FEDERAL Employment Law Insider

An update on new federal law and regulation affecting your workplace

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INSIDE THE DOL

What employers can expect from new DOL Secretary Eugene Scalia

by H. Juanita M. Beecher
Fortney & Scott, LLC

Eugene Scalia, who was George W. Bush's solicitor of labor and the son of the late U.S. Supreme Court Justice Antonin Scalia, was sworn in as secretary of the U.S. Department of Labor (DOL) on September 30, 2019, after being confirmed by the Senate 53-44 on September 27.

Scalia returns to government service after spending nearly 20 years representing large corporations at Gibson, Dunn & Crutcher. During his time at the firm, he led the legal teams that overturned the Obama DOL's fiduciary rule and tip-pooling regulation. Known as a stickler for ethics, Scalia has agreed not to participate in any decision that could affect a former client without first obtaining a written waiver. He replaces Alexander Acosta, who resigned from the DOL after his involvement in a lenient plea deal for the late sex offender Jeffrey Epstein was criticized.

As Scalia settles into the DOL, employers can expect him to accelerate the rollback of Obama-era policies and move the agency toward a more business-friendly stance. Employers had been very disappointed in Acosta's progress in reversing the prior administration's policies. Indeed, the DOL under Acosta appeared to be run by career employees committed to continuing the Obama-era approach on civil rights, wage and hour law, and health and safety issues.

Change has been slow at the DOL in part because of the Trump administration's failure to quickly nominate and confirm political appointees to agency positions. However, the roadblocks to change began to be removed as the Senate finally confirmed a number of political appointees this summer, including Cheryl Stanton, who is now in place as the administrator of the Wage and Hour Division (WHD). The Trump appointees have begun reorganizing their departments to gain more control over career employees. Expect Scalia to continue that close supervision of career employees.

An area of concern for employers was the DOL's failure to roll back Obama-era regulations and replace them with more employer-friendly rules on overtime, tip sharing, and joint employment. Once Acting Secretary Patrick Pizzella was put in place, however, he quickly pushed out the long-delayed final overtime and tip-sharing regulations. Scalia will preside over the issuance of the final joint-employer rule. Employers can expect the DOL under Scalia to continue the push to eliminate or substantially revise any remaining Obama regulations.

There has been speculation about what Scalia, a strong proponent of the rule of law, would do with the

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subregulatory guidance issued over the past 14 months by Craig Leen, director of the Office of Federal Contract Compliance Programs (OFCCP). Two new Executive Orders issued by the White House on October 15 stating that agency guidance cannot carry the implicit threat of enforcement may require Leen to either propose rulemaking or collect and review information to formalize the agency's existing directives.

Finally, expect Scalia to focus on revising or eliminating DOL regulations that unnecessarily burden employers.

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EMPLOYMENT LAW

Supreme Court to decide on series of employment disputes this term

by Sara Nasseri
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The U.S. Supreme Court began its 2019-20 term on October 7, 2019. The Court will again hear cases that have significant implications for U.S. employers. Let's take a closer look at a couple of those cases.

LGBT rights

On October 8, the Supreme Court heard arguments in a trio of cases involving the question of whether sexual orientation and gender identity should be covered by the prohibition on sex discrimination under Title VII of the Civil Rights Act of 1964. After two hours of arguments, the justices seemed divided over the key issue of whether employment actions based on sexual orientation or gender identity qualify as sex-based discrimination, which is explicitly barred under Title VII. The three cases are *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Altitude Express, Inc. v. Zarda,* and *Bostock v. Clayton County, Georgia.* Two of the cases, *Zarda* and *Bostock,* involve discrimination based on sexual orientation, while *Harris* involves gender identity issues.

The workers contend that sexual orientation and gender identity bias are forms of sex discrimination because they necessarily depend on the gender of the person being targeted. The employers and the Trump administration counter that when Title VII was passed, lawmakers didn't consider sexual orientation and gender identity. With the Court's four liberal justices likely to side with workers who were fired because of their sexual orientation or transgender status, the looming question is whether one of the conservative justices might join them.

In *Zarda,* skydiving company Altitude Express petitioned the Court to review the U.S. 2nd Circuit Court of Appeals' ruling that skydiving instructor Donald Zarda could allege that he was fired because of his sexual orientation. The 2nd Circuit held that Title VII prohibits discrimination on the basis of sexual orientation and found that Zarda was unlawfully fired from his job for being gay. The employer is asking the Court to decide, as a matter of law, whether Title VII encompasses sexual orientation discrimination.

