

Insight

IN-DEPTH DISCUSSION

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Review of Key EEOC Developments: Successes and Failures in FY 2015 and What to Watch For in FY 2016

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This Insight reviews key EEOC statistics and highlights the EEOC's successes and failures over the past fiscal year, particularly focusing on the EEOC's "national priorities" discussed in the EEOC's Strategic Enforcement Plan.

A comprehensive review of key EEOC statistics, regulatory developments and litigation initiated by the EEOC are discussed in Littler's *Annual Report on EEOC Developments: Fiscal Year 2015*, which is available on Littler's website.¹ This Insight is primarily based on the opening chapter to Littler's *Annual Report*.

The EEOC reached major milestones in FY 2015. The agency celebrated its 50th anniversary and the 25th anniversary of the Americans with Disabilities Act. As significantly, the EEOC was a party to two cases before the U.S. Supreme Court, *EEOC v. Mach Mining, LLC*² and *EEOC v. Abercrombie & Fitch Stores*,³ and had a prominent role in *Young v. UPS*,⁴ as the impact of the agency's 2014 guidance on pregnancy discrimination⁵ was discussed in the Court's decision.

This Insight provides a summary of key agency and case developments over the past fiscal year, concentrating on the EEOC's focus on systemic⁶ investigations and related litigation and the EEOC's current priorities based on its Strategic Enforcement Plan (SEP).⁷

1 See Barry Hartstein et al., *Annual Report on EEOC Developments – Fiscal Year 2015*, Littler Report (Jan. 12, 2016), available at <http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93-fiscal-year-2015>.

2 *EEOC v. Mach Mining, LLC*, 135 S. Ct. 1645 (2015).

3 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015).

4 *Young v. United Parcel Service*, 135 S.Ct. 1338 (2015).

5 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003 (Updated June 25, 2015).

6 The EEOC has defined systemic cases 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." See EEOC Systemic Task Force Report (March 2006) at 1, available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

7 The EEOC's Strategic Enforcement Plan, which was adopted by the EEOC on December 12, 2012, is available on the EEOC's website at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

Agency Developments

The past fiscal year started out with some difficult challenges for the EEOC based on a report issued on November 24, 2014, by Lamar Alexander (R-TN), Chairman of the Senate Committee on Health, Education, Labor and Pensions (HELP). The report found:

[T]oday's EEOC is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to taxpayers. Courts have found EEOC's litigation tactics to be so egregious they have ordered EEOC to pay defendants' attorney's fees in ten cases since 2011. The courts have criticized EEOC for misuse of its authority, poor expert analysis, and pursuit of novel cases unsupported by law.⁸

The November 2014 report by Sen. Alexander immediately preceded the confirmation hearing for David Lopez, who was nominated for a second term as General Counsel for the EEOC.⁹ While Lopez faced significant challenges, he was approved for a new term as General Counsel on December 3, 2014 by a Senate vote of 54-43. On that same day, Charlotte Burrows was approved as a new EEOC Commissioner by a Senate vote of 93-2. The Commission ended the year with a 3-2 Democratic majority, with Jenny Yang appointed by President Obama as the Chair of the Commission, and David Lopez continuing in his role as General Counsel. These developments cleared the way for the EEOC's continued focus on its systemic initiative and its current list of priorities.

Even so, the agency faced additional criticism by the Republican members of the HELP Committee in an oversight hearing held on May 19, 2015.¹⁰ During this hearing, Sen. Tim Scott (R-SC) was critical of the agency spending resources on EEOC-initiated litigation where a discrimination charge had not even been filed.¹¹ General Counsel Lopez responded by stating such lawsuits involved only a "small fraction" of the EEOC's litigation docket. He responded to criticism regarding one pending large-scale age discrimination lawsuit, which was initiated based on a Commissioner's charge, explaining, "There is a lot of information in that case with evidence of age discrimination." Lopez otherwise highlighted what he viewed as some major achievements during his role as General Counsel, but also stated that litigation should be the "enforcement tool of last resort."¹²

Chair Yang also testified at the Senate HELP Committee hearing and highlighted what she viewed as significant achievements by the agency, including "ensuring efficient and effective enforcement by using integrated strategies that encourage prompt and voluntary resolution of charges," explaining:

- Voluntary compliance remains the preferred means of preventing and remedying employment discrimination.
- In FY 2014, EEOC's mediation program successfully helped employers and employees voluntarily resolve 7,846 (77%) of the 10,221 mediations it conducted.
- Over the past three years, EEOC has worked with employers to conciliate and voluntarily resolve a greater percentage of cases than in recent history—and with successful conciliations rising from 27% in FY 2010 to 38% in FY 2014. The success rate for the conciliation of systemic charges is even higher (47%), particularly significant as these charges are more complex and have the potential to improve practices for many workers.
- In 2012, the Commission reaffirmed the importance of systemic enforcement in its Strategic Plan and Strategic Enforcement Plan. Because of these efforts, at the end of FY 2014, 57 out of 228, or 25% of the cases on the EEOC's litigation docket, were systemic.

⁸ See *HELP Committee Press Release, Alexander Report Finds EEOC Missteps Costing Taxpayers and Victims of Workplace Discrimination* (Nov. 11, 2014), available at <http://www.help.senate.gov/chair/newsroom/press/alexander-report-finds-eec-missteps-costing-taxpayers-and-victims-of-workplace-discrimination>.

⁹ The EEOC published a rebuttal to the Senator Alexander Report on its website on November 28, 2014 at http://www.eeoc.gov/eeoc/legislative/report_response_final.cfm.

¹⁰ See Senate HELP Committee hearing, *Oversight of the Equal Employment Opportunity Commission: Examining EEOC's Enforcement and Litigation Programs* (May 19, 2015), available at <http://www.help.senate.gov/hearings/oversight-of-the-equal-employment-opportunity-commission-examining-eeocs-enforcement-and-litigation-programs>.

¹¹ See Kevin McGowan, *EEOC Officials Respond to GOP Criticisms During Senate Committee Oversight Hearing, Daily Labor Report* (May 19, 2015), available at <http://www.bna.com/eeoc-officials-respond-n17179926736/>.

¹² *Id.*

- This is the largest proportion of systemic lawsuits on the EEOC's docket since tracking began in FY 2006.
- In 2014, EEOC's success rate for conciliation of systemic charges of discrimination was 47%.¹³

Key Statistics for FY 2015

On November 19, 2015, the EEOC issued its annual Performance and Accountability Report (referred to as the EEOC's "PAR") for Fiscal Year 2015.¹⁴ The PAR reviews the agency's achievements over the past fiscal year, and includes statistics relating to EEOC charge activity and litigation.

According to the FY 2015 PAR, there was a minor increase in the number of discrimination charges compared to those filed in FY 2014 (89,895 in FY 2015 compared to 88,878 in FY 2014). Even so, the level of charge activity has decreased over the past few years. There were 4,000 fewer charges filed in FY 2015 compared to FY 2013 (93,727 charges) and an approximate 10,000-charge decrease from FY 2011 (99,947 charges).¹⁵

Despite the general decrease in the number of charges filed with the agency over the past couple of years, the EEOC's backlog of private-sector charges (referred to by the agency as the "Private Sector Charge Inventory") has continued to increase. During FY 2015, the backlog increased to 76,408, increasing slightly from 75,935 charges in FY 2014.¹⁶ While this inventory increase was modest, the EEOC had already raised concerns at the end of FY 2014 based on the "major challenge" of its charge inventory, which had increased 7.28% from 70,781 charges to 75,935 between FY 2013 and FY 2014.¹⁷ The backlog increased despite hiring 90 investigators. Even with turnover, the net increase in investigators was approximately 60. The EEOC attempted to explain the backlog challenge by referring to the impact of "losing experienced investigators" and the need "to ensure high quality standards for charge processing," but acknowledged, "As it does each year, the EEOC faces a fundamental challenge in efficiently processing the pending inventory of private-sector discrimination charges while improving the quality of charge processing."¹⁸

Even so, the most significant trend to closely monitor from an employer's perspective is the EEOC's focus on systemic investigations. During FY 2015, there was a slight increase in the number of systemic investigations completed by the EEOC, and more importantly, in the total monetary recovery based on the resolution of systemic investigations. The EEOC completed 268 systemic investigations in FY 2015, compared to 260 in FY 2014, but the amount obtained in resolving systemic charges increased dramatically from \$13 million to \$33.5 million.¹⁹ While this increase at first blush may be alarming, it is more in line with the amounts recovered in FY 2012 and FY 2013 when the EEOC obtained \$36.2 million and \$40 million, respectively, through the resolution of systemic investigations.²⁰ More troublesome, however, is the continued increased likelihood of a reasonable cause finding based on a systemic investigation. The EEOC made a reasonable cause finding in 99 out of the 268 systemic investigations completed in FY 2015 (36.0%),²¹ which is in a range similar to the number of

13 See *Statement of Jenny R. Yang, Chair U.S. Equal Employment Opportunity Commission Committee on Health, Education, Labor and Pensions U.S. Senate* (May 19, 2015), available at http://www.eeoc.gov/eeoc/legislative/yang_5-19-15.cfm.

14 See *EEOC's FY 2015 PERFORMANCE AND ACCOUNTABILITY REPORT* (herein "FY 2015 PAR") and Press Release, EEOC, *EEOC Issues FY 2015 Performance Report* (Nov. 19, 2015), available at <http://eeoc.gov/eeoc/newsroom/release/11-19-15.cfm>.

15 See *Littler's Annual Report on EEOC Developments: Fiscal Year 2014* (herein "Littler 2014 Annual Report on EEOC") at 18, available at <http://www.littler.com/annual-report-eeoc-developments-fiscal-year-2014>.

16 Compare FY 2015 PAR at 11 to FY 2014 PAR at 46, available at <http://www.eeoc.gov/eeoc/plan/2014par.pdf>; see also Press Release, EEOC, *EEOC Issues FY 2014 Performance Report* (Nov. 18, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>.

17 See FY 2015 PAR at 52 and FY 2014 PAR at 46.

18 See FY 2015 PAR at 52.

19 Compare FY 2015 PAR at 36 to FY 2014 PAR at 29.

20 See FY 2012 PAR at 28, available at <http://www.eeoc.gov/eeoc/plan/2012par.cfm>, and FY 2013 PAR at 32 available at <http://www.eeoc.gov/eeoc/plan/2013par.cfm>.

21 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.

reasonable cause findings in FY 2014 and FY 2013 (45% and 35%, respectively).²² This number is in stark contrast to the EEOC's published statistics showing that historically, the EEOC has issued reasonable cause findings in less than five percent (5%) of the charges filed with the agency.²³

Next, turning to litigation, the EEOC has continued its "new normal" by decreasing the number of lawsuits it files. In FY 2015, the agency filed only 142 merits lawsuits.²⁴ While this was a slight increase from the 133 lawsuits filed in FY 2014,²⁵ this trend is similar to the number filed in FY 2013 (131 merits lawsuits) and FY 2012 (122 merits lawsuits), and in sharp contrast to the number of suits filed in prior years (250 or more).²⁶

Among the 142 lawsuits filed in FY 2015, a total of 42 involved "multiple victims," which included 16 systemic lawsuits (*i.e.*, impacting 20 or more individuals).²⁷ While this number may not appear to be significant, a review of the EEOC's cases on its active docket at the end of FY 2015 shows that approximately 40% of the EEOC's active docket (88 out of 218 cases) involves multiple-victim lawsuits, which includes 48 pending lawsuits involving challenges to alleged systemic discrimination (22%).²⁸ Also worth noting is that among the 142 lawsuits filed by the agency during FY 2015, the largest number of lawsuits involved claims under the ADA—37% (53 lawsuits).

Key Procedural Developments

Over the past fiscal year, the EEOC's multi-step procedure for investigating and conciliating discrimination claims prior to suing was closely reviewed by the courts. The impact of the Supreme Court's decision in *EEOC v. Mach Mining* on the conciliation process was one of the most hotly debated issues among EEO attorneys over the past year, and recent decisions since *Mach Mining* have addressed the impact of that decision. The potential reach of *Mach Mining* in limiting a court's review of the EEOC's investigation process was also discussed in the Second Circuit's decision in *EEOC v. Sterling Jewelers*.²⁹

Impact of Mach Mining

Mach Mining involved litigation initiated by the EEOC and what actions had to be taken by the agency before suing an employer. The focus of the lawsuit was Title VII of the Civil Rights Act of 1964, which expressly states that if the Commission finds "reasonable cause" to believe there is a violation of the Act, the EEOC must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."³⁰ However, the pivotal language relied on by the EEOC to argue that any review of its conciliation obligation is limited stems from the additional statutory provision stating the EEOC may sue an employer if "the Commission has been unable to secure from respondent a conciliation agreement acceptable to the Commission."³¹

From the EEOC's perspective, the above language was relied on to argue that the "statutory directive to attempt conciliation" is "not subject to judicial review," relying on the ruling by the Seventh Circuit in favor of the EEOC.³² The employer relied on case authority that had imposed a "good faith" obligation on the EEOC concerning its conduct during the conciliation process.

22 See FY 2014 PAR at 27 and FY 2013 PAR at 32.

23 See EEOC statistics, "All Statutes, FY 2007- FY 2013," available at <http://eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

24 See FY 2015 PAR at 34.

25 See FY 2014 PAR at 27.

26 See Littler's 2014 Annual Report on EEOC Developments at 20.

27 See FY2015 PAR at 34.

28 *Id.*

29 *EEOC v. Sterling Jewelers*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015).

30 29 U.S.C. §2000e-5(b).

31 29 U.S.C. §2000e-5(f)(1).

32 See *EEOC v. Mach Mining*, 738 F.3d 171, 177 (7th Cir. 2013).

The Supreme Court struck a balance between the two polar positions, holding there is a “strong presumption” favoring judicial review of administrative actions. The Court further held, however, that judicial review would be limited. Based on a reasonable cause finding, the Court contemplates notice to the employer of the EEOC’s finding of the alleged violation, and explained what was expected:

Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the alleged discriminatory practice.³³

The Court described this 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. In fulfilling this statutory requirement, the EEOC is required only to “tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” In the Court’s view, a “sworn affidavit from the EEOC stating that it has performed its obligations but that its efforts have failed will usually suffice to show that it has met the conciliation requirement.”

While the impact of *Mach Mining* on the conciliation process remains unsettled, two courts recently reached opposite conclusions when reviewing the EEOC’s conduct during the conciliation process.

