

EEOC-Initiated Litigation: Case Law Developments in 2013 and Trends To Watch For in 2014

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I. EXECUTIVE SUMMARY

A. Mid-Point Of The Strategic Enforcement Plan

In FY 2013, employers and practitioners gained critical insight into the Equal Employment Opportunity Commission's ("EEOC") strategic objectives as it closes in on the approximate half-way point of its 2012-2016 Strategic Enforcement Plan ("SEP"). The SEP is a roadmap to the agency's enforcement and litigation strategy through FY 2016. As such, it is a must-read for any employer caught in the EEOC's crosshairs - or who desires to stay off the Commission's radar - for a free "peak" into the issues that are top-of-mind for the agency.

At the close of FY 2012, the EEOC was in the early stages of implementing a new SEP, though it reported meaningful progress on its strategic objectives. Now, the agency – and employers – have another year's worth of EEOC enforcement and litigation data. This is an important opportunity to look back at FY 2013 developments and make year-over-year comparisons of key metrics compared to last year.

Although the EEOC is not free to ignore the mandate laid out in the SEP, it can (and has) refined and evolved its objectives to respond to real (or perceived) "emerging issues" and legal developments. Indeed, FY 2013 was characterized by an expansion of the EEOC into new territory (for example, the Genetic Information Nondiscrimination Act) or a doubling down into well-trodden territory (for example, its Systemic Initiative).

This Report explores the key FY 2013 enforcement and litigation drivers in more detail below, looks back to compare FY 2013 data with previous years to tease out trends and the "real" EEOC agenda; and looks forward to predict what FY 2014 may hold.

B. An Evolving Commission -- Changing Of The Guard?

With its confirmation of Jenny Yang this past spring, the EEOC returns to its full complement of five Commissioners. Further, the U.S. Senate recently reconfirmed Chai Feldblum to serve a second term at the agency, extending her tenure to the summer of 2018. FY 2014 will bring additional changes to the Commission. EEOC Chair Jacqueline A. Berrien's term expires in July 1, 2014. Unless Chair Berrien opts to extend her term through December 2014, by next summer the Commission may be looking for a new leader, who may bring a new focus to the Commission's agenda.

1. Spotlight On Newest EEOC Commissioner: Jenny Yang

Commissioner Yang was unanimously confirmed by the Senate in April 2013, and replaces fellow Democratic Commissioner, Stuart Ishimaru, whose seat had been

vacant since his resignation in 2012.¹ Commissioner Yang's confirmation brought the bipartisan Commission count to three Democrats (Commissioner Yang, Commissioner Berrien and Commissioner Chai Feldblum) and two Republicans (Commissioner Victoria Lipnic and Commissioner Constance Barker), reducing the possibility of stalemates on important policy issues.²

Commissioner Yang, a seasoned litigator and longtime champion of employee rights, was previously a partner at Cohen, Milstein, Sellers & Toll PLLC, a plaintiff-side firm focusing on complex civil rights and employment-related class actions.³

How will the addition of Commissioner Yang impact the future of the EEOC? It is likely that, at least in the short term, Commissioner Yang will support the Commission's existing agenda and direction, erring on the side of expanding employee rights. As she grows into her role, Commissioner Yang will almost certainly put her own stamp on the Commission's agenda. Indeed, in the short time since her confirmation, she has indicated that her keen areas of interest include: (1) prohibitions against caregiver and pregnancy discrimination;⁴ (2) enforcement of the Equal Pay Act;⁵ and (3) the role of the EEOC given the expansion of mandatory arbitration and class-action waivers.⁶ Commissioner Yang has also emphasized the importance of implementing strategies that integrate resources, both in the public and private sectors, to collectively combat systemic discrimination in employment.⁷ Finally, both EEOC General Counsel David Lopez and Commissioner Yang have stated that the EEOC plans to increase collaboration with the plaintiffs' bar as well as state and local fair employment practices agencies in an effort to share knowledge and "build trust between the affected communities and their district offices."⁸

¹ *EEOC Now Operating at Full Strength with New Commissioner Jenny Yang*, WORKPLACE WEEKLY NEWS (May 15, 2013, 11:32 PM), available at <http://www.workplace-weekly.com/2013/05/15/eecoc-now-operating-at-full-strength-with-new-commissioner-jenny-yang/>; *Senate Confirms Jenny Yang to the EEOC*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (May 2, 2013), available at <http://www.shrm.org/publications/hrnews/pages/senate-confirms-yang-eecoc.aspx>.

