation of charge by undocumented worker, stating, "[T]he only question we must consider now is whether the EEOC's subpoena, designed to investigate Escalante's Title VII charges, is enforceable. We hold that it is. EEOC and employer disagree on EEOC's authority to investigate charge based on having undocumented status when hired . . . [the EEOC] reads Title VII's definition of 'employee' and related provisions to cover Escalante despite his undocumented status.")
- 25 See *EEOC v. Burlington Northern Santa Fe Railroad*, 69 F. 3d 1154 (10th Cir. 2012) and *EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014). The favorable impact of the Royal Caribbean decision should be tempered based on the Eleventh Circuit's view that the EEOC could seek such information in a Commissioner's charge, but the EEOC had not elected that option in dealing with the matter under investigation.
- 26 The Report states that "Congress authorized EEOC to use Commissioner Charges under Title VII, 42 U.S.C. §2000e-5(b), the ADA and GINA. See 29 C.F.R. §§1601.1 and 1601.11 (2015)." Report at 16.
- 27 As explained in the Report, "Directed Investigations are initiated by the EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. (1967), and the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards act, 29 U.S.C. §211." Report at 16.
- 28 See 2016 Systemic Report at 17-18.
- 29 See Report at 12.
- 30 This information is based on a review of the EEOC's annual Performance and Accountability Report (PAR) since FY 2012, except that the FY 2015 PAR did not include such data, but it was provided to Littler by a senior official at the agency. EEOC data shows the following: (1) the EEOC issued 106 reasonable cause determinations based on 300 systemic investigations in FY 2013 (35%); (2) there were 118 reasonable cause determinations in 260 systemic investigations in FY 2014 (45%); and (3) there were 99 reasonable cause determinations based on 268 systemic investigations in FY 2015 (36%). This would be an overall average of 39 percent for the 3-year period (i.e., 323 reasonable cause determinations and 823 systemic investigations). See Barry A. Hartstein, et al., *Littler's Annual Report on EEOC Developments: Fiscal Year 2015* at 4 and *Littler's Annual Report on EEOC Developments: Fiscal Year 2014* at 4. The statistics for FY 2016 are discussed in the next section herein.
- 31 See Report at 31.
- 32 *Id.* at 32.
- 33 *Id.*
- 34 See EEOC's *FY 2016 Performance And Accountability Report* (herein "FY 2016 PAR") and Press Release, EEOC, *EEOC Issues FY 2016 Performance Report* (Nov. 16, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/11-16-16.cfm>.
- 35 FY 2016 PAR at 93-94.
- 36 *Id.*
- 37 *Id.* at 94.
- 38 See EEOC charge statistics at <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.
- 39 See FY 2016 PAR at 37.
- 40 See *Littler's Annual Report of EEOC Developments: Fiscal Year 2015* at 4, available at <https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93fiscal-year-2015>. See FY 2014 PAR at 27 (<https://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>) and FY 2013 PAR at 32 (<https://www.eeoc.gov/eeoc/newsroom/release/12-16-13.cfm>). While the number of reasonable cause findings for systemic investigations completed in FY 2015 is not included in the FY 2015 PAR, this information was provided to Littler by a senior official at the agency.
- 41 See FY 2016 PAR at 35.
- 42 The EEOC has defined "merits" suits as direct lawsuits or by intervention involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements. See EEOC, *EEOC LITIGATION STATISTICS, FY 1997*

THROUGH FY 2015, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

- 43 See 2016 Systemic Report at 6, Footnote 27 (i.e. “Multi-victim’ cases are those cases with fewer than 20 identified victims that do not challenge a discriminatory policy or pattern-or-practice”).
- 44 See FY 2015 PAR at 34.
- 45 See FY 2016 PAR at 36.
- 46 See FY 2016 PAR at 94-96.
- 47 See FY 2016 PAR at 39-42.
- 48 *EEOC v. Mach Mining*, 135 S. Ct. 1645 (2015). Therein, The Supreme Court described the EEOC’s conciliation obligation as a “barebones review” that gives the EEOC “expansive discretion...to decide how to conduct conciliation efforts and when to end them.” Any failure by the EEOC would require merely staying the action and requiring the EEOC to meet its conciliation obligation.
- 49 See 2016 EEOC Systemic Report at 33.
- 50 *EEOC v. Sterling Jewelers*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015).