In one decision, *EEOC v. Ohio Health*,³⁴ as part of a summary judgment motion, the employer took strong exception to the EEOC’s approach to the conciliation process. In staying the action and remanding the case for 60 days to require mediation between the parties, the court reviewed the mandate of the Supreme Court’s ruling in *Mach Mining* and concluded “the EEOC has failed to engage in good faith conciliation efforts.” In *Ohio Health*, the district court was presented with an employer declaration asserting that the EEOC had presented its demands during conciliation as a “take-it-or-it proposition, failed to provide information requested by [the employer], demanded a counter offer, and then declared that conciliation efforts have failed despite [the employer] having made it clear that it was ready and willing to negotiate.” The court rejected the EEOC’s argument that because it had already filed a complaint, “only a public resolution was possible.” The court found this position “ridiculous” and cautioned the EEOC that if it “continues down this dangerous path and fails to engage in good faith efforts at conciliation,” it potentially would be subject to “contempt and dismissal of this action for failure to prosecute.”

In contrast, in *EEOC v. Jet Stream Ground Services, Inc.*,³⁵ the district court rejected the employer’s motion for partial summary judgment where there was an ongoing exchange of proposals during conciliation, but the employer took exception with the EEOC’s approach to conciliation. The employer argued that the EEOC did not engage in a “sincere and reasonable conciliation” because it initially proposed that the employer create a settlement fund for “aggrieved individuals” who had not yet been identified, and because the EEOC “demanded that [the employer] reinstate all other aggrieved individuals that it could identify.” The employer argued also that the EEOC negotiations on behalf of the interveners evidenced its “bad faith because the EEOC did not negotiate in an individualized manner,” and instead made significant economic demands for a group of purported victims “while rejecting individualized offers.”

In denying the employer’s motion, the district court in *Jet Stream* acknowledged that the employer “would have preferred individualized settlement counter-offers to match its own,” but *Mach Mining* does not mandate such conduct by the EEOC during the conciliation process. Rather, “the Commission is entitled to ‘expansive discretion...over the conciliation process’” and “its efforts need not involve any specific steps or measures.” The court concluded that the EEOC had engaged in “substantive conciliation efforts,” and “applying the ‘limited’ scope of review mandated by *Mach Mining*,” the EEOC’s settlement efforts “were sufficient to fulfill Title VII’s conciliation requirements.”

33 *Mach Mining*, 135 S.Ct. 1645, No. 13-1019, slip op. at 13.

34 See *EEOC v. Ohio Health Corp.*, 2015 U.S. Dist. LEXIS 84016 (S. D. Ohio June 29, 2015).

35 *EEOC v. Jet Stream Ground Services, Inc.*, 2015 U.S. Dist. LEXIS 130838 (D. Colo. Sept. 29, 2015).

Challenging Scope of EEOC Investigations

The broad reach of *Mach Mining* was also recently discussed in the context of limiting the scope of review of EEOC investigations. Two decisions addressed the issue: (1) a federal court of appeals (Second Circuit) in *EEOC v. Sterling Jewelers*³⁶ and (2) a district court in Illinois in *EEOC v. AutoZone, Inc.*³⁷ In both cases, the courts relied on *Mach Mining* and determined they would not delve into evaluating the merits of the investigation, and thus rejected efforts to limit the scope of “nationwide” lawsuits filed by the EEOC.

In *Sterling Jewelers*, the EEOC filed a nationwide lawsuit alleging a pattern or practice of sex discrimination regarding promotion and compensation. Following discovery, the magistrate granted summary judgment in favor of the employer, taking the view that the EEOC’s lawsuit was fatally defective because the EEOC did not conduct a nationwide investigation prior to suing. The magistrate further held that the EEOC could not rely on the findings of a statistical expert retained by the charging parties’ attorneys, and the subsequent nationwide lawsuit was therefore improper and was justifiably dismissed with prejudice.³⁸ A district court judge affirmed the magistrate’s findings.³⁹

In reversing the district court’s ruling, the Second Circuit underscored that the courts “may not review the sufficiency of an [EEOC] investigation – only whether an investigation occurred.” The court explained that similar to the conciliation process, “an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice.” From the court’s perspective, “Allowing courts to review the sufficiency of an EEOC investigation would effectively make every Title VII suit a two-step action: First, the parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action.” Similar to *Mach Mining*, the Second Circuit concluded there should be only a limited review of the EEOC investigation process, and such efforts should not be permitted to derail litigation by the EEOC. On October 23, 2015 the employer requested a rehearing and full court review of the three-judge panel decision and submitted that the appellate panel was incorrect in relying on the *Mach Mining* decision.⁴⁰

The *AutoZone* case stemmed from three individual charges of disability discrimination at three Illinois stores. Reasonable cause determinations were issued in September 2012 based on the alleged failure to accommodate and the termination of the charging parties. Eight months later, the EEOC amended each determination, finding the employer discriminated against the charging party and a “class of other employees at its stores throughout the United States” based on an attendance policy in which employees were assessed points and eventually discharged for absences, including disability-related absences.

Following unsuccessful conciliation efforts, the EEOC filed a nationwide ADA lawsuit against AutoZone, challenging the company’s attendance plan. Although the lawsuit was filed in May 2014, the issue regarding the scope of the lawsuit did not arise until after the EEOC’s Amended Complaint, filed in the fall of 2014, which led to the employer moving to limit discovery to the three stores in which the charging parties worked. In its November 4, 2015 decision, the court determined that the employer was seeking a protective order and then focused on the employer’s argument that the EEOC could not expand its lawsuit beyond the three stores because there was “not an adequate nationwide investigation” to support a nationwide lawsuit against the employer.

In rejecting the employer’s motion in *AutoZone*, the court underscored that “Title VII does not define ‘investigation’ or outline any steps the EEOC is required to take in conducting its investigation,” and relied on a Seventh Circuit decision in *EEOC v. Caterpillar, Inc.*,⁴¹ prohibiting parties from challenging the sufficiency of an EEOC’s investigation.⁴² The court also relied on *Mach Mining* and the view that the courts should play a limited role in reviewing the EEOC’s pre-suit procedures, explaining, “Although *Mach Mining* focuses on the ‘conciliation’ requirement and *Caterpillar* addresses only the ‘investigation’ requirement, *Mach Mining* supports the reasoning applied in *Caterpillar*.” Relying on *Mach Mining*, the district court concluded that its sole focus should be whether an “investigation” occurred, as required by

36 *EEOC v. Sterling Jewelers, Inc.*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015), *reh’g denied* (2d Cir. Dec. 1, 2015).

37 *EEOC v. AutoZone, Inc.*, 2015 U.S. Dist. LEXIS 149849 (N.D. Ill. Nov. 4, 2015).

38 *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014) (Magistrate Judge recommendation).

39 *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014).

40 *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782-CW (2d Cir.) (Notice of Appeal Filed Oct. 23, 2015).

41 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005).

42 *See Id.*

Title VII, and “not whether the investigation was sufficient to support the charges brought by the EEOC.” The court also concluded that based on *Mach Mining*, Title VII “does not mandate any particular investigative techniques or standards.”

The Court also found the reasoning of the Second Circuit decision in *Sterling Jewelers* to be persuasive. The court held that “at least under the facts at issue here, the EEOC has met its burden to show that it investigated by issuing a determination that: (1) state that the EEOC investigated and; (2) identifies the alleged discrimination discovered during the investigation.”

Continued Debate over Permissible Scope of EEOC Investigations

Employers continue to grapple with the scope of the EEOC’s investigative authority. An ongoing concern is whether a charge might lead to a systemic investigation by the EEOC.⁴³ While a systemic charge can arise as a pattern-or-practice charge, Commissioner’s charge or “directed investigation” involving potential age discrimination or equal pay violations,⁴⁴ the most frequent issue of concern is when the EEOC expands an individual charge into a systemic investigation.

The courts generally have broadly interpreted the EEOC’s investigative authority, and FY 2015 was no different. The best illustration is the Ninth Circuit’s decision in *EEOC v. McLane Company, Inc.*,⁴⁵ in which the Ninth Circuit ordered an employer to comply with the EEOC’s request for “pedigree information” (*i.e.*, name, Social Security number, last known address, and telephone number) based on a subpoena enforcement action after the EEOC expanded its investigation of an individual sex discrimination charge (based on pregnancy) stemming from the charging party’s termination for failing to achieve the required score on an isokinetic strength test upon her return to work.

In the *McLane* case, all new employees and employees returning from leave exceeding 30 days had to take the test. The charging party’s termination occurred after she took the test three times and failed to receive the minimum score required for her position. During the investigation, the employer disclosed that it used the resistance test at its facilities nationwide for all positions classified as physically demanding. The EEOC ultimately expanded its investigation nationwide for the division in which the charging party was employed and required the pedigree information for all those who had taken the test. For all those who were terminated after taking the test, the EEOC requested the reason for termination.

The subpoena enforcement action arose after the employer failed and/or refused to provide the requested information. The district court concluded that the EEOC did not need to know the pedigree and related information to determine whether the company used the test to discriminate on the basis of sex and refused to enforce the subpoena. The Ninth Circuit reversed and relied on the Supreme Court’s decision in *EEOC v. Shell Oil*,⁴⁶ which upheld the EEOC’s right to information as part of a systemic investigation based on the view that the “relevance standard...encompasses ‘virtually any material that might cast light on the allegation against the employer.’” Based on requiring the information,” the EEOC will be better able to assess whether use of the test has resulted in a ‘pattern or practice’ of disparate treatment.”

A Wisconsin federal district court decision, *EEOC v. Union Pacific Railroad Company*,⁴⁷ also is illustrative of the expansive view courts have taken regarding the EEOC’s investigative authority. In *Union Pacific*, the EEOC was investigating the charges of two former employees who alleged race discrimination. During the investigation, the EEOC issued right-to-sue notices to the charging parties, who then sued in federal court. The court subsequently granted summary judgment in favor of the employer. In the interim, despite the EEOC’s issuance of the right-to-sue notices and the charging parties’ filing of individual lawsuits, the EEOC asserted it was legally entitled to continue to pursue a pattern-or-practice investigation based on information acquired during the initial investigation. A subpoena enforcement action then followed, and the court upheld the EEOC’s right to the information based on the view that “[t]he permissible scope of an EEOC lawsuit

43 The EEOC has defined systemic cases 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.” See EEOC Systemic Task Force Report (Mar. 2006) at 1, available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

44 See Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, at 31-32, available at <http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2013>.

45 *EEOC v. McLane Company, Inc.*, 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).

46 *EEOC v. Shell Oil*, 466 U.S. 54 (1968).

47 *EEOC v. Union Pacific Railroad Company*, 2015 U.S. Dist. LEXIS 57305 (E.D. Wis. May 1, 2015).

is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge.”

The above decisions should be contrasted with at least one appeals court decision during the past fiscal year, *EEOC v. Royal Caribbean Cruises, Ltd.*⁴⁸ In this case the Eleventh Circuit joined ranks with the Tenth Circuit⁴⁹ in limiting the scope of a subpoena in an ADA⁵⁰ claim in which the EEOC attempted to discover information to support a pattern-or-practice claim against an employer when it was faced solely with an individual ADA claim. The court sided with the employer on both “relevance” and “burdensomeness” grounds. The favorable impact of this 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.

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

Over the past year, the EEOC has continued to increase its focus on systematic investigations and related litigation based on the EEOC’s Strategic Enforcement Plan.⁵¹ The EEOC’s “national priorities,” as discussed in the plan, are: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach. Discussed below is a review of the EEOC’s litigation efforts and related actions involving these priorities over the past fiscal year.

Eliminating Barriers in Recruitment and Hiring

Claims of Alleged Intentional Discrimination

During the past year the EEOC has continued to pursue numerous class-based “failure-to-hire” lawsuits involving claims of alleged intentional discrimination. The EEOC has not singled out any type of discrimination in such large-scale litigation, which includes lawsuits alleging race, national origin, age and sex discrimination.⁵² Some of the EEOC’s key pending (or recently settled) failure-to-hire lawsuits are:

- *EEOC v. Mavis Discount Tire Inc.*, filed in federal court in New York in January 2012,⁵³ alleges a pattern or practice of discriminating against female applicants at its branch stores in four states in the Northeast (New York, Connecticut, Massachusetts, and Pennsylvania). The lawsuit initially stemmed from an individual charge of sex discrimination that expanded into a systemic investigation and determination that the employer discriminated against a class of female employees. Although both parties indicated their plans to move for summary judgment following the close of discovery, only the EEOC did so on February 13, 2015.⁵⁴ On September 11, 2015, the district court denied the EEOC’s summary judgment motion.
- *EEOC v. Bass Pro Outdoor World, LLC*, filed in Texas federal district court in September 2011. The lawsuit stems from a Commissioner’s charge filed in 2007, initially focusing on African American applicants and employees, but was later amended to include Hispanic applicants and employees.⁵⁵ The Letter of Determination, issued on April 29, 2011, made a reasonable cause finding that since 2005, the employer had engaged in a nationwide pattern or practice of discriminating against African American and Hispanic individuals in hiring on the basis of race and national origin. Since the filing of the lawsuit, which was based on Sections

48 *EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

49 See *EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012). In 2012, in *Burlington Northern*, the Tenth Circuit ruled that the EEOC was entitled only to evidence relevant to the charges under investigation, and rejected enforcement of a subpoena seeking data on a nationwide basis in connection with a charge of disability discrimination filed by two men who applied and were rejected for the same type of job in the same state.

50 Pub. L. No. 101-336 (1990), codified at 42 U.S.C. §§ 12101-12213 (2000).

51 The EEOC’s Strategic Enforcement Plan, which was adopted by the EEOC on December 12, 2012, is available on the EEOC’s website at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

52 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); *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011) (age discrimination); *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination); *EEOC v. Cintas*, Case No. 2:04-cv-40132 (E.D. Mich.) (filed May 10, 2004) (sex discrimination); *EEOC v. Mavis Discount Tire Inc. et al*, Case No. 1:12-cv-00741 (S.D.N.Y.) (filed Jan. 31, 2012); *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).

53 See Press Release, EEOC, *Mavis Discount Tire Sued by EEOC for Sex Discrimination in Hiring* (Jan. 12, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-31-11.cfm>.