² See Lorie Almon and Gerald L. Maatman, Jr., *The EEOC's Newest Commissioner -- Jenny Yang*, WORKPLACE CLASS ACTION BLOG (June 5, 2013), available at <http://www.workplaceclassaction.com/2013/06/the-eecocs-newest-commissioner-jenny-yang/>.

³ See Press Release, U.S. Equal Employment Opportunity Commission, *Jenny Yang Sworn In as EEOC Commissioner* (May 3, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-13-13.cfm>.

⁴ See Lorie Almon and Gerald L. Maatman, Jr., *The EEOC's Newest Commissioner -- Jenny Yang*, WORKPLACE CLASS ACTION BLOG (June 5, 2013), available at <http://www.workplaceclassaction.com/2013/06/the-eecocs-newest-commissioner-jenny-yang/>.

⁵ Tripp Baltz, *Elimination of Pay Discrimination Key Priority of Administration, EEOC Commissioner Says*, BLOOMBERG BNA (Aug. 28, 2013), available at http://laborandemploymentlaw.bna.com/lerc/2457/split_display.adp?fedfid=36570307&vname=edrnotallisues&split=0.

⁶ Patrick Dorrian, *Newest Commissioner, Top Agency Lawyers Discuss EEOC Enforcement Goals, Priorities*, BLOOMBERG BNA (July 31, 2013), available at http://laborandemploymentlaw.bna.com/lerc/2447/split_display.adp?fedfid=35250453&vname=eeonot&split=0.

⁷ *Id.*

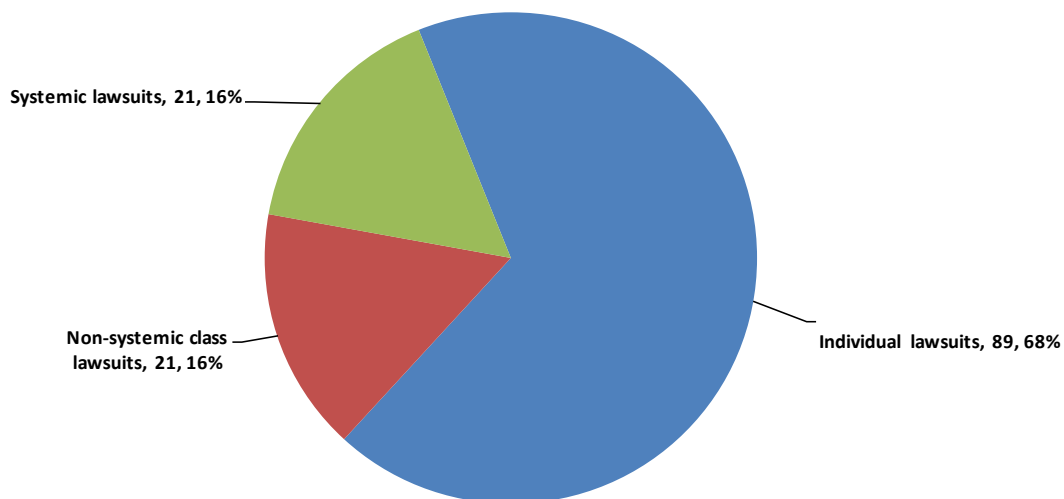
⁸ *Id.*

C. An Overview Of 2013 Litigation Statistics

Each year, one can learn much about the EEOC's current and future agenda by examining its statistics. For example, the EEOC filed 131 "merits" lawsuits in FY 2013, up slightly from the 122 lawsuits it filed in FY 2012.⁹ "Merits" lawsuits include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements. Thus, the overall number of lawsuits stayed roughly stable this year, compared to the high-water mark of filings of 261 in FY 2011.

As illustrated below, of the 131 EEOC lawsuits, 89 were single-claimant actions, 21 were non-systemic class actions, and 21 were systemic actions. The EEOC defines systemic cases as "pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."¹⁰ This data reflects an ongoing transformation of the EEOC's docket on bringing bigger and better lawsuits to get more "bang for its buck," a trend explored in more detail below.