The *Bostock* case also involves an employee who was denied the right to sue his employer under Title VII for antigay discrimination. Gerald Bostock claims he was fired from his job as a child welfare services coordinator when his employer, a Georgia county juvenile court system, found out he is gay. The 11th Circuit ruled that Bostock cannot sue Clayton County under Title VII because the law doesn't bar discrimination based on sexual orientation. Bostock's attorneys maintain the 11th Circuit erred in reaching that conclusion, citing *Zarda* to bolster their argument that Title VII does indeed prohibit discrimination based on employees' sexual orientation.

Finally, the *Harris* case asks an adjacent question: whether Title VII protects transgender workers. The case arose when a Michigan funeral home fired a transgender woman, Aimee Stephens, after she began her transition. The 6th Circuit ruled that the employer unlawfully fired Stephens because of her sex. The funeral home argued, among other things, in its petition to the Court that the statutory construction of Title VII cannot be read to infer that Congress meant "gender identity" rather than just "sex" when the law was passed in 1964. The employer says the 6th Circuit's decision "threatens to drive out sex-specific policies" in employment and public education.

The Court's decision on whether sexual orientation and transgender status are protected under Title VII's prohibition against discrimination "because of sex" will affect many employers. Collectively, the cases before the Court involve some of the most pressing legal issues facing the LGBT community. The Court's ruling will undoubtedly have major consequences, one way or another, for generations to come.

Racial bias

In June, the Supreme Court accepted a case in which it will decide the standard for proving racial bias in a discrimination lawsuit. *Comcast Corp. v. National Association of African American-Owned Media* revolves around the legal standard needed to establish racial bias under a Reconstruction-era law, Section 1981 of the Civil Rights Act of 1866. Entertainment Studios, an African American-owned television network operator, alleges that Comcast has refused to carry any of its channels for more than seven years, even as the cable

provider launched more than 80 lesser-known white-owned channels.

In a ruling favoring Entertainment Studios, the 9th Circuit said the media organization merely has to show that discrimination was a "motivating factor" in Comcast's refusal to contract with it. Comcast is hoping to convince the Supreme Court to overturn the 9th Circuit's decision, arguing race discrimination cases require a showing of "but-for" causation, meaning there must be proof that unlawful racial bias was a main reason behind Comcast's decision not to carry certain television programming. Comcast points to a number of federal appeals court decisions in support of its argument.

The Court has set arguments in the case for November 13.

Stay tuned

The Court won't issue its rulings in these cases until sometime next spring. We will update our readers when the decisions are announced. Until then, employers can only hope for an equitable outcome.

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ADMINISTRATIVE PROCEDURES

Unelected legislators, unenacted laws: New EOs trim federal 'guidances'

by Burton J. Fishman
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As our society has grown more complex, as our statutes have become more complicated and ambiguous, as the regulatory process has developed terminal sclerosis, facing years of review followed by years of litigation, the administrative bureaucracy has sought a way to advise the regulated community in a timely and targeted fashion. Thus, the guidance was born.

Guidances come in a variety of forms—directives, advisory letters, opinions—that are not an official agency statement. Neither legislative fish nor regulatory fowl, guidances are a means by which federal agencies can offer counsel and advice about a new development, a new administration's interpretation of a law, or a change in the government's position without the delays of the normal notice-and-comment process that "official" regulations require or the prospect of judicial review because they aren't "final" agency actions.

In exchange for those "benefits," guidances do not have the force of law. That is to say, a guidance may offer the agency's opinion, but you cannot be punished (by whatever means may be available) for ignoring the agency's advice. At least, that's how it's supposed to work.

What has happened in too many cases over the past several decades is that guidances have become either the basis for enforcement or the standard the regulated community follows for fear of being held to account. Several administrations have made some attempt to rein in subregulatory statements, but their efforts have been half-hearted, in part because guidances are often seen as serving a useful, if legally "hybrid," purpose. That may be about to change.

The Trump administration came into office with the express goal of reducing the burden of federal government regulation, and one of its targets was guidances and other subregulatory advice. Starting in late 2017, the U.S. Department of Justice (DOJ) issued two memoranda directly addressing guidances, DOJ Memorandum "Prohibition on Improper Guidance Documents" and DOJ Memorandum "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases." The memoranda sought to limit the issuance of improper guidances and declared that subregulatory statements could not be the basis for civil enforcement. Their impact has been minimal, perhaps because they were a departmental, rather than a governmental, statement of position. That, too, is about to change.