- 51 *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).
- 52 See 2016 EEOC Systemic Report at 33. While not cited in the Report, the Northern District of Illinois took a similar view in *EEOC v. Autozone, Inc.*, 2015 U.S. Dist. LEXIS 149849 (N.D. Ill., Nov. 4, 2015), citing, in relevant part, the *Sterling Jewelers* decision.
- 53 *State of AZ and EEOC v. Geo Group*, 816 F. 3d 1189 (9th Cir. 2016).
- 54 2016 U.S. App. LEXIS 11031 (5th Cir. June 17, 2016).
- 55 *CRST Van Expedited, Inc.*, 679 F.3d at 657.
- 56 *EEOC v. College America*, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015).
- 57 *EEOC v. CVS Pharmacy Inc.*, 809 F.3d 335 (7th Cir. 2015).
- 58 *EEOC v. McLane Co., Inc.*, Docket No. 15-1248, available at <http://www.scotusblog.com/case-files/cases/mclane-co-v-eeoc/>.
- 59 *Id.* See *Petition for a writ of certiorari* (Questions Presented, Question 1) (Apr. 4, 2016) and ruling (Sept. 29, 2016), “Petition GRANTED limited to Question 1 presented by the petition.”
- 60 The EEOC’s Strategic Enforcement Plan, which was adopted by the EEOC on December 12, 2012, is available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.
- 61 See 2016 EEOC Systemic Report at 20.
- 62 *Id.* at 20.
- 63 *Id.* at 6.
- 64 *Id.* at 6.
- 65 See *EEOC v. Crothall Servs. Grp.*, 2016 U.S. LEXIS 83520 (E.D. Pa. June 28, 2016), in which the district court denied the employer’s summary judgment motion and concluded that the employer “is required to maintain records relating to selection procedures under §709(c) of 29 C.F.R. 1607.4(A), and merely concluded that there was a factual issue whether the employer maintained sufficient records to comply with the EEOC’s Uniform Guidelines that require such adverse impact analysis.
- 66 See *EEOC v. BMW Mfg. Co.*, No. 13-CV-1583 (D.S.C) (Filed: June 11, 2013; Settled: Sept. 8, 2015).
- 67 See *EEOC v. Dolgencorp*, 1:13-cv-04307 (N.D. Ill.) (Filed June 11, 2013).
- 68 *EEOC v. Peoplemark*, 2013 U.S. Appx. 2048 (6th Cir. Oct. 7, 2013).
- 69 *EEOC v. Freeman*, 778 F. 3d 463 (4th Cir. 2015).
- 70 *EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. 2013).
- 71 *EEOC v. Kaplan Higher Learning Education Corp.*, 748 F. 3d 749 (6th Cir. 2014).
- 72 See, e.g., *EEOC v. Bass Pro Outdoor World. LLC*, Case No. 4-11-cv-03425 (S.D. Tex.) (filed Sept. 21, 2011) (race and national origin discrimination).
- 73 *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination).
- 74 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).
- 75 See *Use Big Data with Caution, EEOC Counsel Urges Employers*, Law 360 (Sept. 15, 2014); see also EEOC Meeting dated April 15, 2015, *EEOC at 50: Confronting Racial and Ethnic Discrimination In the 21st Century Workplace*, and Testimony of Kathleen Lundquist, available at <http://www.eeoc.gov/eeoc/meetings/4-15-15/lundquist.cfm>. See also Marko Mrkonich , et al., *The Big Move Toward Big Data*

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- in Employment*, pp. 8-12. Littler Report (Aug. 4, 2015), available at <http://www.littler.com/publication-press/publication/big-move-toward-big-data-employment>.
- 76 *EEOC v. Ford Motor Co.*, No. 04-CV-845 (S.D. Ohio).
- 77 *EEOC v. Pitt Ohio Express*, No. 06-CV-747 (N.D. Ohio).
- 78 *EEOC v. Jeff Wyler Chevrolet, Inc.*, No. 03-CV-662 (S.D. Ohio).
- 79 *EEOC v. Ford Motor Co.*, No. 07-CV-703 (S.D. Ohio).
- 80 *EEOC v. Renhill Staffing*, No. 08-CV-82 (N.D. Ind.).
- 81 *EEOC v. Allstate Insurance Co.*, No. 04-CV-1359 (E.D. Mo.).