54 See *Mavis Discount Tire, Inc.*, supra note 52, Docket No. 110.

55 See generally, *EEOC v. Bass Pro Outdoor World, LLC*, Appellant’s and Appellee’s briefs, Case No. 1520078 (5th Cir.).

706 and 707 of Title VII alleging a pattern or practice of discrimination, the parties have been embroiled in ongoing procedural disputes. A key issue pending in the U.S. Court of Appeals is whether the EEOC can pursue a pattern-or-practice claim seeking compensatory or punitive damages under Section 706 of Title VII.⁵⁶

- *EEOC v. Texas Roadhouse*, filed in Massachusetts federal court in October 2011,⁵⁷ involves allegations that the company “engaged in a nationwide pattern or practice of age discrimination in hiring hourly ‘front of the house’ employees.”⁵⁸ Here, too, the parties were involved in procedural disputes at the outset of the litigation. The employer challenged whether a pattern-or-practice claim could even proceed under the Age Discrimination in Employment Act (ADEA). This argument was rejected by the court based on the finding, “Absent any authority in this Circuit that pattern or practice claims cannot be brought under the ADEA and law in other circuits supporting the viability of a pattern or practice claim in the context of the ADEA, the Court will not dismiss the complaint on the basis that the EEOC cannot bring such a claim.”⁵⁹ Over the past fiscal year, discovery disputes have included the employer’s request for information concerning the EEOC’s hiring practices for certain entry-level positions, which was rejected by the court.⁶⁰ Discovery will continue into 2016, and summary judgment motions are due in July 2016.⁶¹ The *Texas Roadhouse* case also is significant because it illustrates the risks to employers under the ADEA – the lawsuit was based on a “directed investigation” under the ADEA initiated by the EEOC and thus was not based on a charge of discrimination filed by an applicant or employee.⁶²
- *EEOC v. Cintas Corporation*⁶³ involved a pattern-or-practice claim of sex discrimination dating back to 2004. This case—settled on November 11, 2015 for \$1.5 million—had gone back and forth from a federal court in Michigan to the U.S. Court of Appeals for the Sixth Circuit, and served as the linchpin for the EEOC’s pursuit of pattern-or-practice claims in which the agency seeks compensatory and punitive damages for large-scale class actions against employers.⁶⁴ The lawsuit, the last leg of which was based on an Amended Complaint filed in March 2013,⁶⁵ focused on the alleged failure by the employer to hire females as route sales drivers/service sales representatives at the company’s Michigan facilities. Over the past fiscal year, the dispute focused on the EEOC’s failure to identify by name the purported class members for whom the EEOC would be seeking monetary relief. This information was ultimately produced following a court order, although the court denied a request for sanctions against the EEOC for its delay.⁶⁶

56 See discussion below regarding the discussion of claims under Section 706 and 707 under Title VII.

57 See Press Release, EEOC, *Texas Roadhouse Refused to Hire Older Workers Nationwide, EEOC Alleges in Lawsuit* (Oct. 3, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-3-11.cfm>.

58 *Id.*

59 *EEOC v. Texas Roadhouse*, 2014 U.S. Dist. LEXIS 125867 (D. Mass. Sept. 9, 2014).

60 *Texas Roadhouse*, 2014 U.S. Dist. LEXIS 125869 & 2014 U.S. Dist. LEXIS 125865 (D. Mass. Sept. 9, 2014).

61 *Id.*, Case No. 11-11732-DJC Docket No. 365.

62 In *Texas Roadhouse*, the employer also filed a related FOIA suit against the EEOC on September 30, 2014, seeking a declaratory judgment and requesting, among other items, disclosure of various documents, including documents relating to all investigations and complaints since January 1, 2007, leading to the filing of the lawsuit against the employer. See *Texas Roadhouse, Inc. et al v. EEOC*, Case No. 3:14-cv-652 (W.D. Ky. filed Sept. 30, 2014). However, on March 3, 2015, the court issued a judgment in favor of the EEOC, finding that: (1) the EEOC did respond to 3 of the 4 requests and the employer should have amended its complaint and argued that the EEOC’s responses were inadequate; and (2) “the Court finds that Texas Roadhouse must first appeal to the EEOC the EEOC’s decision to redact or withhold certain documents pursuant to FOIA exemptions,” and “the Court will dismiss without prejudice Texas Roadhouse’s FOIA claims so that Texas Roadhouse first may administratively exhaust those claims.” *EEOC v. Texas Roadhouse*, 2015 U.S. Dist. LEXIS 25468 (W.D. Ky. Mar. 3, 2015).

63 See *EEOC v. Cintas Corporation*, Case No. 2:04-cv-40132-SFC-RSW, Docket No. 1095 (E.D. Mich.) (Amended Complaint filed Mar. 13, 2013).

64 In *Serrano & EEOC v. Cintas*, 699 F.3d 884 (6th Cir. 2012), *reh’g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), cert. denied, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013), the U.S. Court of Appeals for the Sixth Circuit reversed a district court and held that the EEOC could pursue a “pattern or practice” claim under Section 706. See Press Release, EEOC, *Sixth Circuit Issues Second Victory to EEOC in Sex Discrimination Case Against Cintas Corp.* (Jan. 17, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-17-13.cfm>.

65 See *EEOC v. Cintas Corporation*, Case No. 2:04-cv-40132-SFC-RSW, Docket No. 1095 (E.D. Mich.) (Amended Complaint filed Mar. 13, 2013).

66 *Cintas Corp.*, Docket No. 1142 (Aug. 20, 2015). The August 20, 2015 order provides a summary of the history of the lawsuit against Cintas.

- *EEOC v. Performance Food Group*, filed in Maryland federal court in June 2013, involves a claim that the employer “engaged in a pattern or practice of failing to hire female applicants for operative positions at distribution centers nationwide.”⁶⁷ The court adopted the reasoning of the Sixth Circuit in the Cintas litigation, permitting the pattern-or-practice claim against the employer to proceed.⁶⁸ During the past year, the EEOC did not prevail on the argument that the employer should be “judicially estopped” from changing its position from that set forth at the administrative stage to its subsequent determination that certain individuals who allegedly made sex-based discriminatory remarks, “lacked hiring oversight or control over any employees” at the affected facilities. The court ruled, however, that the EEOC should be permitted to conduct further discovery regarding the claim.⁶⁹
- *EEOC v. Darden Restaurants, Inc.*,⁷⁰ filed in Florida federal court in February 2015, challenges the employer’s hiring practices nationwide and alleges that individuals are excluded from both “front of the house” and “back of the house” positions based on age. This case has again placed at issue whether pattern-or-practice claims could be brought under the ADEA. The employer argued that the EEOC was resting solely on the view of the Tenth Circuit, which has permitted such claims, and that the court instead should consider the U.S. Supreme Court’s view that the provisions under Title VII and the ADEA are not interchangeable.⁷¹ The employer also challenged the EEOC’s motion that this class-based ADEA lawsuit should be bifurcated for liability and damages.⁷² On November 9, 2015, the court ruled on both motions. In dealing with pattern-or-practice claims under the ADEA, the court acknowledged that the ADEA does not reference pattern-or-practice actions, but rejected the employer’s motion to dismiss and concurred with the Tenth Circuit and “jurisprudence of this Circuit and other circuits that have permitted pattern-or-practice claims in ADEA cases.”⁷³ On the other hand, the court denied the EEOC’s motion to bifurcate discovery and trial into two phases (*i.e.*, liability and liquidated damages in Phase I and individual liability and damages in Phase II). Rather, the court ruled that discovery regarding all aspects would proceed simultaneously. The court also denied the request to bifurcate trial “at this time, but without prejudice to refile such request upon the completion of discovery.”⁷⁴

One of the most pivotal cases for employers to closely monitor is the *Bass Pro* case, in which the Fifth Circuit is reviewing whether the EEOC can pursue pattern-or-practice claims under Section 706 of Title VII and thus seek compensatory and punitive damages in such actions. As referenced above, only one federal circuit court of appeal has addressed this issue to date. In *Serrano v. Cintas*,⁷⁵ the Sixth Circuit reversed a district court and held that the EEOC could pursue a pattern-or-practice claim under Section 706. This holding is significant because it provides the EEOC with two avenues for pursuit of claims under Section 706: (a) presenting circumstantial evidence under *McDonnell Douglas*⁷⁶ familiar burden-shifting analysis; or (b) meeting a heightened prima facie case standard to establish a pattern or practice of discrimination under *International Brotherhood of Teamsters v. United States*.⁷⁷ While under *McDonnell Douglas* the burden of proof remains with the EEOC, under the *Teamsters* framework, once the EEOC establishes a pattern or practice of discrimination, the burden of proof shifts to the defendant on the question of individual liability. Permitting a pattern-or-practice claim under Section 706 allows the EEOC to potentially recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

67 See Press Release, EEOC, *EEOC Sues Performance Food Group for Nationwide Sex Discrimination in Hiring* (June 17, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-17-13a.cfm>.

68 See *EEOC v. Performance Food Group*, Case No. 1:13-cv-01712-MJG, Docket No. 38 (D. Md. Mar. 12, 2014).

69 *Performance Food Group*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014).

70 *EEOC v. Darden Restaurants, Inc.*, Case No. 1:15-cv-20561-JAL, Docket No. 1 (S.D. Fla.) (filed Feb. 12, 2015).

71 *Id.*, Docket Nos. 7. See also Docket Nos. 20 (Response) and 22 (Reply).

72 *Id.*, Docket Nos. 27 and 29.

73 *EEOC v. Darden Restaurants*, 2015 U.S. Dist. LEXIS 151742 (S.D. Fla. Nov. 9, 2015).

74 *Id.*

75 *Serrano v. Cintas*, 699 F.3d 884 (6th Cir. 2012), *reh’g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied*, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013).

76 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

77 *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Challenges to Neutral Employment Policies

The EEOC's results during FY 2015 were far more mixed based on EEOC challenges to neutral employment practices having a disparate impact on a protected group.

One of the EEOC's most significant losses over the past fiscal year was the Fourth Circuit's ruling in *EEOC v. Freeman*,⁷⁸ which dealt with the EEOC's challenge to the employer's use of criminal and credit history in the hiring process. In *Freeman*, the court never reached the ultimate issue because it merely affirmed the district court's summary judgment ruling, which struck down the findings the EEOC's statistical expert relied on to support the disparate impact claim of discrimination involving African American applicants. The concurring opinion of one of the judges was critical of the EEOC and its "disappointing litigation conduct," finding, "The Commission's work of serving 'the public interest' is jeopardized by the kind of missteps that occurred here." On remand, the EEOC also did not fare well based on the district court judge awarding \$938,771.50 to the employer, aside from his harsh criticism of the EEOC.⁷⁹

World-renowned poker expert Kenny Rogers once sagely advised, "You've got to know when to hold 'em. Know when to fold 'em. Know when to walk away." In the Title VII context, the plaintiff who wishes to avoid paying a defendant's attorneys' fees must fold 'em once its case becomes so groundless that continuing to litigate is unreasonable, i.e. once it is clear it cannot have a winning hand. In this case, once Defendant Freeman revealed the inexplicably shoddy work of the EEOC's expert witness in its motion to exclude that expert, it was obvious Freeman held a royal flush, while the EEOC held nothing. Yet, instead of folding, the EEOC went all in and defended its expert through extensive briefing in this Court and on appeal. Like the unwise gambler, it did so at its peril. Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees.

Despite the setbacks in the *Freeman* decision, the EEOC has continued to actively litigate cases involving criminal background checks. The two primary lawsuits, which were aggressively litigated by both the EEOC and employers in FY 2015, were *EEOC v. BMW Manufacturing Co. LLC*, which was pending in the federal district court in South Carolina (and recently settled)⁸⁰ and *EEOC v. Dolgencorp LLC*, which remains pending in the Northern District of Illinois.⁸¹ Based on these lawsuits, the EEOC alleged that the respective policies disproportionately screened out African Americans, were not job-related or consistent with business necessity, and failed to include an individualized assessment prior to screening out applicants for employment.⁸² In the *BMW* case, after a federal judge denied competing summary judgment motions to both sides,⁸³ a Consent Decree was approved by the court on September 8, 2015, as requested by the parties, in which BMW agreed to a settlement payment of \$1.6 million, modification of its criminal history policy and related training.⁸⁴ The parties remain knee-deep in discovery-related issues in the *Dolgencorp* case.

The EEOC has prevailed in a challenge to its 2012 criminal history guidance, but the issue is now on appeal in the Fifth Circuit. In *State of Texas v. EEOC*,⁸⁵ the state filed a complaint for declaratory and injunctive relief, arguing the EEOC's guidance ignored state and local law that disqualified convicted felons from holding certain jobs. Rejecting that argument, the court on August 20, 2014, dismissed the lawsuit and held that the guidance was not a final agency action and the lawsuit was premature because no action had been brought against the

78 *EEOC v. Freeman*, 2015 U.S. App. LEXIS 2592 (Feb. 20, 2015). See also Barry A. Hartstein, Rod M. Fliegel, Jennifer Mora and Carly Zuba, *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment*, Littler Insight (Feb. 23, 2015), available at <http://www.littler.com/update-criminal-background-checks-impact-eEOC-v-freeman-and-ongoing-challenges-continuously-changing>.

79 See *EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. Sept. 3, 2015).

80 See *EEOC v. BMW Manufacturing Co. LLC*, Case No. 13-cv-01583 (D.S.C., Spartanburg Div.) (filed June 11, 2013) ("BMW Case").

81 *EEOC v. Dolgencorp LLC*, Case No. 13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

82 See Press Release, EEOC, *EEOC Files Suit Against Two Employers for Use of Criminal Background Checks*, (June 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

83 See BMW Case, Docket No. 231 (July 30, 2015).

84 *Id.*, Docket No. 243.

85 *State of Texas v. EEOC*, Case No. 5-13-cv-00255 (N.D. Texas, Lubbock Div.) (filed Nov. 4, 2013).