FY 2013 Cases By Lawsuit Type



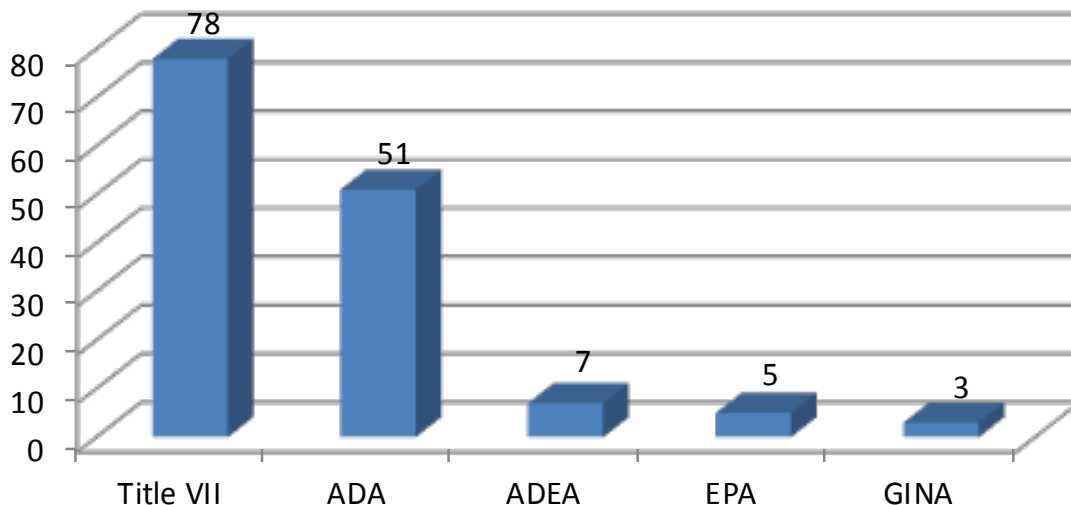
As revealing as these numbers are, it is not enough to focus on the sheer number and type of cases, but also on which theories the EEOC pursued. Lawsuits alleging claims under Title VII traditionally account for a lion's share of the EEOC's annual enforcement and litigation activity. The rapid rise of claims brought under the Americans With Disabilities Act ("ADA") in FY 2013 broke this trend. Further, although race and gender

⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 21, 2013), p. 3, *available at* <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹⁰ *Id.* at 15.

traditionally are the most often pursued theories among Title VII claims, in FY 2013, the EEOC devoted a majority of its Title VII litigation docket to suits alleging sex and pregnancy discrimination with race discrimination claims a distant second.¹¹ We explore the substantive trends more fully in later sections. Here is a snapshot of 2013 filings:

FY 2013 Cases by Statute



But for many, it all comes down to the money. The EEOC's annual metrics include monetary recoveries based on resolutions of pending lawsuits: in FY 2013, the EEOC resolved 209 merits lawsuits for a total monetary recovery of \$39 million¹² as compared to 254 merits lawsuits resolved in FY 2012 for a total monetary recovery of \$44.2 million.¹³ In terms of dollars received in merits lawsuits by statutes, Title VII predictably was top-of-the-list in FY 2013.¹⁴ Further, ADA resolutions were a strong second, which is in line with the EEOC's heightened focus on these claims.¹⁵ These substantive trends are summed up in the graphics below.

¹¹ Christopher DeGroff, Gerald L. Maatman, Jr., and Lily M. Strumwasser, *Time's Up, Pencils Down: EEOC Final Fiscal Year End Filing Totals Provide Surprises and Insight*, WORKPLACE CLASS ACTION BLOG (Sep. 30, 2013), available at <http://www.workplaceclassaction.com/2013/09/times-up-pencils-down-eeoc-final-fiscal-year-end-filing-totals-provide-surprises-and-insight/>; see also Lily M. Strumwasser, *Not Without Warning: The EEOC Continues To File Barrages Of Pregnancy Discrimination Lawsuits*, WORKPLACE CLASS ACTION BLOG (Sep. 30, 2013), available at <http://www.eeocountdown.com/2013/09/24/not-without-warning-the-eeoc-continues-to-file-barrages-of-pregnancy-discrimination-lawsuits/>.