- 82 *EEOC v. Wal-Mart Stores, Inc.*, No. 01-CV-339 (E.D. Ky.).
- 83 *EEOC v. Les Schwab Tire Centers*, No. 06-CV-45 (W.D. Wash.).
- 84 *EEOC v. Paramount Staffing*, No. 06-CV-2624 (W.D. Tenn.).
- 85 *EEOC v. Pepsi Beverages* – EEOC Charge, Press Release, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Jan. 11, 2012).
- 86 *EEOC v. Presrite*, No. 11-CV-260 (N.D. Ohio).
- 87 *EEOC v. McCormick & Schmicks*, No. 08-CV-984 (D. Md.).
- 88 *EEOC v. Real Time Staffing Corp.*, No. 13-CV-2761 (W.D. Tenn.).
- 89 *EEOC v. Source One Staffing, Inc.*, No. 15-CV-1958 (N.D. Ill.).
- 90 *EEOC v. Target* – EEOC Charge, Press Release, *Target Corporation to Pay \$2.8 Million to Resolve EEOC Discrimination Finding* (Aug. 24, 2015).
- 91 *EEOC v. BMW Mfg. Co.*, No. 13-CV-1583 (D.S.C.).
- 92 *EEOC & Serrano v. Cintas*, No. 04-CV-40132 (E.D. Mich.).
- 93 *EEOC v. PMT Corp.*, No. 14-CV-00599 (D. Minn.).
- 94 *EEOC v. Mavis Discount Tire, Inc.*, No. 12-741 (S.D.N.Y.).
- 95 *EEOC v. Lawler Foods, Inc.*, No. 14-3588 (S.D. Tex.).
- 96 *EEOC v. New Prime Trucking, Inc.*, No. 6:11-CV-03367.
- 97 See 2016 Systemic Report at 23.
- 98 *Id.*
- 99 See EEOC, *Meeting of January 14, 2015 – Workplace Harassment*, available at <http://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm>. See also Press Release, EEOC, *Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting* (Jan. 14, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm>.
- 100 See Press Release, EEOC, *Press Release, EEOC to Study Workplace Harassment* (Mar. 20, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-30-15.cfm>.
- 101 See EEOC, *Select Task Force Meeting of October 22, 2015 – Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, and Press Release, EEOC, *Multi-Prong Strategy Essential to Preventing Workplace Harassment* (Oct. 23, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm>.
- 102 See EEOC's *Select Task Force on the Study of Harassment in the Workplace*, issued in June 2016, at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.
- 103 *Id.*
- 104 *Id.* at 44.
- 105 *Id.* at 50.
- 106 *EEOC v. Patterson-UTI Drilling Company LLC*, No. 15-cv-600 (D. Colo.) (Consent decree entered Apr. 15, 2015). See 2016 Systemic Report at 23.
- 107 *EEOC v. Yellow Freight Sys., Inc.* No. 09-CV-7693 (N.D. Ill.) (Consent decree entered Sept. 25, 2012). 2016 Systemic Report at 23.
- 108 *EEOC v. Roadway Express, Inc.*, No. 06-CV-4805 (N.D. Ill.) (Consent decree entered Dec. 20, 2010). 2016 Systemic Report at 23.
- 109 *EEOC v. Carrols Corp.*, No. 98-CV-1772 (N.D.N.Y.) (Consent decree entered Jan. 10, 2013, provided \$2.5 million for 79 women). 2016 Systemic Report at 23.

- 110 *EEOC v. Sonic Drive In*, No. 09-CV-953 (D.N.M.) (Consent decree entered June 14, 2011). 2016 Systemic Report at 23.
- 111 See *EEOC v. Z Foods*, Case No. 1:13-at-00698 (E.D. Cal.) (Announced in EEOC Press Release, *Federal Judge Awards \$1,470,000 in EEOC Sexual Harassment and Retaliation Case Against Z Foods* (July 22, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-22-16a.cfm>).
- 112 See *EEOC v. Vail Run Resort Community Association, Inc. d/b/a Vail Run Resort, et al*, Civil Action No. 1:15-cv-01592 (D. Colo.) (Announced in EEOC Press Release, *Vail Condo Association Will Pay Over \$1 Million to Settle EEOC National Origin Discrimination and Sexual Harassment Lawsuit* (Feb. 12, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/2-12-16.cfm>).