On October 15, 2019, the White House issued two Executive Orders (EOs) that go substantially further in the effort to rein in guidances: EO 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" (the Guidance EO), and EO 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (the Transparency EO).

The Guidance EO states that it springs from the belief that:

> Agencies have sometimes used [their] authority inappropriately in [an attempt] to regulate the public without following the rulemaking procedures of the [Administrative Procedure Act (APA) by publishing guidances that] carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the *Federal Register* or distributed to all regulated parties.

To attack those problems on the procedural front, the Guidance EO requires each executive agency to issue a regulation setting forth its processes for releasing guidance documents within 300 days and directs

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FEDERAL CONTRACTOR CORNER

FY 2019 monetary recovery largest in OFCCP's history

by H. Juanita M. Beecher
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David Cohen, co-chair of The Institute for Workplace Equality and founder of DCI Consulting, Inc., stated in his annual update on Office of Federal Contract Compliance Programs (OFCCP) enforcement that the OFCCP had announced $46.6 million in settlements and judgments in 2019, including the $6.6 million judgment in its case against Enterprise Rent-A-Car, which is on appeal. For the first time, the agency recovered as much from its compensation settlements as from its hiring settlements.

During fiscal year (FY) 2019, the agency settled 38 hiring cases for more than $23 million in back pay and interest. Although the OFCCP settled only 11 compensation cases, it recovered more than $23 million in those cases as well. Nine of the 2019 settlements were early resolution conciliation agreements (ERCAs) and accounted for nearly $30 million of the recovery amount. In addition, a number of contractors agreed in their settlements to switch to functional affirmative action plans (FAAPs). For more information on some of the OFFCP settlements, see the final section of this column.

OFCCP proposes revisions to Section 503 self-ID form

On October 3, 2019, the OFCCP published a request that the Office of Management and Budget (OMB) reapprove the self-identification form required by Section 503 of the Rehabilitation Act with some "nonmaterial changes." The Section 503 self-ID form must be used by federal contractors to invite applicants and employees to voluntarily self-identify as individuals with disabilities. The current form is scheduled to expire on January 31, 2020.

The revised form expands the examples of covered disabilities to include autoimmune disorders; gastrointestinal disorders such as Crohn's disease, irritable bowel syndrome, and celiac disease; psychiatric conditions beyond posttraumatic stress disorder; and cardiovascular or heart disease. In addition, the revised form will fit on one page because the reasonable accommodation notice will be removed.

The opening paragraph of the new form will provide additional information about why applicants and employees are being asked to complete the form, explaining the "7% requirement" (i.e., federal contractors have a nationwide seven percent utilization goal for qualified individuals with disabilities by job group). Finally, "or have a history/record of having a disability" will be added to the "Yes" option on the new form.

Contractors have until December 2 to submit comments about the proposed revisions to the Section 503 self-ID form, "including specific suggestions for updating the form and for matching applicants with forms for affirmative action purposes using a method other than name."

ALJ criticizes DOL for redaction overkill in Oracle case

In the latest volley in the OFCCP's lawsuit against Oracle, Administrative Law Judge (ALJ) Richard Clark called the U.S. Department of Labor's (DOL) redactions of its interview notes "troubling." In his order granting Oracle's motion to compel the production of documents, the ALJ stated: "Having reviewed the parties' arguments as well as a random sampling of the redacted and unredacted versions of the notes, I find the OFCCP has significantly over-redacted the documents in question."

While Judge Clark found it was premature to block the agency from using withheld notes or witnesses whose interviews it didn't fully disclose at trial, any further failure to be forthcoming could merit sanctions against the agency.

Major OFCCP settlements in FY 2019

Here's a closer look at some of the settlements the OFCCP negotiated with contractors in FY 2019:

- **Wells Fargo** will pay $603,612 in back wages, interest, and benefits to resolve hiring discrimination claims brought by 2,066 female applicants for online customer service representative jobs in Virginia and Utah, and by 282 African-American applicants for phone banker positions in Arizona. As positions become available, the company will make 17 job offers to female applicants in Glen Allen, Virginia, 20 job offers to female applicants in Salt Lake City, Utah, and 29 job offers to African-American applicants in Phoenix, Arizona. Wells Fargo will also review and revise its selection process and provide better training

to its hiring managers to eliminate the practices that resulted in the violations.