¹² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 21, 2013), p. 3, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

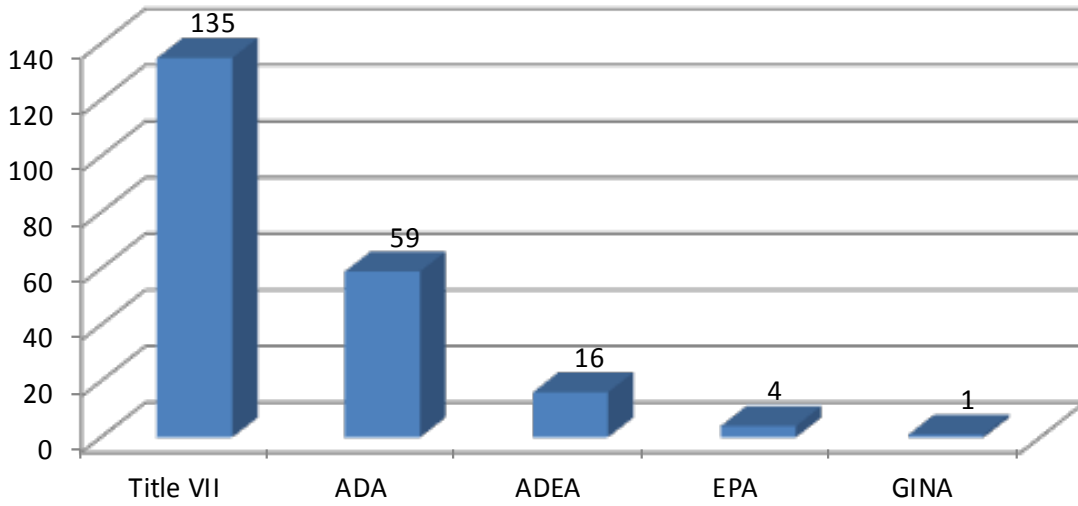
¹³ *Id.*

¹⁴ *Id.* at p. 29.

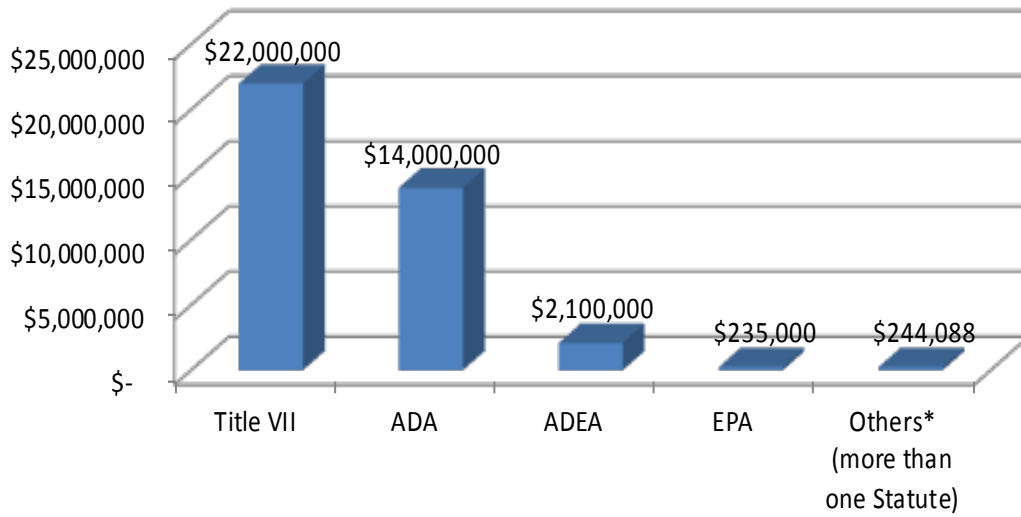
¹⁵ *Id.*

EEOC Cases By Resolutions - FY 2013

Number of Lawsuits Resolved



Dollars Recovered



The specific legal theories that the EEOC pursued in FY 2013 are discussed in more detail below. Overall, FY 2013 statistics paint a picture of higher intensity and focus from the Commission: it is filing more lawsuits, the proportion of systemic lawsuits on its docket is increasing, and the dollars collected through litigation are holding steady in the multi-millions. All of this points to an EEOC that is very willing and able to push its agenda through good old fashioned federal court litigation.