- 113 See *CRST Van Expedited, Inc. v. EEOC*, No. 14-1375, 2016 U.S. LEXIS 3350, 578 U.S. ____ (2016).
- 114 See 2016 Systemic Report at 24.
- 115 *Id.* at 24. See *EEOC v. Outback Steakhouse of Florida, Inc.*, No. 06-CV-1935 (D. Colo.) (Consent decree entered Dec. 29, 2009).
- 116 *Id.* at 24. Also see *EEOC v. Walgreen Co.*, No. 07-CV-172 (S.D. Ill.) (Consent decree entered Mar. 24, 2008).
- 117 *Id.* at 24. See also *EEOC v. Woodward Governor*, No. 06-CV-50178 (N.D. Ill.) (Consent decree entered Feb. 16, 2007).
- 118 *EEOC v. Port Auth. Of N.Y. & N.J.*, Case No. 10 Civ. 7462 (NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012), *aff'd*, 2014, 2014 U.S. App. LEXIS 18533 (2d Cir. Sept. 29, 2014). The lawsuit included both ADEA and EPA claims.
- 119 *Port Authority*, 2014 U.S. App. LEXIS 18544, at *4.
- 120 See *EEOC v. True Oil, LLC*, Case No. 15-cv-74 (D. Wyo., May 15, 2016).
- 121 *EEOC v. True Oil LLC*, 0:16-cv-08109 (10th Cir.) (Notice of Appeal Filed Sept. 16, 2016); (Notice of Termination Filed Oct. 12, 2016).
- 122 See Press Release, EEOC, *EEOC Updates Strategic Enforcement Plan* (Oct. 17, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>. The updated SEP is available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.
- 123 See 2017-2021 SEP at 8.
- 124 See Press Release, EEOC, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports* (Jan. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm>.
- 125 *Id.*
- 126 See Press Release, EEOC, *EEOC to Collect Summary Pay Data* (Sept. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.
- 127 Based on the EEOC's FY 2016 PAR, 35 out of 86 merits lawsuits (40%) involved ADA claims, and 11 of the 18 systemic lawsuits filed by the EEOC during FY 2016 involve ADA claims. There has been a similar pattern in prior years; (1) in FY 2015, 53 of the 142 merits lawsuits (37%) filed by the EEOC involved ADA claims; (2) in FY 2014, there were 49 ADA lawsuits among the 167 lawsuits (29%) filed by the EEOC.; and (3) in FY 2013, there were 51 ADA (lawsuits among the 148 lawsuits (34%) filed by the EEOC. See EEOC, *Litigation statistics*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.
- 128 *EEOC v. United Parcel Service*, Case No. 1:09-cv-05291 (N.D. Ill.) (filed Aug. 27, 2009).
- 129 See 2016 Systemic Report at 25. Also see EEOC Press Release, *Lowe's to Pay \$8.6 Million to Settle EEOC Disability Discrimination Suit* (May 13, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm>.
- 130 See Press Release, EEOC, *EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability* (May 9, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm>; see also 2016 Systemic Report at 26.
- 131 *Id.* at 26, citing *EEOC v. Interstate Distributor Co.*, Civil Action No. 12-CV-2591 (D. Colo.) (Consent decree entered Nov. 8, 2012) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free requirement; consent decree provided \$4.9 million for 427 individuals with disabilities, revised leave and ADA policies); *EEOC v. Supervalu, Inc. et al.*, Civil Action No. 09-CV-5637 (N.D. Ill.) (Consent decree entered Jan. 14, 2011) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free policy; consent decree provided \$3.2 million to 110 individuals with disabilities and extensive injunctive relief). In the *Supervalu* case, the court later held the company in contempt for violating the consent decree, by failing to provide accommodations to several employees who attempted to return to work from medical leaves of absence, and awarded additional damages. See also *EEOC v. Sears Roebuck & Co.*, No. 04-7282 (N.D. Ill. Sep. 29, 2009) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible workers' compensation leave exhaustion policy; consent decree provided \$6.2 million for around 400 individuals with disabilities).
- 132 See *EEOC v. AutoZone, Inc.*, 14-cv-3385 (N.D. Ill.).
- 133 *EEOC v. Verizon Maryland, Inc.*, No. 11-CV-1832 (D. Md.) (Consent decree entered Jul. 6, 2011) (alleging large-scale denial of reasonable accommodation, discipline and discharge based on inflexible attendance policies; three-year consent decree provided \$20 million to 800 individuals with disabilities and revised policies to require accommodation). See 2016 Systemic Report at 25.