- **Intel Corp.** will pay $3.5 million in back pay and interest to resolve allegations of systemic pay discrimination against female, African-American, and Hispanic employees at its facilities in Arizona, California, and Oregon. Intel entered into an ERCA with the OFCCP in which it agreed to allocate at least $1.5 million in pay equity adjustments for the next five years for U.S. employees in engineering positions as part of its annual pay equity analysis.
- **Dell Technologies** voluntarily entered into an ERCA with the OFCCP to resolve allegations of race- and gender-based wage discrimination. Under the agreement, Dell will provide compensatory relief for the affected workers totaling $7 million in lost wages, interest, and benefits, including $1,504,192 in back pay and salary adjustments that EMC Corp. voluntarily paid in April 2012. Dell acquired EMC in 2016.
- **Goldman Sachs & Co. LLC** has entered into an ERCA to resolve the OFCCP's findings of race- and gender-based compensation discrimination. The company will voluntarily provide compensatory relief totaling $9,995,000 in back pay and interest to approximately 600 affected workers at its corporate headquarters in New York City, as well as ensuring that all corporate employees are afforded equal employment opportunities. In addition, Goldman Sachs has committed to revising its current affirmative action programs and developing FAAPs that are based on business function rather than working establishment.
- **Bank of America** agreed to enter an ERCA and pay $4.2 million in back wages and interest to resolve alleged hiring discrimination against African Americans, Hispanics, and women applying for registered phone representative, client service, mortgage underwriter, telephone sales associate, and sales specialist positions at its branches in Jacksonville, Florida; Kennesaw, Georgia; Pennington, New Jersey; and Addison, Fort Worth, and Plano Texas. Under the ERCA, Bank of America will monitor its hiring practices nationwide and retain a consultant to evaluate its hiring policies and procedures for five years.
- **Penske Logistics LLC** has agreed to pay $350,000 in back wages to 185 female applicants to settle OFCCP allegations of hiring discrimination. Penske will also extend warehouse worker job offers to 99 female class members at its facility in Shelbyville, Indiana.

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each agency to publish a searchable list of its guidance documents and rescind those that should no longer be in effect.

On the substantive front, executive agencies must publish all "significant" guidances for public notice and comment and then respond to the concerns raised in the comments, a procedure that will be overseen by an agency of the Office of Management and Budget (OMB). In addition, all guidances of any kind must make clear that they do not have the force of law, and they must be published in a searchable public database. Finally, a "significant" guidance is no longer defined by its purported economic impact, but will include any guidance that raises "novel legal or policy issues."

The Transparency EO harkens back to the first DOJ memorandum limiting civil enforcement based on a guidance. The EO expressly states:

> When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations.

The stated purpose of the Transparency EO is to ensure that federal agencies "apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise."

The ultimate impact of the new EOs remains to be seen. Because a number of statutes sorely need additional explication, perhaps the EOs will return guidances to their original purpose of suggesting "best practices" rather than promulgating unlegislated laws. It's also likely that agencies will be much more focused on civil enforcement efforts and clearly root their actions in statutory violations rather than unenacted agency pronouncements.

Stopping the flow of subregulatory statements is akin to stanching the Mississippi during a flood stage. The new EOs are a bold attempt to start the process.

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REPORTING REQUIREMENTS

Update on collection of EEO-1 Component 2 data

by H. Juanita M. Beecher
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On October 8, 2019, the Equal Employment Opportunity Commission (EEOC) asked the U.S. District Court for the District of Columbia to deem its collection of Component 2 data complete under the April 25 order issued by Judge Tanya S. Chutkan. In her order, Judge Chutkan directed the agency to "immediately take all steps necessary to complete the EEO-1 Component 2 data collection for calendar years 2017 and 2018 by September 30, 2019." The EEOC's motion explained:

> The order also required that, "beginning on May 3, 2019[,] and continuing every 21 days thereafter, [the] EEOC must . . . report to [the plaintiffs, the National Women's Law Center (NWLC) and the Labor Council for Latin American Advancement (LCLAA),] and the court . . . all steps taken to implement the EEO-1 Component 2 data collections since the prior report" as well as "all steps taken during the ensuing three-week period" and must indicate "whether [it] is on track to complete the collection(s) by September 30, 2019."

The EEOC also cited the judge's statement in the order about its completion of data collection:

> Data collection(s) will not be deemed complete, for the purpose of this Order, until the percentage of EEO-1 reporters that have submitted their required EEO-1 Component 2 reports equals or exceeds the mean percentage of EEO-1 reporters that actually submitted EEO-1 reports in each of the past four reporting years.

