

LABOR AND EMPLOYMENT UPDATE

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EEOC Vice Chair Tells U.S. Employers to Conduct Employment Law Audits to Prepare for EEOC's Aggressive New Approach to Fighting Systemic Discrimination

On November 16, 2006, Equal Employment Opportunity Commission (EEOC) Vice Chair Leslie Silverman addressed a group of Hogan & Hartson clients about EEOC's aggressive efforts to combat "systemic discrimination" in U.S. workplaces. Speaking at the Firm's annual Labor and Employment Law Seminar, Vice Chair Silverman revealed details of EEOC's new "agency-wide top priority" to attack such discrimination, a copy of which can be found at www.eeoc.gov/abouteeoc/task_reports/systemic.html.

The following is a brief summary of relevant EEOC pronouncements, and Vice Chair Silverman's remarks, followed by our recommendations to U.S. employers.

What exactly is "systemic discrimination?"

EEOC defines "systemic discrimination" as discrimination that has a broad impact on a particular industry, profession, company or geographic location. Vice Chair Silverman gave just a few potential examples: (1) a lack of minorities or women in upper level management positions in a particular industry or company; (2) the hiring of candidates largely by word-of-mouth where such practices exclude individuals (e.g., members of certain ethnic groups) that may be underrepresented in existing employees' social networks; (3) a company- or industry-wide policy of testing employees or job applicants that adversely impacts a certain group of qualified individuals (e.g., individuals with physical or mental disabilities); and (4) employee benefit plans that may disadvantage certain employees (e.g., older workers or workers with certain kinds of disabilities).

But doesn't EEOC already focus on fighting systemic discrimination?

In theory, yes; but, in practice, not as much as it should, according to Vice Chair Silverman. Though EEOC's mandate is to eradicate all forms of unlawful discrimination, EEOC's field offices have spent most of their time during the past several decades addressing individually filed cases. While Vice Chair Silverman cited several recent EEOC class victories (e.g., settlements of approximately \$50 million with Morgan Stanley for gender discrimination and with Abercrombie & Fitch for race discrimination), she noted that EEOC field offices currently lack the structure, resources, and incentives to focus on systemic cases as effectively as they could. This will change as a result of the new approach.



What does EEOC's initiative consist of?

EEOC is about to undergo major internal structural changes, which will redeploy resources and will provide award and pay incentives for staff to investigate and litigate systemic cases, and to do so on a national level (EEOC will adopt what it calls a "national law firm" model, with far greater coordination across offices, including designation and training of specific EEOC staff members as experts in particular subject matters, industries, and statistical analytical techniques). EEOC will greatly expand its use of technology and information systems; for example, the EEO-1 reports filed by many private employers will now be input into a centralized database and examined much more carefully using statistical models and available census data to identify intentional or unintentional instances of discrimination in a given region, industry or company. Finally, EEOC likely will hire new statisticians, systemic litigation analysts, and labor economists.

How does EEOC intend to implement this initiative?

EEOC field staff will be trained to inform individual employees who file charges that they are welcome and encouraged to file class charges where appropriate. (Note that EEOC is exempt from the stringent class certification requirements of Federal Rule of Civil Procedure 23.) In addition, EEOC is expanding its efforts to partner with the plaintiffs' employment bar, as well as with other federal and state agencies (e.g., state fair employment practice agencies, OFCCP, Department of Justice) to challenge jointly systemic discrimination in particular companies, industries and areas and to share knowledge and best practices. EEOC field staff will be encouraged to communicate more with each other via internal intranet-type resources and to monitor discrimination trends and issues discussed in newspapers and other publicly available sources. Finally, EEOC will begin intensive outreach efforts to the defense bar (including Hogan & Hartson) so management attorneys can put our clients on notice that they should evaluate their current employment practices and immediately move to fix those that may result in systemic discrimination.

Did Vice Chair Silverman give any examples during her speech of systemic discrimination at specific companies or industries?