- 134 *Id.* See Consent Decree, Section 20.03.
- 135 See *EEOC Guidance: Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*

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- (Sept. 3, 2008) (See Questions 19 and 20) at <https://www.eeoc.gov/facts/performance-conduct.html>; *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Oct. 17, 2002) (See Question 17) at <https://www.eeoc.gov/policy/docs/accommodation.html>; EEOC Resource on *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016). See EEOC, Press Release, *EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability* (May 9, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm> and publication at <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.
- 136 See EEOC's wellness rules, as discussed in EEOC Press Release, *EEOC Issues Final Rules on Employer Wellness Programs* (May 16, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm>.
- 137 See *EEOC v. Flambeau*, 131 F. Supp. 3d 849 (W.D. Wis. 2015) (summary judgment for employer striking down EEOC challenge based on "safe harbor" provision of ADA). But see *EEOC v. Orion Energy Sys.*, 2016 U.S. Dist. LEXIS 1127292 (E.D. Wis. Sept. 19, 2016) (rejected adoption of "safe harbor" defense in part based on EEOC regulations, but viewed participation as voluntary;" notwithstanding, question of fact regarding retaliation claim based on concerns raised regarding wellness program).
- 138 See *AARP v. United States Equal Employment Opportunity Commission*, Case No. 16-cv-2113 (D.D.C.), in which AARP has challenged the "incentives" permitted by the EEOC wellness rules, arguing that they are improper "financial penalties."
- 139 2016 Systemic Report at 26-27.
- 140 See Press Release, EEOC, *EEOC Issues Final Enforcement Guidance on Retaliation and Related Issues after Public Input Process* (Aug. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm>.
- 141 *Id.*
- 142 2016 Systemic Report at 2.
- 143 2016 Systemic Report at 26-27.
- 144 See *EEOC v. Albertsons, Inc.*, No. 06-CV-1273 (D. Colo.) (Consent decree entered Dec. 14, 2009) (alleging widespread race harassment and retaliation).
- 145 See *EEOC v. Global Horizons*, 2014 WL 1118009 (D. Haw. Mar. 19, 2014).
- 146 See *EEOC v. Pitre Inc.*, No. 11-CV-875 (D.N.M.) (Order issued Jan. 26, 2012) (granting preliminary injunction in systemic harassment suit based on testimony of numerous witnesses of extreme fear of being blacklisted in car dealership industry, evidence that charging party lost a subsequent job after employer spoke to defendant, and evidence of vandalism and death threats); *EEOC v. Evans Fruit*, 2010 WL 2594960 (E.D. Wash. Jun. 24, 2010) (granting temporary restraining order in systemic harassment suit based on employer's offer to pay witnesses, threats and intimidation tactics, and solicitation of accomplices to commit criminal acts against charging parties and witnesses).
- 147 See 42 U.S.C. §2000e-6(a).
- 148 See 2016 Systemic Report at 27 and *EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) (in denying motion to dismiss, court found EEOC had stated a viable claim under section 707 of Title VII).
- 149 After the suit was filed, the employer submitted that any employee could file a charge, and the arbitration provision merely applied to a subsequent action by an applicant or employee.
- 150 It also should be noted that in the EEOC's appeal of the *CVS* decision, the EEOC filed a supplemental submission with the Seventh Circuit following issuance of the *Doherty* opinion arguing that its rationale should be adopted. The employer also submitted a response, taking exception to any reliance on the district court's opinion in *Doherty*. See *supra* note 181, regarding the Seventh Circuit appeal in *CVS*, Appeal No. 14-3653, Document Nos. 29 (EEOC Submission, Sept. 2, 2015) and 30 (Employer Response, Sept. 4, 2015).
- 151 See 2016 Systemic Report at 35-37.
- 152 *Id.*
- 153 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, (7th Cir. 2015), *reh'g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).
- 154 *Id.*
- 155 See *EEOC v. CVS Pharm., Inc.*, No. 14-cv-00863, Docket Nos. 16 and 29.
- 156 Another recent lawsuit in which the EEOC challenged a separation agreement is *EEOC v. College America*, 2014 U.S. Dist. LEXIS 167055 (D. Colo. Dec. 2, 2014), which was tied to an ADEA claim, in which the court upheld dismissal of a claim involving the EEOC's attack on the separation agreement based on the EEOC's lack of notice and failure to engage in conciliation prior to filing suit against the employer.