D. Substantive Trends In The EEOC's 2013 Litigation - SEP Remains Key Driver

1. A Transforming Docket: Systemic Initiative

To have a true grasp of the EEOC's FY 2013 and future agenda, one must understand the EEOC's most important driving force: its Systemic Initiative.¹⁶ The launch of the current SEP underscored an evolution in the EEOC's agenda to champion bigger, better, and more media-driven cases. In recent years, the agency's enforcement and litigation agenda has gained a sharper edge, its enforcement aim has been more precise, and its pursuit of employers in certain industries and scrutiny of certain employment practices has been more dogged. Thus, in its quest to increase its impact (and perhaps political relevance) even while its funding has dwindled, the EEOC has been actively pursuing "systemic cases," including "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."¹⁷

Under the SEP, the EEOC has set annual quotas for key performance measures for its enforcement and litigation activity.¹⁸ The agency's stated goal is to ensure that systemic cases make up 22% to 24% of its litigation docket by FY 2016, with at least 20% of its annual litigation docket made up of systemic cases.¹⁹ In FY 2013, the EEOC continued to take strides toward that goal. According to the EEOC's final tally of litigation activity, it filed 131 merits lawsuits during FY 2013.²⁰ These included 89 individual suits, 21 non-systemic class suits, and 21 systemic suits.²¹ In FY 2013, the EEOC challenged a variety of systemic discrimination, including "challenges to patterns or practices of refusing to hire applicants based on their race or sex, criminal record policies that the EEOC contends disproportionately screen out African American applicants, pre-offer medical inquiry and examination policies that violate the ADA or GINA, reductions in force that target older workers, and unequal pay practices."²²

¹⁶ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013-2016, available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

¹⁷ *Id.* at 12 n. 23.

¹⁸ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹⁹ *Id.* at 33.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.* at 33.

While the influx of new systemic cases shows the EEOC means business, the numbers are even more significant when viewed in terms of the EEOC's overall active docket. At the end of FY 2013, the EEOC had a daunting 231 cases on its active docket, of which 46 (20%) were non-systemic class cases, and 54 (23%) involved challenges to systemic discrimination.²³ Thus, systemic suits comprised 16% of all merits filings in 2013, and by the end of the year, represented 23.4% of all active merit suits – the largest proportion of these large scale cases since FY 2006, when the EEOC first started tracking these statistics.²⁴

The EEOC's goal to “do more with less” spilled over to its enforcement activity at the charge level as well. By the end of FY 2013, the EEOC had launched 300 systemic investigations resulting in 63 settlements or conciliation agreements that recovered approximately \$40 million.²⁵

For employers, how the EEOC litigates systemic lawsuits and carries out systemic investigations is just as, if not more, important than the types of claims involved. On that front, the EEOC received a failing grade in FY 2013. Courts threw out EEOC's systemic claims rejecting the EEOC's “shoot first, aim later” tactics and sanctioned the EEOC.

In *EEOC v. The Original Honeybaked Ham*,²⁶ a systemic sexual harassment and retaliation case, the U.S. District Court for the District of Colorado sanctioned the EEOC for its efforts to evade discovery of social media content.²⁷ Specifically, the Court found that the EEOC prolonged the discovery process and caused unnecessary expense and delay on several occasions.²⁸ The Court found that “in certain respects, the EEOC has been negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court. EEOC counsel has prematurely made promises about agreed-upon discovery methodology and procedure when they apparently had no authority to do so”²⁹ The Court's ruling warns the EEOC that using discovery as a tool to create ongoing and unnecessary burdens is unacceptable.

In *EEOC v. CRST Van Expedited, Inc.*,³⁰ the U.S. District Court for the Northern District of Iowa ordered the EEOC to pay \$4,694,442.14 in attorneys' fees, expenses, and

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).

²⁷ Christopher J. DeGroff and Gerald Maatman, Jr., *District Court Sanctions The EEOC For Thwarting Discovery Of Social Media Content*, (Mar. 3, 2013), available at <http://www.eeocountdown.com/2013/03/03/district-court-sanctions-the-eeoc-for-thwarting-discovery-of-social-media-content/>.