State of Texas based on the guidance. On August 25, 2014, the State of Texas filed a Notice of Appeal with the Fifth Circuit, and the matter remains pending before the federal appellate court.⁸⁶

On July 9, 2015, in *EEOC v. Crothall Services Group, Inc.*,⁸⁷ the EEOC sued a Pennsylvania employer alleging that relying on criminal background tests in the hiring process “constitutes a test or selection procedure” based on the “Uniform Guidelines on Employee Selection Procedures.”⁸⁸ Based on the lawsuit, the EEOC has alleged the employer was required “to make, keep, and have available for inspection records or other information which will disclose the impact which its tests or other selection procedures have upon employment opportunities of persons identifiable by race, sex, or ethnic group,” and maintain such records for review and inspection.⁸⁹

Finally, in dealing with hiring barriers, the EEOC also has started to directly challenge employer testing practices. In August 2015, a major retailer agreed to pay \$2.8 million to resolve a Commissioner’s Charge following a reasonable cause finding by the EEOC that “three employment assessments formerly used by [the employer] disproportionately screened out applicants for exempt-level professional positions based on race and sex.”⁹⁰ As part of resolving the charge, the employer agreed to discontinue use of the assessments in its selection procedures for exempt-level personnel. The employer also agreed to “perform a predictive validity study for all exempt assessments currently in use and any new assessments” the employer expects to use and to “monitor the assessments it uses for exempt-level professional positions for adverse impact based on race, ethnicity and gender.”⁹¹

During the coming year, based on comments by EEOC representatives, it is anticipated that the EEOC will continue to closely review pre-employment testing practices and may take a closer look at reliance on “big data” in the hiring process.⁹²

Protecting Immigrant, Migrant and Other Vulnerable Workers

During the past fiscal year, the EEOC has been involved in several pattern-or-practice lawsuits dealing with immigrant workers. Claims for such workers are sometimes tied to other related lawsuits filed by private counsel, which include broad-based causes of action. In reviewing EEOC litigation, the civil rights agency had very mixed results based on the outcome of such litigation.

One of the most complex cases has involved Signal International LLC, which was involved in EEOC and related litigation in federal court in both Texas and Louisiana.⁹³ According to the EEOC action, which remains pending in Louisiana federal court, Signal allegedly engaged in a pattern or practice of unlawful activities involving a class of Indian workers at facilities in Mississippi and Texas that included: (1) requiring Indian employees to live in a main camp on company property, in crowded and substandard housing conditions; (2) subjecting Indian employees to oppressive conditions in the main camp, such as providing poor quality food, subjecting employees to searches and seizures; (3) refusing or restricting their right to have visitors; (4) charging monetary penalties for rule violations; (5) deducting in excess of \$1,000 per month from Indian employees’ wages for food and housing; and (6) limiting Indian employees’ freedom of movement and access to the local community.⁹⁴ The lawsuit included claims of ethnic epithets and derogatory language toward the Indian workers.

86 Case No. 14-10949 (5th Cir.) (Appeal filed Aug. 25, 2014).

87 See *EEOC v. Crothall Services Group Inc.*, Case No. 2:15-cv-03812, Docket No. 1(E.D. Pa.) (filed July 9, 2015) (“Crothall Services Group Complaint”).

88 29 CFR part 1607, Section 2C and part 1607, Section 16Q.

89 See Crothall Services Group Complaint.

90 See Press Release, EEOC, *Target Corporation to Pay \$2.8 Million to Resolve EEOC Discrimination Finding* (Aug. 24, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm>.

91 *Id.*

92 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 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>.

93 See *EEOC v. Signal International LLC*, Case No. 2:12-cv-00557-SM-DEK (E.D. La.) (filed Apr. 20, 2011). *Kurian David et al v. Signal International, LLC*, Case No. 08-cv-01220-SM-DEK (E.D. La.) (filed Mar. 7, 2008); and *Samuel et al v. Signal International LLC et al*, Case No. 1:13-cv-323 (E.D. Tex.) (filed May 21, 2013).

94 *EEOC v. Signal*, Docket No. 626 (Joint Statement of Case, May 6, 2015).

The employer in *EEOC v. Signal* vigorously disputed the allegations, contending it built housing for the Indian workers based on Hurricanes Katrina and Rita and submitted that the 500 affected foreign workers would not have found housing due to these conditions. The employer acknowledged it struggled at times with a first-time landlord, but denied any decisions were ever influenced by race or national origin.⁹⁵

On May 6, 2015, the district court issued a ruling postponing the *EEOC v. Signal* trial on an “indefinite” basis.⁹⁶ The court’s decision stemmed from the employer’s unopposed motion to delay the trial, pending the outcome in the Fifth Circuit’s decision in *EEOC v. Bass Pro*, explaining that a ruling in *Bass Pro* “may bear on whether the EEOC can bring pattern-and-practice claims under both §§706 and 707.”⁹⁷ In the interim, on December 18, 2015, the EEOC announced that a \$5 million settlement was entered into to resolve the lawsuit against Signal. Although the company filed a “notice of filing bankruptcy in the matter on July 13, 2015,⁹⁸ the “settlement establishes a claims process and ensures that all aggrieved individuals included in the litigation may receive relief in spite of the bankruptcy proceedings.”⁹⁹

Aside from the EEOC lawsuit against Signal, the related private litigation against Signal demonstrates 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.¹⁰⁰

During FY 2015, aside from *EEOC v. Signal*, in looking after the interests of vulnerable workers, the EEOC focused primarily on finishing up some major litigation on behalf of agricultural workers. This litigation involved two major lawsuits against Global Horizons, a farm labor contractor, and various grower defendants who were included in the lawsuits filed in Hawaii and the State of Washington.¹⁰¹ The lawsuits were highly publicized in an EEOC press release when the suits initially were filed within a week of one another in April 2011.¹⁰² The EEOC asserted claims similar to those in the *Signal* case, alleging that Global Horizons “enticed Thai male nationals into working at the farms with the false promises of steady, high-paying agricultural jobs along with temporary visas allowing them to live and work in the U.S. legally.” The EEOC alleged that aside from high recruitment fees for the Thai workers, Global Horizons also confiscated the workers’ passports and threatened deportation if they complained, and additional abuses then followed.¹⁰³ The EEOC alleged that the defendant farms “not only ignored abuses, but also participated in the obvious mistreatment, intimidation, harassment, and unequal pay of the Thai workers.”

In the fall of 2014, the EEOC announced major settlements with various grower defendants in the Hawaii litigation,¹⁰⁴ followed by default judgments of \$8.7 million award against Global Horizons and one grower defendant, plus an additional default judgment against Global Horizon for \$8.1 million.¹⁰⁵

95 *Id.*

96 See *EEOC v. Signal*, Docket No. 631 (May 7, 2015)

97 See *EEOC v. Signal*, Docket No. 631 (May 7, 2015). A discussion of the key issues being debated in the Fifth Circuit in the *Bass Pro* case involving Section 706 v. Section 707 and the impact on any potential trial is explained in the employer’s motion to continue the trial date. See *EEOC v. Signal*, Docket No. 623 (May 1, 2015).

98 *Id.*, Docket No. 643 (Notice of Bankruptcy filed July 7, 2015).

99 Press Release, EEOC, *Signal International, LLC to Pay \$5 Million to Settle EEOC Race, National Origin Lawsuit* (Dec. 18, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-18-15.cfm>.

100 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). A summary of the history of the litigation is included in the Plaintiff’s Memorandum.

101 See *EEOC v. Global Horizons et al*, Civil Action No. 11-00257 (D. Haw.) (filed Apr. 11, 2011) and *EEOC v. Global Horizons et al*, Case No. CV-11-3-45EFS (E.D. Wash) (filed Apr. 19, 2011).

102 See Press Release, EEOC, *EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizons, Farms* (Apr. 20, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm>.

103 *Id.*

104 See Press Release, EEOC, *Judge Approves \$2.4 Million EEOC Settlement with Four Hawaii Farms for over 500 Thai Farmworkers* (Sept. 5, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-5-14.cfm>.

105 See *EEOC v. Global Horizons*, 2014 U.S. Dist. LEXIS 175851 (D. Haw. Dec. 19, 2014).

The above awards and settlements are in stark contrast to the findings in the related litigation in the State of Washington. Although a default judgment was entered against Global Horizons on September 28, 2015,¹⁰⁶ the district court judge in the Washington case took strong exception with the EEOC 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) as to the Grower Defendants shows that the EEOC was not prepared to allege plausible, reasonable, or non-frivolous Title VII claims against the Grower Defendants.” 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. The EEOC was left with a “joint-employer” theory without legal or factual support. In a scathing opinion finding that an award of legal fees against the EEOC was appropriate for its conduct, the court 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.¹⁰⁷

Addressing Emerging and Developing Issues

Based on its Strategic Enforcement Plan, the EEOC—in describing “emerging and developing issues” the agency will focus on as part of its “national priorities,” the EEOC expressly referred to several concerns: (1) ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams; (2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and (3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions. Religious accommodation issues also appear to fall within this framework, as evidenced by the EEOC’s role in bringing this issue before the U.S. Supreme Court in *EEOC v. Abercrombie*.

During the past year, the EEOC placed particular emphasis on various emerging issues under our EEO laws, especially pregnancy, religious discrimination and LGBT protection under Title VII. The EEOC also continued to aggressively litigate employee rights under the ADA.

Pregnancy Discrimination

While the EEOC was not a party in *Young v. United Parcel Service*, decided by the U.S. Supreme Court on March 25, 2015, the civil rights agency injected itself into the dispute by issuing updated “Enforcement Guidance on Pregnancy Discrimination and Related Issues” literally two weeks after the Supreme Court granted certiorari in the case.¹⁰⁸ In the updated pregnancy guidance, issued in July 2014, the EEOC rejected the Fourth Circuit’s decision in *Young* and essentially adopted the plaintiff’s view regarding “light duty” work, claiming that pregnant workers were entitled to light duty if provided to other workers performing similar work.

The timing of the updated guidance in July 2014 was a point of contention among the Commissioners, as evidenced by the strongly worded objections by Commissioners Lipnic and Barker who voted against the Guidance.¹⁰⁹ In the *Young* decision, the Supreme Court also took exception with the EEOC’s July 2014 guidance, which provided that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g. a policy of providing light duty only to workers injured on the job).”

¹⁰⁶ 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).

¹⁰⁷ *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 37674 (E.D. Wash., Mar. 18, 2015).

¹⁰⁸ Certiorari was granted in *Young v. UPS* on July 1, 2014. See <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1226.htm>. The EEOC issued its guidance two weeks later on July 14, 2014. See Press Release, EEOC, *EEOC Issues Updated Enforcement Guidance On Pregnancy Discrimination And Related Issues* (July 14, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm>.

¹⁰⁹ See *Ilyse Schuman, EEOC Issues New Enforcement Guidance on Pregnancy Discrimination over Commissioner Objections*, Littler ASAP (July 14, 2014), available at <https://www.littler.com/publication-press/publication/eeoc-issues-new-enforcement-guidance-pregnancy-discrimination-over>.

In rejecting the Solicitor General's view that the Court "should give special, if not controlling weight to this guideline," the Court focused on prior precedent,¹¹⁰ explaining that "the rulings, interpretations and opinions of an agency charged with the mission of enforcing a particular statute, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," but underscored that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control."¹¹¹ The Court was troubled by the "timing, consistency, and thoroughness of consideration," underscoring that the EEOC's 2014 guidelines were issued "only recently, after this Court had granted certiorari in this case," and otherwise found that the EEOC was taking a position in which its previous guidelines were silent, the position taken was inconsistent with positions previously advocated, and in which the agency does not "explain the basis for its latest guidance."¹¹² The Court concluded, "[W]e cannot rely significantly on the EEOC's determination."

Based on *Young*,¹¹³ the EEOC reissued its pregnancy discrimination guidance several months later, on June 25, 2015, and explained:

The updates to the Guidance are limited to several pages about the U.S. Supreme Court's recent decision in *Young v. UPS*, issued in March 2015. The updated Guidance reflects the Supreme Court's conclusion that women may be able to prove unlawful pregnancy discrimination if the employer accommodated some workers but refused to accommodate pregnant women. The Court explained that employer policies that are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.¹¹⁴

As significantly, based on the EEOC's updated pregnancy guidance, employers also need to be sensitive to potential reasonable accommodation obligations under the ADA based on the expanded definition of protected disabilities in the ADA based on the ADAAA. According to the EEOC's guidance, "[T]here is no requirement that impairment last a particular length of time to be considered substantially limiting,"¹¹⁵ thus applying its provisions to cover pregnancy-related disabilities.

During the past year, employers also have become more vulnerable to suit by the EEOC. As an example, during the fiscal year 2015, the agency only filed 142 lawsuits, but this included at least 13 lawsuits by the EEOC involving pregnancy discrimination, which frequently were coupled with ADA claims.¹¹⁶ Despite the EEOC's renewed focus on pregnancy discrimination and related lawsuits against employers, FY 2015 brought to a close the largest lawsuit filed by the EEOC involving alleged pregnancy discrimination—*EEOC v. Bloomberg LP*¹¹⁷—after nearly eight years of litigation. During that litigation, the court rejected the EEOC's pattern-or-practice claim in August 2011,¹¹⁸ issued a final

110 The Court relied on *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944).

111 *Id.*

112 For a discussion of the deference to be given to EEOC guidance, see *El v. SEPTA*, 479 F.3d 232, 243-244 (3d Cir. 2007). As explained in the *El* decision, there are generally three recognized categories of deference that the courts will accord to an agency's rulemaking and interpretations:

- *Chevron Deference*. Chevron Deference is the most deferential standard and is generally accorded to an agency's regulations interpreting a statute that is tasked with enforcing or interpreting, after such regulations have gone through a notice and comment period. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
- *Auer Deference*. This approach is also highly deferential and generally applies to an agency's interpretation of ambiguities in the agency's own formal regulations. Generally, such interpretations are binding unless they are plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997).
- *Skidmore Deference*. This is a less deferential standard that is often applied to an agency's informal guidance, rules, policy statements, and other publications that do not go through a formal notice and comment period. *Skidmore v. Swift & Co.*, 323 U.S. 434, 440 (1944).

113 For a detailed analysis of the *Young* decision, see Joseph P. Harkins, et al., *The Heavy Burden of Light Duty: Young v. UPS*, Littler Insight (Mar. 31, 2015), available at <http://www.littler.com/heavy-burden-light-duty-young-v-ups>.

114 See Press Release, EEOC, *EEOC Issues Updated Pregnancy Discrimination Guidance* (June 25, 2015) available at <http://www.eeoc.gov/eeoc/newsroom/release/6-25-15.cfm>.

115 See discussion of the Americans with Disabilities Act in Section II of the guidance at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

116 See EEOC Press Releases at <http://www.eeoc.gov/eeoc/newsroom/release/index.cfm>; see also FY 2015 PAR at 34. While the EEOC's PAR does not identify the number of pregnancy discrimination lawsuits, Littler monitors all EEOC court filings, and the number of pregnancy discrimination lawsuits is based on monitoring lawsuits filed by the EEOC during FY 2015.