- 157 *Id.*, Docket No. 33 (Oct. 7, 2015).
- 158 *Id.* at pp. 8-9.
- 159 *EEOC v. Allstate Insurance Company*, 2015 U.S. App. LEXIS 2330 (3d Cir. Feb. 13 2015).
- 160 See 2016 Systemic Report at 27-28.

- 161 *EEOC v. Hill Country Farms, Inc., d/b/a Henry's Turkey Serv.*, No. 11-CV-41 (S.D. Iowa) (Judgment upon jury verdict entered Jun. 11, 2013) (Jury verdict reduced due to statutory caps on damages; judgments provided \$3.4 million for 32 men).
- 162 *Id.*
- 163 *EEOC v. Signal Int'l, LLC*, No. 12-CV-557 (E.D. La.) (Order entered Dec. 18, 2015) (Indian nationals recruited to work at Mississippi and Texas shipbuilding plant; order provides approximately \$5 million to 476 men, and CEO letter of apology). Related private litigation demonstrates the complexity of the issues involved in dealing with immigrant workers. In a related private lawsuit filed in Louisiana on behalf of various Indian workers, the jury returned a verdict of over \$14 million in favor of the workers based on factual allegations similar to those in the EEOC lawsuit. In the related litigation, various claims were asserted, including: (1) alleged violations of the Trafficking Victims Protection Act; (2) alleged violations of the Racketeer Influence and Corrupt Organizations (RICO) Act; (3) misrepresentation; (4) breach of contract and promissory estoppel; (5) false imprisonment; and (6) intentional infliction of emotional distress. See *Kurian David et al v. Signal International, LLC*, Case No. 08-cv-01220-SM-DEK, Docket No. 2299 (Plaintiff's Memorandum in Support of Motion for Entry of Judgment, Feb. 24, 2015.).
- 164 *EEOC v. Global Horizons*, No. 11-CV-257 (D. Haw.) (Judgment entered Dec. 19, 2014 and consent decrees entered against co-defendants) (Thai nationals recruited to work on Hawaii farms under H-2A visa program; judgment and series of decrees provided \$12.8 million for 546 employees, multiple job offers, and revised contracts with labor contractors). See also Press Release, EEOC, *Federal Judge Awards EEOC \$7,658,500 in Case Against Farm Labor Contractor Global Horizons* (May 2, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-2-16.cfm>.
- 165 *EEOC v. B & H Foto*, No. 07-CV-9241 (S.D.N.Y.) (Consent decree entered Mar. 17, 2009) (decree provided \$4.3 million for 149 workers, wage equalization).
- 166 *EEOC v. Evans Fruit Co.*, Nos. 10-CV-3033, 11-CV-3093 (E.D. Wash.) (Settlement agreement entered Jan. 28, 2016) (sexual harassment and retaliation of 20 female farmworkers). See also Press Release, EEOC, *Evans Fruit Settles Sexual Harassment and Retaliation Lawsuits With EEOC*, NW Justice Project (Jan. 28, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-28-16.cfm>.
- 167 See *EEOC v. Global Horizons et al*, Case No. CV-11-3-45EFS, Docket No. 667 (E.D. Wash) (Notice of Default Judgment entered Sept. 28, 2015).
- 168 *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 37674 (E.D. Wash., Mar. 18, 2015).
- 169 See 2016 Systemic Report at 28-29.
- 170 *EEOC v. Sidley Austin*, No. 05-CV-208 (N.D. Ill.) (Consent decree entered Oct. 5, 2007).
- 171 *EEOC v. Baltimore Cty.* 747 F.3d 267 (4th Cir. 2014).
- 172 *EEOC v. Minn. Dept. of Corr.* 648 F.3d 910 (8th Cir. 2011).
- 173 *EEOC v. Minnesota Board of Public Defense*, Civil Action No. 12-cv-205 (D. Minn.) (Consent decree entered Apr. 26, 2012); *EEOC v. Minnesota Dep't of Commerce*, Civil Action No. 11-cv-2746 (D. Minn.) (Consent decree entered Nov. 9, 2011); *EEOC v. Minnesota Dep't of Natural Res.*, No. 11-cv-2745 (D. Minn.) (Consent decree entered Nov. 7, 2011).