The EEOC argued that it has met the court's requirements to take "all steps necessary to complete the EEO-1 Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019." The agency noted that its Component 2 data collection would be deemed complete based on their calculation of Judge Chutkan's order once 72.7% of Component 2 reports had been filed, and 75.9% of eligible filers had submitted their reports as of October 8. Although the EEOC had agreed to leave the portal open until November 11, it is now asking the court to allow it to end data collection as of November 1 based on its estimate that each additional week of data collection after November 11 will cost the government $150,000.

The NWLC and the LCLAA have objected to the EEOC closing the portal until 98.25% of the Component 2 reports have been filed, citing the agency's past practice of leaving the EEO-1 Report portal open "long after the data collection deadlines passed." On October 22, they responded to the EEOC's motion by arguing that Judge Chutkan's order requires the agency to collect Component 2 data until 98.5% of employers report, which represents the percentage of employers that actually submitted EEO-1 reports over the past four years. The EEOC countered that in the last few years it has allowed the EEO-1 portal to remain open for only six weeks after the deadline. The NWLD and the LCLAA also objected to the EEOC's failure to file status reports after October 8, arguing the reports are vital to keeping them and the court apprised of the status of the data collection.

Meanwhile, the U.S. Department of Justice's appeal of Judge Chutkan's order continues in the D.C. Circuit. The NWLC and the LCLAA stated in an October 18 brief to the appellate court that the EEOC's failure to collect the data harmed them in a "concrete and specific" manner.

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SEXUAL HARASSMENT

America's solution to sexual harassment after #MeToo

by Juliette Duval, Visiting Fellow
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The #MeToo movement of 2017 increased awareness of discriminatory and harassing behavior in the workplace and the urgent need to combat that behavior. The two-year anniversary of the movement is a great opportunity to examine some of the practical solutions to this international issue offered by different states and cities.

In 2016, the co-chairs of the Equal Employment Opportunity Commission's (EEOC) Select Task Force on the Study of Harassment in the Workplace issued a report in which they noted that past responses to sexual harassment haven't been successful in preventing unwelcome behavior mostly because they were too focused on preventing legal liability for employers rather than creating an enterprise culture based on principles of respect and inclusion shared by managers and employees. As a result, a number of state legislatures have required or revised laws mandating antiharassment training. Effective training should outline an employer's responsibility to teach employees and managers how to recognize and prevent sexually harassing behavior.

Currently, California, Connecticut, Delaware, Maine, Massachusetts, New York, and New York City impose mandatory harassment training requirements on employers. The training generally includes:

- A legal definition of sexual harassment and its unlawful nature;
- Examples of conduct that constitutes sexual harassment;
- A description of the complaint process and the remedies available to employees;
- A reminder that retaliation is prohibited; and
- An acknowledgment that supervisory and managerial employees have a specific responsibility to prevent sexual harassment and report unwelcome behaviors.

Some states have added supplementary training requirements like New York City's requirement that employers provide information about bystander intervention and California's requirement that the training must explain the effects abusive conduct has on the victim as well as other employees.

Training requirements are still in the experimental phase, and we will only be able to measure their effectiveness in a couple of years. Furthermore, the authors of the 2016 EEOC report insist there is no perfect antiharassment training that will make unwelcome behavior suddenly disappear. What's certain is that it will take time to eliminate sexual harassment because employers must transform workplace culture. Instead of simply forbidding and punishing unwelcome and offensive behavior, employers are now being encouraged to combine inclusion and civility training with antiharassment training, thereby training managers and employees to work toward a diverse and respectful workplace.

European solution to sexual harassment

The #MeToo movement has also had great resonance throughout Europe, where governments have tried to address the problem and ensure employees have a workplace free from all kinds of harassment and discrimination, most notably based on gender. Here, we're focusing on the efforts in France and the United Kingdom.

In the UK, there's no explicit statutory duty for employers to take proactive steps to prevent sexual harassment. However, employers can be held vicariously liable for acts committed by their employees. In practice, that means employers will be held responsible if unwelcome behavior occurs in their workplace and they cannot show they took all reasonable steps to prevent it. Employers are free to decide which reasonable steps they take, including implementing antiharassment policies, training, and appropriate procedures for reporting harassment and taking action to end it.

Some observers consider the existing statutory requirements in the UK insufficient. That's why, on July 11, 2019, the Government Equalities Office (GEO) launched a public consultation on sexual harassment in the workplace, through which anyone who has experienced sexual harassment at work can share their views on how the existing law can be improved. For its part, the #ThisIsNotWorking campaign has petitioned the government to introduce a law placing a legal duty on employers to take proactive actions to prevent harassment in the workplace.