117 *EEOC v. Bloomberg LP*, 751 F.Supp.2d 628 (S.D.N.Y.2010).

118 *EEOC v. Bloomberg LP*, 778 F.Supp.2d 458 (S.D.N.Y. 2011).

dismissal order of all remaining claims on November 7, 2014,¹¹⁹ considered an employer's motion for attorneys' fees filed on December 24, 2014,¹²⁰ and received notices of appeal filed by the EEOC and employer on May 7, 2015.¹²¹ On July 15, 2015, the EEOC ultimately agreed to drop the Bloomberg lawsuit in its entirety, which was coupled with the employer's withdrawal of its motion for attorneys' fees.¹²²

Religious Discrimination

EEOC v. Abercrombie,¹²³ in which the EEOC was front and center before the U.S. Supreme Court, is a good example of the agency's approach with emerging issues. The lawsuit, which involved a case of first impression, asked whether Title VII's requirement to make an accommodation absent undue hardship to a religious practice applied only where the employer had knowledge of the applicant's need for an accommodation. The applicant, who wore a headscarf, was denied employment based on the belief she wore the headscarf for religious reasons and the employer had a "Look Policy" that prohibited "caps." Following discovery, the EEOC filed and prevailed on summary judgment, but was reversed by the Tenth Circuit. In holding that the Tenth Circuit erred in ordering entry of summary judgment for the employer, the Court determined it was sufficient that a "motivating factor" for the employer's decision was the desire to avoid making an accommodation based on the belief that the applicant wore the headscarf for religious reasons. In the Court's view "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

The EEOC recently updated its "Fact Sheet on Recent Religious Discrimination Litigation," which included discussion of the *Abercrombie* case and a favorable settlement in *EEOC v. Mims Distributing*, in which the EEOC sued based on the employer's allegedly refusing to hire an applicant who declined to cut his hair for religious reasons.¹²⁴ On October 22, 2015, the EEOC also announced a jury award of \$240,000 to two Muslim truck drivers who allegedly were fired from their jobs as over-the-road truck drivers when they refused to transport alcohol because it violated their religious beliefs.¹²⁵

Also noteworthy is a recent EEOC tactic—"dual track" litigation filed by the EEOC involving two separate, but virtually identical, lawsuits against the same employer (JBS USA LLC). In JBS, the EEOC filed two separate lawsuits on the same day against JBS in Nebraska and Colorado, respectively, based on the alleged failure to accommodate the religious prayer practices of its Muslim workers.¹²⁶

The EEOC has faced numerous challenges in the Nebraska litigation, which included an employer victory in October 2013 striking down a pattern-or-practice claim in Phase I of the litigation, finding the requested multiple prayer breaks posed an undue hardship on the employer.¹²⁷ The district court also granted a motion to dismiss and judgment on the pleadings based on the remaining class-type claims under Section 706 of Title VII in Phase II, finding, "[A]t a minimum, an EEOC complaint must provide either the names of all class member or some indication of the size and scope of the class," and "dependence upon facts supporting pattern-or-practice claims also renders the EEOC Complaint ambiguous and potentially confusing for purposes of Phase II."¹²⁸ This led to a Fourth Amended Complaint being filed by the EEOC in August 2015.¹²⁹ Although the Court has set a trial date for June 2016, the employer has filed an additional motion to dismiss a portion of the lawsuit.¹³⁰

119 *EEOC v. Bloomberg LP*, No. 07 Civ. 8383(LAP), Docket No.595.

120 *Id.*, Docket Nos. 598-599.

121 *Id.*, Docket No. 717.

122 *Id.*, Docket No. 722.

123 135 S.Ct. 2028 (2015).

124 See EEOC, *Fact Sheet on Recent EEOC Religious Discrimination Litigation* (Last updated Feb. 19, 2015), available at http://www.eeoc.gov/eeoc/litigation/selected/religious_discrimination_facts.cfm.

125 See Press Release, EEOC, *Jury Awards \$240,000 to Muslim Truck Drivers In EEOC Religious Discrimination Suit* (Oct. 22, 2015), available at <http://eeoc.gov/eeoc/newsroom/release/10-22-15b.cfm>.

126 See *EEOC v. JBS USA LLC*, Case No. 8:10-cv-00318 (D. Neb.) (filed Aug. 30, 2010) ("*JBS Nebraska Lawsuit*") and *EEOC v. JBS USA LLC*, Case No. 1:10-cv-02103 (D. Colo.) (filed Aug. 30, 2010) ("*JBS Colo. Lawsuit*").

127 See *JBS Nebraska Lawsuit*, Docket No. 516 (Oct. 11, 2013).

128 *Id.*, *EEOC v. JBS*, 2015 U.S. Dist. LEXIS 96946 (D. Neb. July 24, 2015).

129 *Id.* Docket No. 730 (Aug. 20, 2015).

130 *Id.* Docket Nos. 751, 752 and 757.

Despite the EEOC's setbacks in the Nebraska litigation, the rulings in the Colorado litigation have been more favorable to the EEOC. As an example, in July 2015, the Colorado federal court denied JBS' motion for summary judgment seeking to strike the pattern-or-practice claims. In rejecting an estoppel argument, the court concluded there were factual differences in the operations between the two facilities (e.g., staffing levels and "larger time windows in which management could schedule breaks"), and stated, "Although both cases involve application of the same rule of law and involve claims that are closely related, JBS has failed to establish that the factual differences between this case and the Nebraska case are legally insignificant and the Court further finds that the balance of considerations weighs against finding that the identity of issue element is satisfied."¹³¹

Discrimination Based on Sexual Orientation or Gender Identity or Expression

During FY 2015, the EEOC continued its emphasis on reducing LGBT-related discrimination by employers. The EEOC made it abundantly clear it continues to broadly interpret discrimination on the basis of sex to include discrimination based on sexual orientation and gender identity or expression.

The most significant activity involved transgender workers. In April 2015, in reversing an agency action that restricted a transgender employee from using a common female restroom and required the employee to use a single-use restroom called the "executive restroom," the Commission held that the agency violated Title VII's prohibition against sex discrimination.¹³² The Commission relied, in part, on its 2012 ruling in *Macy v. Department of Justice*,¹³³ in which it held that discrimination against a transgender individual is, by definition, discrimination based on sex in violation of Title VII. According to the Commission's decision, when an employer takes action because someone is transgender, it is discrimination whether the treatment is because the individual has expressed his or her gender in a non-stereotypical manner, because the employer is uncomfortable with a person who has transitioned their gender, or because the individual is transitioning from one gender to another. In any event, the employer is "making a gender-based evaluation" in violation of Supreme Court precedent.¹³⁴

The EEOC also appeared in and/or initiated litigation on behalf of two other transgender employees, which included: filing an amicus brief in January 2015 arguing against dismissal of a lawsuit where the defendant sought to dismiss the case because Title VII did not extend to the plaintiff, who was transgender,¹³⁵ and suing in June 2015 on behalf of a transgender employee who claimed she was denied use of a woman's restroom and allegedly subjected to harassment by her supervisors and co-workers when they intentionally used the wrong pronouns to refer to her.¹³⁶ In a press release announcing the most recent lawsuit, the EEOC stated this was the third lawsuit filed by the EEOC "on the basis of gender identity/transitioning/transgender status and that the EEOC has "made clear through its federal sector decisions that transgender individuals are protected under Title VII."¹³⁷

One of these lawsuits involving transgender employees, pending in federal court in Michigan, recently became extremely contentious when the employer served discovery requests that sought information regarding the employee's anatomy, the progress of the employee's gender transition (including medical and psychological records), and the employee's familial background and prior intimate relationships.¹³⁸ While the magistrate judge assigned to the case granted the EEOC's request for a protective order to avoid having the transgender employee

131 See *EEOC v. JBS*, 2015 U.S. Dist. LEXIS 93244 (D. Colo. July 17, 2015).

132 See *Lusardi v. John M. McHugh, Secretary, Dept. of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015).

133 EEOC Appeal No. 020120821 (Apr. 20, 2012).

134 See *Lusardi v. John M. McHugh, Secretary, Dept. of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (quoting *Macy v. Department of Justice*, EEOC Appeal No. 020120821 and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)).

135 See *Jamal v. Saks & Co.*, 4-14-cv-01782, Docket No. 17 (S.D. Tex.) (Amicus brief filed Jan. 22, 2015), although the case was privately resolved prior to any ruling on the motion to dismiss.

136 See *EEOC v. Deluxe Financial Services Corp.* Case No. 15-cv-02646 (D. Minn.) (filed June 4, 2015).

137 See Press Release, EEOC, *EEOC Sues Deluxe Financial for Sex Discrimination Against Transgender Employee* (June 5, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-5-15.cfm>. One of the three lawsuits settled in April 2015, as discussed Press Release, EEOC, *Lakeland Eye Clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Lawsuit* (Apr. 13, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>.

138 See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Case No. 2:14-cv13710 (E.D. Mich.) (filed Sept. 25, 2014).

respond to such discovery, the parties remain in conflict over the scope of Title VII regarding transgender employees and the scope of discovery relating to claims of discrimination based on transgender status under Title VII.¹³⁹

During FY 2015, the Commission reaffirmed its position that sexual orientation claims are covered by Title VII.¹⁴⁰ In February 2015, the Commission reversed an agency's decision regarding comments made to a federal employee by his co-worker that he was a "homo" and was "going to hell," which the employee reported to his supervisor, who did nothing.¹⁴¹ The Commission, relying on U.S. Supreme Court precedent in *Oncale v. Sundowner Offshore Services, Inc.*,¹⁴² found that the "hateful nature of the alleged comments," coupled with the lack of adequate response by his supervisor stated a viable claim of harassment on the basis of sex due to gender-based stereotyping. In July 2015, the Commission reversed an agency's decision as to an employee's claim he was not selected for a position because he was gay.¹⁴³ In reviewing the federal worker's claim, the Commission stated in unequivocal terms, "[W]e conclude that sexual orientation is inherently a sex-based consideration," and "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

Disability Discrimination Claims

Disability discrimination continues to be the most frequently litigated issue by the EEOC. Over the past several years, including FY 2015, the largest number of lawsuits filed by the EEOC have been claims under the ADA.¹⁴⁴ The EEOC has aggressively litigated ADA pattern-or-practice claims and also has taken numerous individual ADA lawsuits to trial, although the EEOC has had mixed results at trial and disappointing results at the federal appellate level. The EEOC was also proactive on the regulatory front in addressing ADA matters, issuing proposed regulations to address the interplay between the ADA and the Affordable Care Act (ACA).

In recent years, 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 they violate the ADA. As significantly, the EEOC remains deeply entrenched in a nationwide ADA pattern-or-practice lawsuit filed in August 2009—*EEOC v. United Parcel Service*¹⁴⁵—filed in the Northern District of Illinois involving similar allegations.

The EEOC has treated attendance plans in a similar manner to fixed-leave policies. Failing to accommodate disabilities under a no-fault attendance policy creates exposure for employers as evidenced by a nationwide ADA lawsuit, *EEOC v. AutoZone, Inc.*,¹⁴⁶ also filed in the Northern District of Illinois, in which the EEOC alleges that the employer discriminated against those suffering from disabilities in violation of the ADA.

139 *Id.* Docket No. 34 (Motion for Protective Order filed Sept. 24, 2015). The EEOC conceded in its reply brief filed in support of its Motion for Protective Order and at oral argument that, since the District Judge previously had ruled "transgender or transsexual status is currently not a protected class under Title VII," the only remaining theory of discrimination was based on a sex stereotyping claim. Based on that concession, the magistrate judge granted the EEOC's Motion for Protective Order. The defendant has since appealed that discovery ruling and continues to seek to obtain anatomical, medical and psychological, and other intimate details relating to the plaintiff. For its part, the EEOC has indicated it is preserving its right to appeal the district judge's ruling regarding the scope of Title VII as relates to transgender employees.

140 See *Complainant v. U.S. Postal Service*, EEOC Appeal No. 0120133382 2015 WL 755097 (Feb. 11, 2015); *Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA)*, EEOC Appeal No. 0120133080 (July 15, 2015).

141 *Complainant v. U.S. Postal Service*, EEOC Appeal No. 0120133382 2015 WL 755097 (Feb. 11, 2015).

142 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

143 *Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA)*, EEOC Appeal No. 0120133080 (July 15, 2015).

144 As an example, aside from FY 2015, in which 53 of the 142 merits lawsuits filed by the EEOC involved ADA claims, a similar practice has occurred over the past several years: In FY 2014, there were 49 ADA lawsuits among the 167 lawsuits filed by the EEOC. In FY 2013, there were 51 ADA lawsuits among the 148 lawsuits filed by the EEOC. See EEOC, Litigation statistics, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

145 *EEOC v. United Parcel Service*, Case No. 1:09-cv-05291 (N.D. Ill.) (filed Aug. 27, 2009).

146 See *EEOC v. AutoZone, Inc.*, Case No. 14-cv-3385 (N.D. Ill.) (Complaint filed May 9, 2014) (Amended Complaint filed Aug. 5, 2014). See also Press Release, EEOC, *EEOC Nationwide Disability Discrimination Case Against Autozone to Proceed* (Nov. 3, 2015), available at <http://eeoc.gov/eeoc/newsroom/release/11-3-15b.cfm>.