- 174 *EEOC v. Bayville Fire Co.*, No. 07-cv-4472 (E.D.N.Y.) (Consent decree entered Apr. 8, 2010); *EEOC v. Brentwood Fire Dep't*, No. 09-cv-3298 (E.D.N.Y.) (Consent decree entered Mar. 14, 2011); *EEOC v. Village of Minneola*, No. 08-cv-973 (E.D.N.Y.) (Consent decree entered Jan. 20, 2010); *EEOC v. Selden Fire Dist.*, No. 08-cv-3974 (E.D.N.Y.) (Consent decree entered Apr. 16, 2010); *EEOC v. Eaton's Neck Fire Dist.*, No. 08-cv-5089 (E.D.N.Y.) (Consent decree entered Oct. 30, 2009); *EEOC v. Oyster Bay Fire Dep't*, No. 09-cv-3297 (E.D.N.Y.) (Consent decree entered Sep. 16, 2011); *EEOC v. Amityville Fire Dep't*, No. 09-cv-3742 (E.D.N.Y.) (Consent decree entered Mar. 15, 2011); *EEOC v. Village of N. Syracuse*, No. 12-cv-1465 (N.D.N.Y.) (Consent decree entered Apr. 3, 2013).
- 175 See EEOC Systemic Report at 29.
- 176 See *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015) (EEOC nationwide pattern-or-practice lawsuits alleging age discrimination involving front and/or back of the house positions at hospitality companies).
- 177 See *EEOC v. Tepro, Inc.*, Case No. 4:12-cv-75 (E.D. Tenn.) and Press Release, EEOC, *Tepro, Inc. To Pay \$600,000 to Settle EEOC Age Discrimination Suit* (Dec. 17, 2015) available at <https://www.eeoc.gov/eeoc/newsroom/release/12-17-15.cfm>. (Consent Decree involving \$600,000 settlement affecting 25 class members following reclassification, which resulted in loss of seniority and subsequent layoff).
- 178 See EEOC SEP for FY Fiscal Years 2017 - 2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.
- 179 Since FY 2011, when 261 "merits" lawsuits were filed, there has been a dramatic decrease in the number of lawsuits filed, and the number ranged from 122 suits to 142 suits, which was the number filed in FY 2016. See *Littler's Annual Report on EEOC Developments: Fiscal Year 2015*, available at <https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93-fiscal-year-2015>.
- 180 This includes both non-systemic multiple victim suits (*i.e.*, impacting fewer than 20 individuals) and systemic discrimination suits.
- 181 Compare FY 2015 PAR at 35 and FY 2016 PAR at 36.
- 182 See 2016 EEOC Systemic Report at 20.

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- 183 See, e.g., *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4-11-cv-03425 (S.D. Tex.) (filed Sept. 21, 2011) (race and national origin discrimination).
- 184 *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination).
- 185 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).
- 186 See *EEOC v. Dolgencorp.*, 1:13-cvo-04307 (N.D. Ill.) (filed June 11, 2013).
- 187 See *EEOC v. Crothall Servs. Grp.*, 2016 U.S. LEXIS 83520 (E.D. Pa. June 28, 2016).
- 188 See Press Release, EEOC, *Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016)*, available at <https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm>. See also *Meeting of October 13, 2016 - Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law* (Oct. 13, 2016), available at <https://www.eeoc.gov/eeoc/meetings/10-13-16/>.
- 189 See 2016 Systemic Report at 22, citing *EEOC v. Source One Staffing, Inc.*, Civil Action No. 15-cv-1958 (N.D. Ill.) (Consent decree entered May 6, 2015) (alleging failure to refer applicants for “temp to hire” jobs based on sex, unlawful pre-employment medical inquiries; resolved for \$800K for more than 7300 individuals); *EEOC v. Renhill Staffing*, No. 08-cv-82 (N.D. Ind.) (Consent decree entered Apr. 15, 2008) (alleging failure to refer to temp jobs based on race and age, resolved for \$575,000 for 764 individuals); *EEOC v. Paramount Staffing*, No. 06-cv-2624 (W.D. Tenn. Aug. 19, 2010) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$585,000 for 800 individuals); *EEOC v. Real Time Staffing Corp.*, No. 13-cv-2761 (W.D. Tenn.) (Consent decree entered Dec. 5, 2014) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$580,000 for 60 individuals).