²⁸ *Id.*

²⁹ *Id.* at 2.

³⁰ No. 07-CV-95, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).

costs.³¹ It found that CRST was the prevailing party as to the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims.³² Further, it held that the EEOC's conduct was "frivolous, unreasonable or groundless" given its blatant failure to exhaust Title VII's administrative prerequisites, including its failure to investigate and conciliate prior to bringing suit.³³ Additionally, the court found that the EEOC's pattern-or-practice claim was unreasonable as it presented only anecdotal evidence in support of its claim and failed to present any expert evidence, statistics, or legal authority in support of its systemic claims.³⁴ In determining the fee award, the Court ruled that CRST was entitled to recover an additional \$465,230.47 incurred during the EEOC's appeal of its 2010 decision to the Eighth Circuit given that CRST would not have incurred these appellate fees "but for the EEOC's unreasonable or groundless claims."³⁵ In response to the stinging defeat in *EEOC v. CRST*, in FY 2013, the EEOC aggressively sought to altogether bar judicial review of its pre-suit obligations. Its newly-minted theory and related case law developments are explored in a later section.

In *EEOC v. Bloomberg LP*,³⁶ a pair of decisions had the effect of chopping down the EEOC's systemic pattern or practice pregnancy discrimination case to a single count of pregnancy discrimination on behalf of a single claimant.³⁷ In addition to dismissing most all of the EEOC's claims, and taking it to task for its pre-lawsuit action (or, more appropriately, inaction), the court provided Bloomberg with leave to file an application for attorneys' fees as the prevailing party in this dispute.³⁸

The court granted Bloomberg summary judgment, finding that the EEOC failed to engage in adequate pre-litigation activities, including investigating underlying claims and attempting to resolve the alleged unlawful employment practice through conciliation.³⁹ While noting that the court's role in assessing the EEOC's conciliation efforts is modest and relying heavily on the congressional intent of Title VII, the court held that the role of a court is not "inept" and is to ensure that the EEOC has provided sufficient notice to the employer of the natures of the charges against it so as to set the stage for fruitful, pre-

³¹ Gerald L. Maatman, Jr. and Howard M. Wexler, *Time To Pay Up! EEOC Ordered To Pay \$4.694 Million In Fees And Costs For Pursuing "Unreasonable" And "Groundless" Claims*, EEOC YEAR-END COUNTDOWN (Aug. 3, 2013), available at <http://www.eeoccountdown.com/2013/08/03/time-to-pay-up-eeoc-ordered-to-pay-4-694-million-in-fees-and-costs-for-pursuing-unreasonable-and-groundless-claims/>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013); 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y. Sept. 9, 2013).

³⁷ Gerald L. Maatman, Jr. and Howard M. Wexler, *The EEOC Suffers Another Resounding Defeat Due To "Shoot First, Aim Later" Tactics*, EEOC Year-End Countdown (Sept. 10, 2013), available at <http://www.eeoccountdown.com/2013/09/10/the-eeoc-suffers-another-resounding-defeat-due-to-shoot-first-aim-later-tactics/>.

³⁸ *Id.*

³⁹ *Id.*

litigation, conciliation discussions.⁴⁰ In particular, in a striking blow to the EEOC’s “sue now, ask questions later tactics,” the court held that:

Allowing the EEOC to subvert its pre-litigation obligations with respect to individual’s claims by yelling far and wide about class claims would undermine the statutory policy goal of encouraging conciliation. Thus, the Court holds that its prior [ruling] that the EEOC satisfied its pre-litigation obligations with respect to a class-wide claim applies to that class-wide claim only and that it must look independently at whether the EEOC fulfilled its statutory pre-litigation requirements with respect to the individual claims upon which it purports to continue this litigation.