As mentioned above, Vice Chair Silverman specifically discussed word-of-mouth hiring in any company or industry as a practice that EEOC deems fraught with potential discrimination. In terms of industries, she singled out the financial services, restaurant and retail industries as a few of the industries against which EEOC will be focusing its enforcement efforts, though she said this list is by no means exhaustive. EEOC will continue its focus against race and gender discrimination, and, in terms of particular additional types of discrimination, she gave as examples discrimination based on pregnancy (which is on the rise, particularly in its more subtle forms), discrimination based on religion, and harassment and discrimination against younger women (particularly in industries with high turnover, such as fast-food restaurants, that may result in employees leaving after a short period without filing a discrimination complaint). Vice Chair Silverman also said EEOC will continue to focus on retaliation claims, which are the fastest growing type of claim, and which undoubtedly will continue to expand as a result of the U.S. Supreme Court's 2006 decision in *Burlington Northern v. White*.

What exactly should employers do to ensure that they do not have or perpetuate systemic discrimination?

According to Vice Chair Silverman, all employers should comprehensively audit their employment practices – everything from decisions and processes for recruiting and hiring, to compensation and promotion, to termination and benefits – to ensure that systemic discrimination does not exist.

Once practices have been scrutinized (and, where appropriate, revised), employers should provide comprehensive training to managers and employees.

How can my company conduct an employment law audit?

Any employment law audit should include a comprehensive review of Human Resource Department practices. To evaluate recruiting and hiring practices, employers should review their recruiting mechanisms (and the results those mechanisms yield), employment-related agreements and offer letters, job descriptions, practices and procedures relating to testing and reference/background checking, interviewing protocols, and documentation requirements.

Employee handbooks and performance management approaches should be carefully examined, as should all policies (e.g., those regarding employee leaves, drug testing) that may adversely impact a particular group of employees. Employers should review carefully their pay practices to ensure nondiscriminatory compensation practices (and also should confirm that these pay practices comply with applicable federal and state overtime and other labor laws). Employer policies concerning equal employment opportunity and harassment, and related complaint/investigation procedures should be checked. Finally, termination, severance and benefits practices should be reviewed. Employers should consider conducting statistical analyses -- where appropriate, with the help of an outside consultant -- to determine whether patterns with respect to hiring, compensation, promotion and termination emerge which may be indicative of systemic discrimination and need to be addressed.

Should an employment law audit be done with the assistance of counsel?

Though not required, there are significant benefits from conducting an employment law audit with the assistance of counsel because an audit that is not directed by counsel will be subject to full disclosure (to governmental authorities and plaintiffs' lawyers, among others), while counsel can conduct the audit and give advice concerning correction of any problems detected in a way that maximizes the protections available under the attorney-client privilege and, in some cases, the work product doctrine. For this reason, many of our clients ask us to conduct their employment law audits and to be the entity that retains any outside vendors (e.g., statisticians, vocational economists).

What is the best way to train my employees and managers to avoid systemic discrimination?

All employees should attend mandatory anti-discrimination and anti-harassment training. It is often effective to provide this training when employees are hired and thereafter at certain intervals. All managers should receive additional training on discrimination prevention, complaint procedures, interview techniques, and performance management; some states (e.g., Connecticut, California) mandate that supervisors receive certain training. There is no "best way" to train employees or managers; rather, each training program should be tailored to the particular audience, subject

matter and organization, both in terms of content and medium (e.g., in-person, as opposed to computer-assisted or videotaped, training), taking into account cost constraints. At least some “in-person” training is generally recommended to allow for questions and to encourage attendees to inform management (ideally, individually after the training session, rather than publicly during the session) of specific issues that may exist at the company so that the company can take steps to fix those issues. We have a wide variety of training programs available, and we routinely work with our clients to create or customize programs to meet their needs.

For more information about the topics discussed in this Labor and Employment Update, please contact the Hogan & Hartson attorney with whom you work or an author listed below.

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