On November 5, 2015, an employer also agreed to a \$1.7 million settlement with the Chicago office of the EEOC involving another challenge to an attendance plan. The EEOC faulted the employer's "nationwide policies to issue attendance points for medical-related absences; not allowing intermittent leave as a reasonable accommodation; and not allowing leave or an extension of leave as a reasonable accommodation."¹⁴⁷

The EEOC has not been reluctant to take ADA cases to trial during the past fiscal year. In October 2014, a Florida jury found that an employer discriminated against a licensed security guard with only one arm, who was removed from his post following a customer complaint.¹⁴⁸ Next, in January 2015, an Arkansas jury ruled in favor of the EEOC based on a claim that a trucking firm unlawfully denied a reasonable accommodation to a truck driver who had self-reported alcohol abuse, and then terminated his employment.¹⁴⁹ In June 2015, in federal court in Alaska, the EEOC prevailed in challenging an employer that withdrew its initial job offer to an experienced oil rig worker because he had no vision in his left eye.¹⁵⁰

However, the above jury verdicts in favor of the EEOC during FY 2015 should be contrasted with less favorable federal court rulings, as illustrated by several cases:

- In an ADA action in Massachusetts, *EEOC v. Chipotle Mexican Grill*,¹⁵¹ the EEOC argued that the charging party, who suffered from cystic fibrosis, was able to perform the essential functions of the job and that she was fired one day after the employee's immediate manager learned of her disability. The employer argued it knew of her disability when she was hired, she was employed three months, she understood customer service was a critical part of the job, the employee received a written warning based on various customer complaints about her rudeness to customers, and one week later a customer complained about an employee, vowing never to return to the restaurant, and after the company learned it was the charging party, she was fired because of her poor interactions with customers. On August 10, 2015, a jury rendered a verdict in favor of the employer.
- In *EEOC v. AutoZone, Inc.*,¹⁵² filed in federal court in Wisconsin, the EEOC focused on the termination of a Parts Sales Manager, whose employment was terminated based on indefinite lifting restrictions. The employer submitted that the store was leanly staffed, often with only one or two employees, including the manager on duty, and on various occasions the charging party had to work alone. The charging party admitted that lifting over 15 pounds was an essential function of the job, and securing parts for customers was part of the manager's job, aside from assisting customers in taking parts to their cars. After suffering a shoulder injury, the plaintiff was temporarily accommodated for approximately two years, but based on permanent medical restrictions not to lift over 15 pounds, the charging party's employment was terminated. On November 21, 2014, a jury ruled in favor of the employer and denied the EEOC's motion for a new trial. The EEOC filed a notice of appeal on April 8, 2015.

147 See Press Release, EEOC, *Pactiv to Pay \$1.7 Million to Settle EEOC Disability Discrimination Class Investigation* (Nov. 5, 2015), available at <http://eoc.gov/eoc/newsroom/release/11-5-15a.cfm>.

148 See Press Release, EEOC, *Jury Finds In Favor Of EEOC That One-Armed Security Guard Was Fired Because Of His Disability* (Oct. 23, 2015), available at <http://www.eoc.gov/eoc/newsroom/release/10-23-14.cfm>.

149 See Press Release, EEOC, *Jury in EEOC Suit Says Old Dominion Freight Line Must Pay Former Driver \$119,612 for Disability Bias* (Jan. 16, 2015), available at <http://www.eoc.gov/eoc/newsroom/release/1-16-15.cfm>.

150 See Press Release, EEOC, *Jury Finds Parker Drilling Liable in EEOC Disability Discrimination Suit* (June 4, 2015), available at <http://www.eoc.gov/eoc/newsroom/release/6-4-15.cfm>.

151 *EEOC v. Chipotle Mexican Grill*, Case No. 1:153-cv-11503, Docket 117 (D. Mass. Aug. 10, 2015); see also, *EEOC v. Chipotle Mexican Grill*, Case No. 1:153-cv-11503, Docket No. 91 (Joint Pre-Trial Memorandum filed May 21, 2015).

152 *EEOC v. AutoZone, Inc.*, Case No. 2:12-cv-00303, Docket No. 209 (E.D. Wis.) (jury verdict for employer), Docket N. 229 (Decision and Order Denying Plaintiff's Motion for a New Trial, Docket No. 230 (Notice of Appeal by EEOC).

- In *EEOC v. Vicksburg Healthcare LLC*,¹⁵³ a federal court in Mississippi issued a summary judgment ruling in favor of an employer and rejected an ADA claim. The lawsuit stemmed from an employee's termination after she sued for disability benefits based on a physician's finding she was "temporarily totally disab[le]d" for an indefinite period. In challenging the employer's motion for summary judgment, the EEOC argued that an individual may be totally disabled and still be a qualified individual with a disability, relying on the U.S. Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.*¹⁵⁴ In rejecting the EEOC's argument, the court concluded "The EEOC has the burden of producing a sufficient explanation under *Cleveland* for the discrepancy between a total disability benefits claim and the assertion that [the employee] was qualified for her job. Because the EEOC has failed to do so, [the employer] is entitled to summary judgment on both the EEOC's failure to accommodate and discriminatory claims."

The EEOC also did not fare well on appeal in ADA cases, as illustrated by decisions in the First, Fourth, Sixth and Tenth Circuits:

- In *EEOC v. Kohl's*,¹⁵⁵ which dealt with an alleged failure to accommodate an employee, the First Circuit affirmed a summary judgment ruling for the employer because the employee, who suffered from diabetes, claimed that an erratic work schedule aggravated her condition, and quit after she demanded a schedule that allowed her to work from 9:00 a.m. to 5:00 p.m. or from 10:00 a.m. to 6:00 p.m., but was told there was no position with those hours. The employee refused the employer's offer to rethink her resignation and discuss alternative accommodations. In the view of the First Circuit, "when an employer initiates an interactive dialogue in good faith with an employee for the purpose of discussing potential reasonable accommodations for the employee's disability, the employee must engage in a good-faith effort to work out potential solutions with the employer prior to seeking judicial redress."
- *EEOC v. Womble Carlyle Sandridge & Rice*¹⁵⁶ dealt with an employee who worked at law firm in an office services job in which many functions required heavy lifting. Following a diagnosis of lymphedema, a condition caused by breast cancer, she had difficulties lifting and suffered a work-related injury while lifting. This led to a lifting restriction of no more than 10 pounds, which was accommodated by providing light-duty assignments for approximately six months. Some months later, the employee's restrictions became permanent, which led to reassessing the employee's capabilities. After the determination was made that there were no available alternative jobs, the employee was placed on medical leave and terminated after the permitted leave expired. In affirming summary judgment in favor of the employer, the Fourth Circuit held the employer was not required to permanently excuse the employee from the lifting tasks "because doing so would force [the employer] to create a modified light-duty position, which the ADA does not require," nor was the employer required to permanently assign other employees to help the affected employee with all heavy lifting tasks because that "would in effect reallocate essential functions, which the ADA does not require."

The Sixth Circuit also ruled in favor of an employer in rejecting an ADA claim in *EEOC v. Ford Motor Company*,¹⁵⁷ which focused on telecommuting. The affected employee, who suffered from irritable bowel syndrome, requested telecommuting up to four days a week, which far exceeded company policy, and the employee worked in a highly interactive role as a "resale buyer" that required personal interaction with suppliers. While the company made some accommodations to permit a limited amount of telecommuting, it proved unsuccessful and the affected employee already had been experiencing performance problems. Although the company did not grant her requested telecommuting schedule, the company advised the employee it could accommodate her in other ways, such as moving her closer to the restroom or looking for jobs better suited for telecommuting, but the employee's response to the denial of her request was the filing of an ADA claim. In deciding whether to affirm the summary judgment ruling in favor of the employer, the Sixth Circuit faced the question, "Is regular and predictable on-site job attendance an essential function . . . of [the employee's] resale-buyer position?" In the court's view, "We hold that it is." The court concluded it was not writing on a "clean slate"; rather, the "general rule" is that "an employee who does not

153 *EEOC v. Vicksburg Healthcare LLC*, Case No. 3:13-cv-00895, Docket Nos. 121-122 (S.D. Miss. Aug. 27, 2015) (summary judgment in favor of employer); see also Docket No. 124 (EEOC Notice of Appeal filed Oct. 29, 2015).

154 *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

155 *EEOC v. Kohl's Dept. Store*, 2014 U.S. App. LEXIS 24043 (1st Cir. Dec. 19, 2014).

156 *EEOC v. Womble Carlyle Sandridge & Rice*, 2015 U.S. App. LEXIS 10874 (4th Cir. June 26, 2015).

157 *EEOC v. Ford Motor Company*, 2015 U.S. App. LEXIS 5813 (6th Cir. April 10, 2015).

come to work cannot perform any of his job functions, essential or otherwise.” The court also determined that the employee’s proposal of up to four days of telecommuting, which removed the essential function of being on the job site, was “unreasonable.” The court rejected the EEOC’s view that technology created a genuine dispute of fact “as to whether regular on-site attendance is essential.

Aside from reasonable accommodation issues, one of the most significant issues regarding the ADA over the past year involves the EEOC and the health care community. The EEOC took a position at odds with the Affordable Care Act¹⁵⁸ by targeting and challenging wellness programs. Under the ACA, wellness programs are encouraged for both large and small employers. For example, the ACA provides grants for up to five years to small employers that establish wellness programs. It also permits employers to offer employee rewards in the form of discounts and waivers for wellness programs and increase the incentives that can be offered.¹⁵⁹

The EEOC has been involved in several lawsuits challenging wellness programs over the past year,¹⁶⁰ which included attempting to enjoin a wellness program during the EEOC’s investigation concerning the legality of the wellness program. In late October 2014 in *EEOC v. Honeywell*, the EEOC filed a petition for a temporary restraining order and preliminary injunction and argued there would be “irreparable harm” to: (1) the EEOC, because it would be unable to prevent imminent violation of antidiscrimination laws; and (2) employees, “because they will be forced to go through an unlawful test without knowing whether their rights will be remedied in the future.”¹⁶¹ Less than one week later, on November 6, 2014, the court denied the EEOC’s motion, explaining, “Recent lawsuits filed by the EEOC highlight the tension between the ACA and the ADA and signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law.”¹⁶²

Since that time, the primary EEOC lawsuit that has placed wellness programs front and center is *EEOC v. Flambeau, Inc.*, pending in Wisconsin federal court, in which the EEOC asserted that the company’s wellness program required that employees submit to biometric testing and a health risk assessment (HRA) or face cancellation of medical insurance, unspecified disciplinary action for failing to attend the scheduled testing, and a requirement to pay the full premium to stay covered. In the EEOC’s view:

Flambeau used biometric testing and the HRA to gather medical and disability information from its workforce. The biometric test and HRA were thus generally not allowed by the ADA. Only if Flambeau could demonstrate that its means of gathering information were “voluntary” could Flambeau be in compliance with the ADA. But the test and HRA were required for employees to continue getting the normal employee health insurance. That makes the test and HRA non-voluntary as a matter of law. As a result, Flambeau violated the ADA and is liable for the effects of its action.¹⁶³

From the employer’s perspective:

The EEOC is wrong as a matter of law. Indeed, Flambeau’s wellness program satisfied the ADA’s “safe harbor provision” because it was a term of a bona fide benefit plan, based on “underwriting risks, classifying risks, or administering such risks” and not inconsistent with Wisconsin law. Moreover, the program was “voluntary” pursuant to the ADA because Flambeau never required employees to participate as a condition of their employment with the Company. As a result, Flambeau respectfully requests the Court to grant summary judgment in the Company’s favor with respect to the instant lawsuit.¹⁶⁴

158 Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), *codified at* 42 U.S.C. § 18001 (2010).

159 See Ilyse Schuman *et al.*, *The Labor, Employment and Benefits Law Implications of the Affordable Care Act - Are You Prepared?* Littler Report at 7-10 (May 9, 2013), available at <http://www.littler.com/publication-press/publication/workplace-policy-institute-labor-employment-and-benefits-law-implicati>.

160 See *EEOC v. Orion Energy Systems, Inc.*, Case No. 1:14-cv-01019 (E.D. Wis.) (filed Aug. 20, 2014); Press Release, EEOC, *EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee* (Aug. 20, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm>; *EEOC v. Flambeau, Inc.*, Case No. 3:14-cv-00638 (W.D. Wis.) (filed Sept. 30, 2014); Press Release, EEOC, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), available at <http://www1.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>; and *EEOC v. Honeywell Int’l Inc.*, Case No. 14-cv-04517 (D. Minn.) (filed Oct. 27, 2014).

161 *EEOC v. Honeywell Int’l Inc.*, Case No. 14-cv-04517 (D. Minn.) (filed Oct. 27, 2014), Docket #1.

162 *Id.*, Docket #24 at 10.

163 See *EEOC v. Flambeau, Inc.*, *supra* note 160, Docket No. 15, p. 2 (filed July 15, 2015).

164 *Id.*, Docket No. 9, p. 2 (filed July 15, 2015).

On December 30, 2015, The U.S. District Court for the Western District of Wisconsin agreed, finding that the wellness program was well within the ADA's safe harbor provision. According to the court, the "wellness program requirement constituted a 'term' of its health insurance plan and that this term was included in the plan for the purpose of underwriting, classifying and administering health insurance risks."¹⁶⁵ In addition, the court agreed with the defendant that the wellness program was not a subterfuge for discrimination, as there was no evidence that the company used the information from its health-related tests and assessments "to make disability-related distinctions with respect to employees' benefits."¹⁶⁶

In the interim, the EEOC also has addressed wellness programs based on proposed regulations issued by the EEOC. On April 16, 2015, the EEOC announced a proposed rule, as published in the *Federal Register* on April 20, 2015, that "makes clear that wellness programs are permitted under the ADA," focuses on a requirement that participation be voluntary, but explains that companies "may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with incentive programs."¹⁶⁷ This proposed rule was followed by a second proposed rule, announced on October 29, 2015, which provides that employers offering wellness programs as part of group health plans also may offer incentives "in exchange for an employee's spouse providing information about his or her current or past health status."¹⁶⁸ This proposed rule expands the incentive to 30% of the total cost of the plan in which the employee and any dependents are enrolled. The comment period for the April 2015 proposed rule ended on June 19, 2015, and remains under review. The comment period for the most recent proposed rule ends on January 28, 2016.¹⁶⁹

Enforcing Equal Pay Laws

Similar to prior years, there was limited activity involving the Equal Pay Act (EPA) during FY 2015, but the issue continues to gain increased attention by the EEOC. On April 13, 2015, EEOC Chair Jenny Yang issued a statement on Equal Pay Day,¹⁷⁰ and underscored: (1) according to U.S. Census income data, women earn "just 78 cents on the dollar" compared to men's average earnings; (2) since the creation by the White House of the Equal Pay Task Force in 2010, through administrative enforcement efforts "the EEOC has obtained over \$85 million in monetary relief for victims of sex-based wage discrimination;" (3) the EEOC recently issued a new equal pay fact sheet;¹⁷¹ and (4) the EEOC "provided training on equal pay issues at events across the country that reached nearly 40,000 attendees." Chair Yang also referred to the EEOC having filed a "friend of the court" brief based on the EPA claim in the Fifth Circuit in *Margaret Thibodeaux-Woody v. Houston Community College*.¹⁷² In reversing summary judgment in favor of the employer, the Fifth Circuit rejected the claim that the plaintiff's lower salary was due to a "factor other than sex." Although the employer argued that the salary differential from a male counterpart was due to the differences in approach to salary negotiation, there existed evidence that the plaintiff was not permitted to negotiate her salary. Therefore, a "practice is not a bona fide 'factor other than sex' if it is discriminatorily applied."¹⁷³

During FY 2015, there were only seven EPA lawsuits filed by the EEOC. For example, in April 2015, a class-based lawsuit was filed in Maryland federal court—*EEOC v. Maryland Insurance Administration*¹⁷⁴—in which the EEOC has asserted that since 2009, the employer

165 *EEOC v Flambeau, Inc.*, 2015 U.S. Dist. LEXIS 173482, at *7 (W.D. Wis. Dec. 30, 2015).