- 190 2016 Systemic Report at 22, citing Cynthia Poole, *Steady Growth Continues*, American Staffing Association (2015), available at <https://americanstaffing.net/posts/2015/10/22/steady-growth-continues>.
- 191 See Michael J. Lotito, et al., *Little Report, With the Election (Mercifully) Behind Us, What Will a Trump Administration Mean for Employers?* (Nov. 9, 2016) at 5 and 7, available at <http://www.littler.com/publication-press/publication/election-mercifully-behind-us-what-will-trump-administration-mean>.
- 192 See Press Release, EEOC, *Advancing Opportunity for All in the Tech Industry* (May 18, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-18-16.cfm>.
- 193 The issue of alleged age discrimination in the technology industry has continued to get increased attention, as shown by a feature article in USA Today on November 22, 2016, which included discussion of a report from the California Department of Fair Employment and Housing, explaining, “Since 2012, 90 age-related lawsuits have been filed against a dozen top tech companies in Silicon Valley.” See Jon Swartz, *90 age-discrimination suits reflect growing issue for tech*, USA Today (Nov. 22, 2016) available at <http://www.usatoday.com/story/tech/news/2016/11/22/90-age-discrimination-suits-reflect-growing-issue-tech/93110594/>.
- 194 See EEOC Strategic Enforcement Plan, 2017-2021 at 9, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.
- 195 See EEOC’s *Select Task Force on the Study of Harassment in the Workplace*, issued in June 2016, at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686314.
- 196 *Id.* at 31.
- 197 *Id.* at 44.
- 198 See discussion at supra note 127.
- 199 See 2016 PAR at 36 and 94-97.
- 200 See 2016 SEP at 7.
- 201 See *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities Q’s and A’s*, Nos. 19 and 20 (Sept. 3, 2008), available at <https://www.eeoc.gov/facts/performance-conduct.html>.
- 202 *Id.*
- 203 See 2017-2021 SEP at 8.
- 204 See 29 U.S.C. § 206(d) and 29 CFR Part 1620; also see 29 CFR 1620.9.
- 205 29 U.S.C. § 206(d)(1).
- 206 *EEOC v. Sterling Jewelers*, Case No. 8-cv-0706 (W.D.N.Y., filed Sept. 23, 2008) - Nationwide sex discrimination lawsuit challenging pay and promotion practices involving female retail associates.
- 207 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).
- 208 *Villarreal v. R. J Reynolds*, No. 15-10602 (11th Cir. Oct. 5, 2016).

- 209 *Karlo v. Pittsburgh Glass Works, LLC*, No. 15-3435 (3d Cir.) (filed Apr. 7, 2016).
- 210 *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015), available at <http://www.eeoc.gov/decisions/0120133080.pdf>.
- 211 See *What You Should Know About EEOC and Enforcement Protections of LGBT Workers*, available on EEOC website at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; see also Kevin McGowan and Chris Opfer, *EEOC Sexual Orientation Ruling Brings Strong Reactions*, Bloomberg BNA (July 20, 2015), available at <http://www.bna.com/eeoc-sexual-orientation-n17179933661/>.
- 212 *Hively v. Ivy Tech Community College*, No. 15-1720, 2016 U.S. App. LEXIS 13746 (7th Cir. July 28, 2016).
- 213 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).
- 214 *EEOC v. Scott Medical Health Ctr.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016).
- 215 *Christiansen v. Omnicom Grp., Inc.*, No. 16-748 (2d Cir.) (filed June 21, 2016), *Zarda v. Altitude Express, Inc.*, No. 15-3775cv. (11th Cir.) (filed Nov. 20, 2015; oral argument set for Jan. 5, 2017).
- 216 See 2016 SEP.
- 217 See e.g. *EEOC v. Doherty Enterprises*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) and *EEOC v. CVS, Inc.*, 809 F.3d 335, (7th Cir. 2015), *reh'g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).
- 218 See Senate Alexander Report on EEOC and Press Release, HELP Committee, *Alexander Report Finds EEOC Missteps Costing Taxpayers and Victims of Workplace Discrimination* (Nov. 24, 2014), available at <http://www.help.senate.gov/chair/newsroom/press/alexander-report-finds-eeoc-missteps-costing-taxpayers-and-victims-of-workplace-discrimination>.

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