The EEOC may bring any claims reasonably related to the charge it investigated. But such a principle does not grant the EEOC authority to abdicate its statutory responsibility to provide sufficient notice and pursue a pre-suit resolution in good faith. The Court is not aware of any binding legal authority, and the EEOC has provided none, that allows the EEOC to do what it is attempting to do here—namely level broad accusations of class-wide discrimination to present Bloomberg with a moving target of prospective plaintiffs and, after unsuccessfully pursuing pattern-or-practice claims, substitute its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims under Section 706. The EEOC’s conduct here blatantly contravenes Title VII’s emphasis on resolving disputes without resort to litigation and lands far and wide of any flexibility Title VII might provide with respect to pre-litigation conciliation requirements where both individual and class-wide claims are asserted and potential claimants are discovered throughout the course of discovery.⁴¹

The court’s opinion captures well the frustration when the EEOC stonewalls employers who attempt to not only understand the basis of charges brought against them, but also the foundation for the EEOC’s conciliation demands.

⁴⁰ *Id.*

⁴¹ *Id.*

Finally, in *EEOC v. Peoplemark, Inc.*, the U.S. Court of Appeals for the Sixth Circuit upheld a district court's award of \$751,942.48 against the EEOC in a high profile case based on a purported (and unfounded) disparate impact theory of liability stemming from an employer's use of background checks.⁴² Although holding that the EEOC's case was not groundless when it was first filed, the Sixth Circuit held that the EEOC refused to reassess its pattern or practice claim even when discovery revealed the nonexistence of a company-wide policy.⁴³ It held that, "from that point forward, it was unreasonable to continue to litigate the Commissioner's pleaded claim because the claim was based on a companywide policy that did not exist."⁴⁴

The bottom line: the EEOC has committed to bringing bigger and better lawsuits, both to its internal stakeholders and the political powers that hold the purse strings. Looking forward to FY 2014, we predict that the Systemic Initiative will continue to be a key driver for the EEOC's enforcement and litigation activity.

However, beyond showing results on paper based solely on the number of lawsuits and investigations filed in a fiscal year, the Commission appears not to have created or implemented controls to manage how its troops with boots on the ground litigate these cases. The absence of meaningful internal controls and oversight, in turn, resulted in significant setbacks for the Commission, in terms of having to pay sanctions given the agency's tight budget. It remains to be seen whether the EEOC takes to heart the criticism of its litigation and enforcement tactics.

2. ADA Cases A Key Element Of FY 2013

Even though it is not expressly one of the EEOC's "Big Six" national priorities, disability claims was a chart-topper for the EEOC in FY 2013. The Americans With Disabilities Act Amendments Act of 2008 ("ADAAA"), enacted in 2009, significantly broadened the scope of protection under the ADA, which had been whittled down through a series of U.S. Supreme Court rulings.⁴⁵ Specifically, the ADAAA further expanded the definition of disability, making it easier for employees to demonstrate they have disabilities. In May 2011, the EEOC issued its Regulations under the ADAAA.⁴⁶ The EEOC's regulations implemented the broad statutory mandate of the ADAAA. These

⁴² Gerald L. Maatman, Jr. and Howard M. Wexler, *Sixth Circuit Upholds Big Fee Award Against EEOC For Continuing To Pursue Lawsuit Based On A "Companywide Policy That Did Not Exist"*, EEOC YEAR-END COUNTDOWN (Oct. 8, 2013), available at <http://www.eeoccountdown.com/2013/10/08/sixth-circuit-upholds-big-fee-award-against-eeoc-for-continuing-to-pursue-lawsuit-based-on-a-companywide-policy-that-did-not-exist/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12103, 12205a (2009)).

⁴⁶ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.1 (2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf>; see also Letter from Peggy R. Mastroianni, Legal Counsel, U.S. Equal Employment Opportunity Commission to an inquiry from a member of the public, ADA: Definition of Disability Under ADAAA (Aug. 12, 2011), available at http://www.eeoc.gov/eeoc/foia/letters/2011/ada_definition_disability.html.

developments have resulted in an uptick in the number of charges and lawsuits filed under the ADA.

In addition to legislative and regulatory drivers for enforcement activity, the SEP discussed above is the EEOC's organizational mandate. The EEOC has shoehorned many of its ADA claims under the catch-all national priority of "Addressing Emerging and Developing Issues."⁴⁷ The SEP expressly refers to the following examples of "emerging" issues involving ADA law: "coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams."⁴⁸

At outreach events held in FY 2013, the EEOC opined that individuals with disabilities are the nation's largest minority group seeking employment in today's marketplace. Further, the EEOC views individuals with disabilities as an undervalued and untapped potential workforce. The SEP sets out the EEOC's gameplan to alter this dynamic and in FY 2013 we saw the EEOC's strategy play out in the form of aggressive enforcement and litigation of disability discrimination. We expect the dogged focus on ADA enforcement and litigation to continue in FY 2014 and for the near term.