166 *Flambeau*, 2015 U.S. Dist. LEXIS 173482, at *19.

167 See Press Release, EEOC, *EEOC Issues Proposed Rule on Application of the ADA to Employer Wellness Programs* (Apr. 16, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-16-15.cfm>.

168 See Press Release, EEOC, *EEOC Issues Proposed Rule to Amend Title II of GINA* (Oct. 29, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-29-15.cfm>.

169 80 Fed. Reg. 75,956-75,957 (Dec. 7, 2015); See also discussion of the most recent proposed wellness rule by Ilyse Schuman et al., *The EEOC Issues Proposed Rule on GINA and Wellness Programs*, Littler Insight (Nov. 17, 2015) available at <http://www.littler.com/publication-press/publication/eeoc-issues-proposed-rule-gina-and-wellness-programs>.

170 See Statement of Chair Jenny Yang at http://www.eeoc.gov/eeoc/chair/equal_pay_day.cfm.

171 See EEOC, *Equal Pay Day, the EEOC, and Pay Discrimination*, available at http://www.eeoc.gov/eeoc/publications/equal_pay_day.cfm.

172 *Id.* See also see *Margaret Thibodeaux-Woody v. Houston Community College*, No. 13-20738 (5th Cir.) (*Amicus* brief filed Apr. 5, 2014) and decision by the Fifth Circuit reversing summary judgment in favor of the employer and remanding the case for further finding. *Id.*, Docket No. 00512837766 (5th Cir. Nov. 14, 2014).

173 *Id.*

174 See *EEOC v. Maryland Insurance Administration*, Civil Action No. 1:15-cv-01091-JFM (D. Md.) and Press Release, EEOC, *EEOC Sues Maryland Insurance Administration for Sex-Based Pay Discrimination* (Apr. 20, 2015), available at <http://eeoc.gov/eeoc/newsroom/release/4-20-15a.cfm>.

paid three named employees “and a class of similarly situated female investigators and enforcement officers lower wages than it paid to their male counterparts who were doing substantially equal work under similar working conditions.”

In October 2015, the EEOC filed two individual EPA actions. In *EEOC v. Prince George’s County*,¹⁷⁵ the EEOC asserts that a female engineer was hired and told she could not negotiate her salary, but two weeks later a male engineer was hired who requested and received a starting salary that was \$10,000 more than hers. Similarly, in *EEOC v. Stanley Martin Companies*,¹⁷⁶ the EEOC alleges that a female was hired as a budget analyst, that she performed purchasing manager duties for lower pay than male purchasing managers, and when she was promoted to purchasing manager, she still was paid less than the male purchasing managers.

On January 29, 2016—seven years to the day the Lilly Ledbetter Fair Pay Act was signed into law — the EEOC announced its intent to amend the current, demographic-related EEO-1 data collection requirements to include pay information for large employers. The action is among those President Obama highlighted during a White House speech to mark the anniversary of the first piece of legislation he signed into law. According to a White House fact sheet, “The President is highlighting several additional actions that his Administration is taking to further advance equal pay for all workers and to further empower working families.” The White House explains that the EEOC’s proposal would cover over 63 million employees and “will help focus public enforcement of our equal pay laws and provide better insight into discriminatory pay practices across industries and occupations.”¹⁷⁷

Specifically, starting in 2017, employers with 100 or more employees (both private companies and federal contractors) would be required to submit information on their employees’ pay and hours worked as part of the EEO-1 data collection process. Currently, covered employers with 100 or more employees provide information on their employees’ ethnicity, race, and sex, by job category. The proposed policy changes would impact smaller employers as well, as this more limited reporting obligation would now extend to employers with 50-99 employees.

The EEOC’s proposed changes were published in the February 1, 2016 edition of the *Federal Register* in the form of a Notice seeking from the Office of Management and Budget a three-year approval of the revised EEO-1 data collection.¹⁷⁸ The Notice outlines which employers would be required to report their pay data, when this collection will commence, when the annual EEO-1 reports will be due, which pay data will be collected, and how employers will submit such information.

Preserving 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.”¹⁷⁹ Over the past year, the EEOC has continued to pursue litigation challenging releases and an arbitration agreement, taking the view that such documents interfere with an individual’s access to the Commission. The arguments made by the EEOC in its recent litigation may have a far broader impact for two primary reasons: (1) the EEOC is broadly interpreting its authority to file pattern-or-practice lawsuits even absent a charge of discrimination or retaliation; and (2) the EEOC has further submitted that when filing a pattern-or-practice lawsuit not based on a charge of discrimination or retaliation, it has the right to go directly to court with no duty to conciliate, which is even broader than *Mach Mining*.

175 See *EEOC v. Prince George’s County*, Case No. 8:15-cv-2942 (D. Md); see also Press Release, EEOC, *EEOC Sues Prince George’s County for Pay Discrimination* (Oct. 1, 2015), available at <http://eoc.gov/eoc/newsroom/release/10-1-15e.cfm>.

176 See *EEOC v. Stanley Martin Companies*, Case No. 1:15-cv-1246 (E.D. Va.) and Press Release, EEOC, *Stanley Martin Companies, LLC Sued By EEOC For Pay Discrimination* (Oct. 2, 2015), available at <http://eoc.gov/eoc/newsroom/release/10-2-15b.cfm>.

177 See Ilyse Schuman, *EEOC Seeks Input on Proposed Pay Data Collection Requirements and Retaliation Enforcement Guidance*, Littler ASAP (Jan. 29, 2015), available at <http://www.littler.com/publication-press/publication/eoc-seeks-input-proposed-pay-data-collection-requirements-and>.

178 See 81 Fed. Reg. 5113 -5121 (Feb. 1, 2016), available at <https://www.federalregister.gov/articles/2016/02/01/2016-01544/agency-information-collection-activities-revision-of-the-employer-information-report-eeo-1-and>.

179 See EEOC Strategic Enforcement Plan, available at <http://www.eoc.gov/eoc/plan/sep.cfm>.

In *EEOC v. CVS Pharmacy, Inc.*,¹⁸⁰ which involves a challenge to a severance agreement that included a general release, the underlying charge stemmed from a claim that an employee was terminated based on her sex and race, not any attack regarding the severance agreement. The EEOC dismissed the underlying charge and 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.”¹⁸¹ The EEOC then sued without engaging in conciliation.

To support its motion to dismiss or for summary judgment,¹⁸² the employer in CVS focused on the express terms of the severance agreement, which provided it 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.” As significantly, the employer challenged the EEOC’s basis for the EEOC’s pattern-or-practice claim and asserted that a lawsuit only could 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 discrimination by suing the employer. The employer relied on the legislative history for Title VII, which supported the view that the pattern-or-practice provision of Title VII was included in order to ensure that a lawsuit could be filed whenever there was “reasonable cause to believe there is a pattern or practice of discrimination.” The employer pointed to a wealth of case authority “squarely recognizing that Section 706’s procedures, including conciliation, extend to the EEOC’s Section 707 [patterns or practice] suits,” and “Congress’s intent, across the board, was to ‘promote conciliation rather than litigation’ of Title VII cases.”

The gist of the EEOC’s response was that, based on the severance agreement, the employer was engaging in a “pattern or practice conduct designed to deter its employees” from exercising their rights under the Act.¹⁸³ In addressing the jurisdictional basis for its suit, the EEOC focused on the express language of Section 707 of Title VII, which provides that when there is reasonable cause to believe there has been “a pattern or practice of resistance to the full enjoyment of any rights,” a civil action may be filed against an employer. Although a provision in Section 707 referred to acting under the procedures in Section 706, which requires conciliation before suing, the EEOC argued that conciliation was required only when the EEOC was investigating or acting on a “charge” of a pattern or practice of discrimination. The EEOC submitted that because it was attacking “resistance” to rights protected under Title VII, it could challenge employer conduct beyond “unlawful employment practices,” which included “detering employees to exercise their right to initiate, assist, and participate in investigations under Title VII.” The EEOC argued that because its actions were not based on a charge, it was not bound by any conciliation requirement under Section 706 of the Act.

In granting the employer’s motion to dismiss, the district court did not address the substance of the employer’s claim involving the EEOC’s challenge to the separation agreement.¹⁸⁴ 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. The district court rejected the EEOC’s attempt to expand the meaning of the term “resistance” in Section 707 of Title VII beyond discrimination and retaliation.¹⁸⁵ In the 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.”¹⁸⁶ The EEOC filed an appeal with the Seventh Circuit, which heard oral argument on October 29, 2015.¹⁸⁷

180 See *EEOC v. CVS Pharm., Inc.*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014), *EEOC v. CVS Pharm., Inc.*, No. 14-3653 (7th Cir.) (Appeal filed Dec. 5, 2014).

181 *Id.*

182 See *EEOC v. CVS Pharm., Inc.*, No. 14-cv-00863, Docket Nos. 16 and 29.

183 *Id.*, Docket No. 27.

184 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.

185 *Id.*, Docket No. 33 (Oct. 7, 2015).

186 *Id.* at pp. 8-9.

187 *EEOC v. CVS Pharm., Inc.*, No. 14-3653 (7th Cir.) (Appeal filed Oct. 29, 2015).

On December 17, 2015, a three-judge Seventh Circuit panel sided with CVS, rejecting the Commission's claim that it can sue without engaging in conciliation or alleging the employer engaged in discrimination.¹⁸⁸ According to the court, "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII... in one consolidated proceeding." The court noted further, "because there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e), the EEOC is required to comply with all of the pre-suit procedures – including conciliation – contained in Section 706 when it pursues 'pattern or practice violations.'¹⁸⁹ As significantly, the court on its own elected to clarify a prior Seventh Circuit decision to underscore that the EEOC also cannot proceed in any matter in the absence of a charge, explaining, "The 1972 Amendments [to Title VII] gave the EEOC the power to file pattern or practice suits on its own, but Congress intended the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge."¹⁹⁰

The CVS case should be contrasted with the district court's September 1, 2015 opinion in *EEOC v. Doherty Enterprises, Inc.*,¹⁹¹ which also dealt with a claim by the EEOC that the employer engaged in a "pattern or practice of resistance to the full enjoyment of rights secured by Title VII." 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.¹⁹² Similar to CVS, the employer moved to dismiss based on the EEOC's suing without an underlying charge of discrimination and the EEOC's failure to engage in conciliation prior to suing the employer.

In taking exception with the district court opinion in CVS, the court in *Doherty* broadly interpreted Section 707 and the "resistance" language. While agreeing with the CVS court that the EEOC could sue in the absence of a discrimination charge, the court in *Doherty* ruled contrary to the court in CVS in holding 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 held that the procedures in Section 706 were not required for "resistance" claims, and neither a charge nor conciliation was required prior to suing.¹⁹³

In a final discussion involving EEOC processes, some additional discussion is warranted regarding EEOC challenges to releases. The Third Circuit's decision in *EEOC v. Allstate Insurance Company*¹⁹⁴ provides some guidance on the EEOC's approach to challenging releases of Title VII claims and the response by the courts. 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.

188 *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653 (7th Cir. Dec. 17, 2015).

189 *CVS Pharmacy*, slip op. at 14.

190 *Id.* at 16.

191 *EEOC v. Doherty Enterprises, Inc.*, Case No. 14-cv-81184, Docket No. 32 (S.D. Fla.) (filed Sept. 18, 2014).

192 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.

193 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 191, 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).

194 *EEOC v. Allstate Insurance Company*, 2015 U.S. App. LEXIS 2330 (3d Cir. Feb. 13 2015).

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, “In our view, such inaction does not communicate opposition sufficiently specific to qualify as protected employee activity.”

Preventing Harassment Through Systemic Enforcement and Targeted Outreach

During the past fiscal year, the EEOC reiterated its view that harassment remains a major priority of the Commission. The agency held a meeting in January 2015 that focused on harassment.¹⁹⁵ In March 2015, Chair Yang set up the “EEOC Select Task Force on the Study of Harassment in the Workplace,”¹⁹⁶ explaining, “Complaints of harassment span all industries, include many of our most vulnerable workers, and are included in 30% of the charges that we receive.”

In October 2015, the EEOC announced the findings of a “panel of experts” and referred to a “multi-prong strategy essential to preventing workplace harassment,” which included “Placing 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.”¹⁹⁷

During the past fiscal year, the EEOC also publicized its success in litigating harassment cases.

- On October 24, 2014, based on sexual harassment claims brought to trial by the EEOC, a Texas jury awarded three former employees for a medical services provider a total of \$499,000 (\$82,000 in back pay and benefits, \$167,000 in back pay and benefits, and \$250,000 in compensatory and punitive damages, respectively).¹⁹⁸
- On December 22, 2014, the Eighth Circuit also reversed a \$4.6 million attorneys’ fee award in favor of the employer in the long-running, class-based sexual harassment lawsuit in *EEOC v. CRST*, and remanded the case for further findings.¹⁹⁹
- On April 22, 2015, the Sixth Circuit affirmed the judgment of a federal district court in Tennessee. The case involved an action against a logistics firm by the EEOC regarding alleged sexual harassment by a supervisor against female employees. The court denied the employer’s motion for a new trial based on alleged erroneous jury instructions. The EEOC lawsuit focused on alleged sexual harassment and retaliation involving four female workers who were awarded \$1.5 million in compensatory and punitive damages.²⁰⁰
- On September 9, 2015, the EEOC entered into a \$3.8 million settlement with a utility company to resolve a class-based charge based on claims of alleged sexual harassment and/or other forms of sex discrimination involving as many as 300 women workers in field positions. The New York Attorney General, EEOC and employer were parties to the agreement.²⁰¹
- On September 10, 2015, the EEOC announced a \$17 million sexual harassment verdict against a produce growing and packing operation in Florida. The jury awarded \$2,425,000 in compensatory damages and \$15 million in punitive damages to the five female

195 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>.