By contrast to the UK, France has passed legislation specifically stating that employers have an obligation to prevent sexual harassing behavior. The law requires employers to provide information and training to employees to ensure their security and protect their physical and mental health, but it doesn't go into detail about the content of the training or information. The law simply indicates that employers must ensure their training remains effective over time. That implies employees and managers should be trained on a regular basis; otherwise, employers won't be able to establish that they took all reasonable steps to prevent unwelcome behavior in the workplace.

The #MeToo movement acknowledged the need to intensify the fight against sexual harassment and sexist attitudes. That's why the French statute passed on September 5, 2018, "for the freedom to choose one's professional future" required companies with more than 250 employees to designate a sexual harassment officer among their employees. The law also created an obligation for smaller companies with more than 11 employees that have a social and economic committee to designate one of the committee members as a sexual harassment officer.

The role of the sexual harassment officer is to direct, inform, and support employees in the fight against sexual harassment and sexist behavior. That means the officer will be the primary contact person for employees dealing with sexual harassment or sexist behavior. However, the officer's duties and role are not detailed in the law and must therefore be defined by each company.

Among other things, a sexual harassment officer could:

- Organize awareness-raising activities and training for managers and employees;
- When necessary, direct employees to competent authorities (e.g., a labor inspector, an occupational doctor, or a human rights defender);
- Implement internal procedures to encourage the reporting and processing of complaints about sexual harassment or sexist behavior; and
- Conduct an internal investigation after sexual harassment or sexist attitudes are reported.

The actions they've undertaken to amend the existing laws show that France and the UK understand the necessity of strengthening antiharassment measures and providing employees greater protection and

support. Only time will tell whether those actions will be successful and sufficient.

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INSIDE THE EEOC

Reading the tea leaves of EEOC's FY 2019 enforcement activity

by John Clifford
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The Equal Employment Opportunity Commission's (EEOC) fiscal year came to a close at the end of September, and consistent with past practices, the agency ended its fiscal year with a significant surge in filings. In September alone, the EEOC filed 52 lawsuits, which accounted for more than a third of its year-end total of 149 new cases. A review of the agency's activity during the past year provides important information about the continuation of certain trends and focuses and potentially provides insight into what we can expect from the EEOC moving forward.

Notably, despite the year-end rush, the EEOC's fiscal year (FY) 2019 filings, both for September and for the fiscal year as a whole, represent a marked decrease in new lawsuits compared to its filings in FY 2017 (202 cases) and FY 2018 (217 cases). The agency's FY 2019 activity is much more in line with its filing numbers between FY 2012 and FY 2016. Moreover, an examination of the agency's 2019 filings on a district-by-district basis shows that new lawsuits decreased in 11 of its 15 districts, suggesting the decrease in filings was agencywide.

However, it's unclear whether the decreased filing activity signals a new trend or was simply caused by external factors out of the agency's control. Specifically, as a result of significant delays in the appointment of Chair Janet Dhillon, the EEOC lacked a quorum for nearly four months in 2019, impeding its ability to act. Furthermore, the past year saw a month-long government shutdown, which likely had an impact on the agency's enforcement activity—or lack thereof. Absent similar disruptions, 2020 will offer a clearer picture of whether the EEOC intends to continue filing cases at 2017-18 levels or whether this year truly signaled a return to its pre-2017 numbers.

Despite the overall decrease in new lawsuits, the types of cases being filed and the targets of the claims have followed recent EEOC trends. For instance, this year's September filings showed a continuation of the agency's focus on certain industries, including retail trade, healthcare and social assistance, transportation and warehousing, accommodations and food services, and construction.

In addition, the distribution of cases by statute and/or allegations has largely remained static compared with past years. Once again, Title VII and disability cases represented the majority of EEOC filings. Specifically, 84 of the new lawsuits (roughly 60 percent) included Title VII claims (57 of which were based on sex discrimination), while 52 of the cases (approximately 35 percent) included allegations of violations of the Americans with Disabilities Act (ADA). As in past years, allegations of pregnancy discrimination and age discrimination and violations of the Equal Pay Act made up a relatively small percentage of the agency's cases in 2019.

While the EEOC's FY 2019 filings don't reflect any major shifts in its focus, it remains to be seen whether that trend will continue moving forward or if the agency will refocus its efforts under its new leadership.

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