196 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>.

197 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 <http://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm>.

198 See *EEOC v. Emcare Inc.*, Case No. 3:11-cv-02017, Docket No. 104 (N.D. Tex., Jury Verdict, Oct. 24, 2014). The employer filed a post-trial motion with the court seeking to set aside or lower the verdict or order a new trial.

199 See *EEOC v. CRST Van Expedited, Inc.*, 2014 U.S. App. LEXIS 24130 (8th Cir. Dec. 22, 2014).

200 *EEOC v. New Breed Logistics*, 2015 U.S. App. LEXIS 6650 (6th Cir. Apr. 22, 2015), affirming 962 F. Supp. 2d 1001 (W.D. Tenn. 2013).

201 See Press Release, EEOC, *Con Edison To Pay \$3.8 Million To Resolve Sex Discrimination / Harassment Charges Filed With New York A.G. And U.S. EEOC* (Sept. 9, 2015) available at <http://www.eeoc.gov/eeoc/newsroom/release/9-9-15.cfm>.

farmworkers who intervened in the EEOC's suit. The trial was limited to damages based on the corporate defendant having defaulted and did not participate in the trial. The court reserved jurisdiction "to hear requests for injunctive relief from EEOC as well as whether those damages awarded for violations of Title VII should be reduced to statutory damage caps."²⁰²

It is noteworthy, however, that the EEOC elected not to announce a defense verdict in a harassment lawsuit initially publicized by the EEOC in a press release it issued when it sued the employer in 2013.²⁰³ On August 5, 2015, a jury rendered a verdict in favor of the employer, a quick service restaurant group, after a trial in a case in which the EEOC claimed that a store manager subjected a 16-year-old employee to unwanted sexual advances and removed her from the schedule after her mother complained.²⁰⁴ In post-trial submissions, among various challenges, the EEOC challenged the admissibility of the testimony of a health care provider who failed to support the employee's claim that she had complained of sexual harassment.²⁰⁵

Anticipated Trends for FY 2016

As employers review their EEO policies, practices and procedures to identify issues to focus on during the coming year, the above discussion hopefully will assist in that effort. Based on review of the FY 2015 case developments involving EEOC investigations and litigation dealing the agency's "national priorities," employers should take into consideration the following EEOC developments and trends during FY 2016:

- *The EEOC Will Continue to Focus on Systemic Investigations and Related Litigation.* When dealing with policies and/or practices that raise EEO concerns, the EEOC has not been reluctant to expand individual charges into systemic investigations. The EEOC's favorable track record in making broad-based requests for information through subpoena enforcement actions also has been strengthened—from the EEOC's perspective—by the Ninth Circuit's decision in *EEOC v. McLane Company, Inc.*²⁰⁶ This case supported the EEOC's request for "pedigree information" about other employees as part of a systemic investigation of alleged unlawful conduct. Even in the Eleventh Circuit, where the court limited the scope of inquiry when the EEOC attempted to expand its request beyond an individual charge, the court reinforced the view that mere issuance of a Commissioner's charge may provide significant latitude to the civil rights agency when making broad-based requests for information.²⁰⁷ As significantly, when faced with the prospect of related pattern-or-practice litigation initiated by the EEOC, the agency has been emboldened by the Second Circuit's decision in *EEOC v. Sterling Jewelers Inc.*²⁰⁸ that a court "may not review the sufficiency of an [EEOC] investigation, only whether an investigation occurred." However, one significant case to watch is the pending Fifth Circuit case, *EEOC v. Bass Pro Outdoor World LLC*,²⁰⁹ which will determine whether the EEOC can seek compensatory and punitive damages and jury trials based on Section 706 of Title VII, or whether it will be limited to Section 707 equitable relief. Only one federal court of appeals has addressed this issue to date, *Serrano v. Cintas*,²¹⁰ in which the Sixth held that the EEOC could pursue pattern-or-practice claims and seek related relief under Section 706.
- *Anticipate Increased EEOC Investigations Absent a Charge of Discrimination, Based on "Directed" Investigation (Involving Age Discrimination and Equal Pay Claims) and Pattern-or-Practice "Resistance" Claims.* The EEOC has statutory authority to initiate ADEA and EPA investigations even absent a charge of discrimination, which may include broad-based requests for information.²¹¹ While the

202 See Press Release, EEOC, *EEOC Wins Jury Verdict of over \$17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms* (Sept. 10, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm>. See also *EEOC v. Moreno Farms, Inc.*, Case No. 1:14-cv-23181 (S.D. Fla.) (Filed Aug. 28, 2014; Verdict on Liability Jan. 5, 2015; Verdict on Damages Sept. 11, 2015; Injunctive Relief Ordered Oct. 5, 2015).

203 See Press Release, EEOC, *EEOC Sues Memphis Foods for Sexual Harassment of 16-Year-Old Female Employee* (Sept. 12, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-12-13a.cfm>.

204 See *EEOC v. Memphis Foods LLC*, Case No. 2:13cv-02712, Docket Nos. 1 and 123 (W.D. Tenn.) (Complaint filed Sept. 11, 2013; Jury Verdict Aug. 5, 2015).

205 *Id.*, Docket No. 131 (Sept. 15, 2015).

206 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).

207 *EEOC v. Royal Caribbean*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

208 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015).

209 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014), *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 1520078 (5th Cir.) (Order granting appeal filed Feb. 10, 2015).

210 See *EEOC v. Texas Roadhouse*, *supra* notes 59-64.

211 See *EEOC v. McLane Company, Inc.*, 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015) (age discrimination) and *EEOC v. Performance Food Group*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014) (sex discrimination).

EEOC has not historically published statistics involving the number of such directed investigations, one of the EEOC's largest pending age discrimination lawsuits, *EEOC v. Texas Roadhouse*, stems from a directed investigation. An employer cannot appeal to the agency a subpoena issued based on such investigations. Instead, the employer may risk a subpoena enforcement action if an agreement on the scope of information and/or documents cannot be reached with the agency. Based on the EEOC's pattern-or-practice authority, challenges to releases and/or arbitration agreements may arise in the complete absence of a charge of discrimination when the agency is claiming an employer is "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" under Title VII.²¹²

- *Anticipate Continued Debate Regarding the Impact of Mach Mining on the Conciliation Process and EEOC Investigations.* While the Supreme Court in *Mach Mining* ruled that judicial review of the EEOC's conciliation efforts would be limited, the court nevertheless held that the EEOC "must engage the employer in some form of discussion" to resolve the matter. During the coming year, the key issue will be whether the court's limited review will impact the EEOC's approach to conciliation. So far, in one case in which the EEOC allegedly made a "take it or leave it proposition," *EEOC v. Ohio Health*,²¹³ the district court took strong exception to the EEOC's conduct. In another case – *EEOC v. Jet Stream*²¹⁴ – in which the EEOC rejected an individualized settlement approach and instead focused on settlement for "aggrieved individuals" who had not yet been identified, the court refused to examine the EEOC's conciliation efforts.
- *Employers Will Continue to Face Scrutiny Based on Policies and/or Practices That Are Viewed as Creating Hiring Barriers Involving Any Protected Status.* The EEOC has focused on large-scale claims of intentional discrimination, including claims of race, sex and age discrimination, particularly at companies where there appears to be a significant underrepresentation of individuals in a protected group. Neutral employment practices that may have a disparate impact on a protected group also are subjecting employers to closer scrutiny of their hiring practices. Although recent litigation has focused on criminal history,²¹⁵ the EEOC has also been closely reviewing other pre-employment hiring practices, including pre-employment testing by employers.²¹⁶
- *There Will be a Continued Expansion of Pregnancy Discrimination Claims.* Based on *Young v. UPS*, the Supreme Court expanded the scope of coverage for pregnancy discrimination claims to the extent that an employer accommodates some workers but fails to accommodate similarly situated pregnant workers. As significantly, the EEOC's guidance clarifies that failing to accommodate pregnant employees may expose employers to ADA claims based on temporary disabilities caused by pregnancy. The EEOC has also clarified based on its guidance that employers may be subject to disparate impact claims to the extent an employer policy, such as eligibility for and/or limits on leave, unfairly impacts pregnant workers.
- *Issues of Religious Discrimination Will Continue to Evolve, Including the Scope of Undue Hardship.* While the issue addressed in *EEOC v. Abercrombie* (i.e., whether the obligation to make reasonable accommodation to a religious practice arises only where the employer has knowledge of the need for a religious accommodation) was a matter of first impression, the scope of reasonable accommodation for religious practices most likely will get increased attention over the coming year. Care must be taken with both grooming and appearance policies and issues of requested time off, including breaks for religious practices. In dealing with the latter issue, two cases to closely monitor are *EEOC v. JBS*, pending in federal courts in Nebraska and Colorado.
- *The EEOC Will Continue to Broadly Interpret LGBT Rights in the Workplace.* Over the past couple of years, the EEOC has made it abundantly clear it will continue to challenge what it believes are discriminatory employment practices affecting transgender workers. A case to closely monitor is *EEOC v. R.G. & G.R Funeral Homes, Inc.*,²¹⁷ pending in Michigan federal court. The EEOC has stated in

212 See *EEOC v. CVS Pharmacy*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014), *EEOC v. CVS Pharm., Inc.*, No. 14-3653 (7th Cir.) (Appeal filed Dec. 5, 2014) and *EEOC v. Doherty*, 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).

213 *EEOC v. Ohio Health Corp.*, 2015 U.S. Dist. LEXIS 84016 (S.D. Ohio June 29, 2015).

214 *EEOC v. Jet Stream Ground Services, Inc.*, 2015 U.S. Dist. LEXIS 130838 (D. Colo. Sept. 29, 2015).

215 See, e.g., *EEOC v. Freeman*, 2015 U.S. App. LEXIS 2592 (Feb. 20, 2015); *EEOC v. BMW Manufacturing Co. LLC*, Case No. 13-cv-01583 (D.S.C., Spartanburg Div.) (filed June 11, 2013); *EEOC v. Dolgencorp LLC*, Case No. 13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

216 See *supra* notes 92-94.

217 *EEOC v. R.G. & G.R Funeral Homes, Inc.*, Case No. 2:14-cv-13710 (E.D. Mich.) (filed Sept. 25, 2014).

unequivocal terms that discrimination based on sexual orientation “is necessarily an allegation of sex discrimination under Title VII.”²¹⁸ Despite the failure of Congress to amend Title VII to include discrimination on the basis of sexual orientation and/or gender identity, the EEOC will seek to protect such workers based on the prohibition of sex discrimination.

- *Special Care Should be Taken with ADA Claims Based on the EEOC’s Ongoing Close Scrutiny of Such Claims.* Over the past several years, the EEOC has filed more ADA lawsuits than any other type of discrimination claim, and FY 2015 was no different.²¹⁹ Three areas should be monitored during FY 2016: (1) employers with inflexible leave policies will continue to face a high risk of litigation by the EEOC, and employers should closely monitor *EEOC v. UPS*, a pattern-or-practice ADA lawsuit pending in federal court in Chicago, in which the EEOC is challenging what the EEOC views as an inflexible leave policy; (2) employers that fail to engage in the interactive process in dealing with requests for reasonable accommodation also may be vulnerable to cause findings and potential litigation by the EEOC; and (3) employer wellness policies determined not to be “voluntary” by the EEOC will create risk for employers. One pending case to watch closely is the EEOC’s challenge to a wellness program in a lawsuit pending in federal court in Wisconsin, *EEOC v. Flambeau*.²²⁰ The EEOC’s proposed regulations involving wellness programs providing for incentives for participation will also need to be watched based on their potential impact on wellness programs.
- *Increased Attention Will Be Placed on Equal Pay Issues.* Although the EEOC has filed a limited number of equal pay lawsuits in recent years, EEOC Chair Yang has underscored the pay disparity between the average earnings of women and men (“just 78 cents on the dollar” compared to men’s wages based on U.S. census data). The EEOC’s proposed revisions to the Employer Information Report (EEO-1), as announced on January 29, 2016, to include collecting pay data from employers with more than 100 employees is a clear indication that the EEOC will use such data to assist the agency “in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces.”²²¹ These developments are a strong indication that increased attention will be placed on equal pay issues during the coming year. The EEOC’s ability to initiate directed investigations focusing on equal pay without a discrimination charge even being filed also raises the stakes for employers. The class-based equal pay lawsuit filed by the EEOC in federal court in Maryland (*EEOC v. Maryland Insurance Administration*) is a case to closely monitor during the coming year.
- *The EEOC Will Continue to Vigorously Challenge Release Agreements and Arbitration Agreements that Are Viewed as Deterring or Interfering with an Individual’s Right to File EEO Claims.* The EEOC has taken an aggressive approach by suing in the absence of a charge and challenging release and arbitration agreements, particularly as shown by *EEOC v. CVS Pharmacy* and *EEOC v. Doherty*, respectively. In initiating such litigation, the EEOC is expected to continue to rely on Section 707 of Title VII and argue that an employer is “engaged in a pattern or practice of resistance to the full enjoyment of any of the rights” under Title VII in challenging such agreements. While the court in *Doherty* has fully endorsed the EEOC’s approach, in *CVS*, the Seventh Circuit recently rejected the EEOC’s position regarding its conciliation requirements prior to filing suit. Regardless of the procedural steps the courts will require, it seems clear that the EEOC will continue to take an active role on these issues. It would not be surprising if future litigation included attacks on arbitration agreements that precluded class-type claims.
- *The EEOC Will Continue to Take an Active Role in Attacking Harassment in the Workplace.* Aside from the EEOC’s generally successful track record in litigating harassment cases over the past fiscal year, and identifying ongoing concerns of harassment spanning all industries, the EEOC set up a special task force to address this issue. These developments are a clear signal to employers that during the coming year, the EEOC will continue to vigorously investigate harassment charges, including potentially expanding such investigations to cover other workers when faced with such charges, and vigorously litigating such claims against employers.

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218 See *Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA)*, EEOC Appeal No. 0120133080 (July 15, 2015).

219 According to the FY 2015 PAR, among the 142 lawsuits filed by the agency during FY 2015, 53 contained ADA claims (i.e., 37% of all EEOC lawsuits filed during FY 2015).

220 *EEOC v. Flambeau, Inc.*, Case No 3:14-cv-00638 (W.D. Wis.) (filed Sept. 30, 2014).

221 See EEOC Press Release, EEOC, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*, available at <http://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm>.