Below we discuss FY 2013 metrics against the backdrop of ongoing trends as well as the key substantive issues that are on the EEOC's radar.

a. Litigation And Enforcement Trends

Whereas in FY 2012 the EEOC was just starting to pick up momentum toward its SEP goal to target "emerging issues" under the ADA, in FY 2013 the EEOC's ADA litigation and enforcement agenda was in full swing. Disability cases were the most often filed EEOC lawsuit in FY 2013. As we discussed above, 51 out of the 131 merits lawsuits (38%) the EEOC filed in FY 2013 asserted claims under the ADA. Although detailed EEOC FY 2013 charge data is not yet available, charge data shows a similar upswing in ADA claims. In FY 2012, the EEOC received 99,412 charges, raising 200,866 issues or claims. Of these, 26,379 charges—26.5%—raised at least one ADA issue.⁴⁹ We expect to see similar, if not higher, percentages of ADA issues in the FY 2013 charge data.

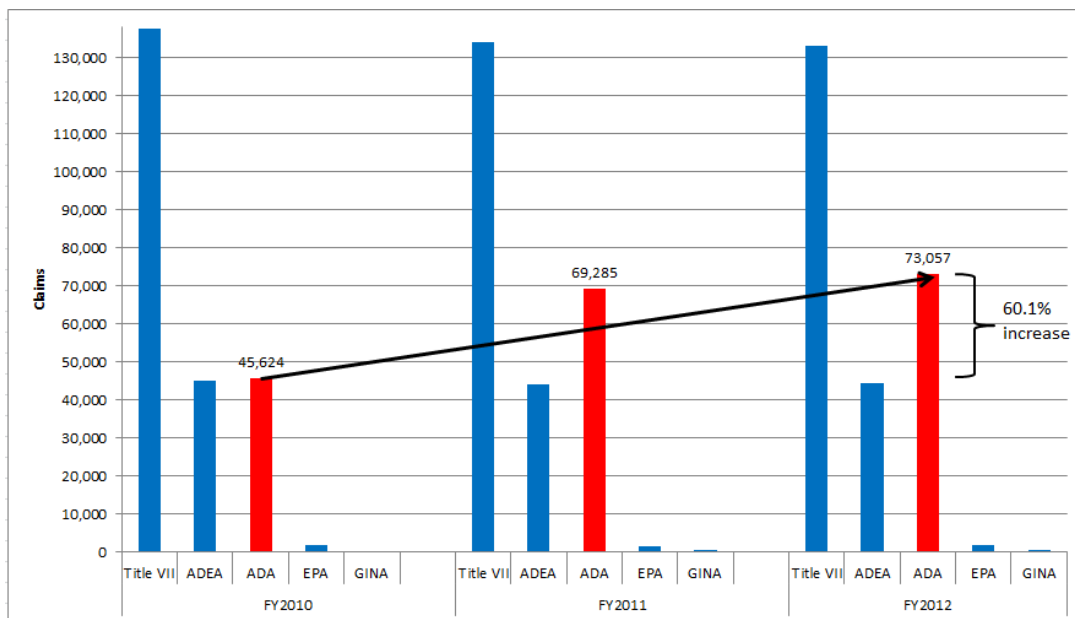
The EEOC's focus on ADA claims may have intensified under the SEP, but charge filing data shows that ADA claims have traditionally posed a major risk area for employers. For example, between FY 2010 and 2012, there was an overall increase of 9.7% in the total number of claims raised in all charges filed with the EEOC. In particular, in FY 2010, charges filed pursuant to Title VII, ADA, ADEA, EPA and GINA raised a combined total of 230,498 claims. By FY 2012, that number increased to 252,881. A significant increase in ADA claims accounts for a majority of the overall increase in EEOC charges

⁴⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FOR FISCAL YEARS 2012-2016, available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

⁴⁸ *Id.*

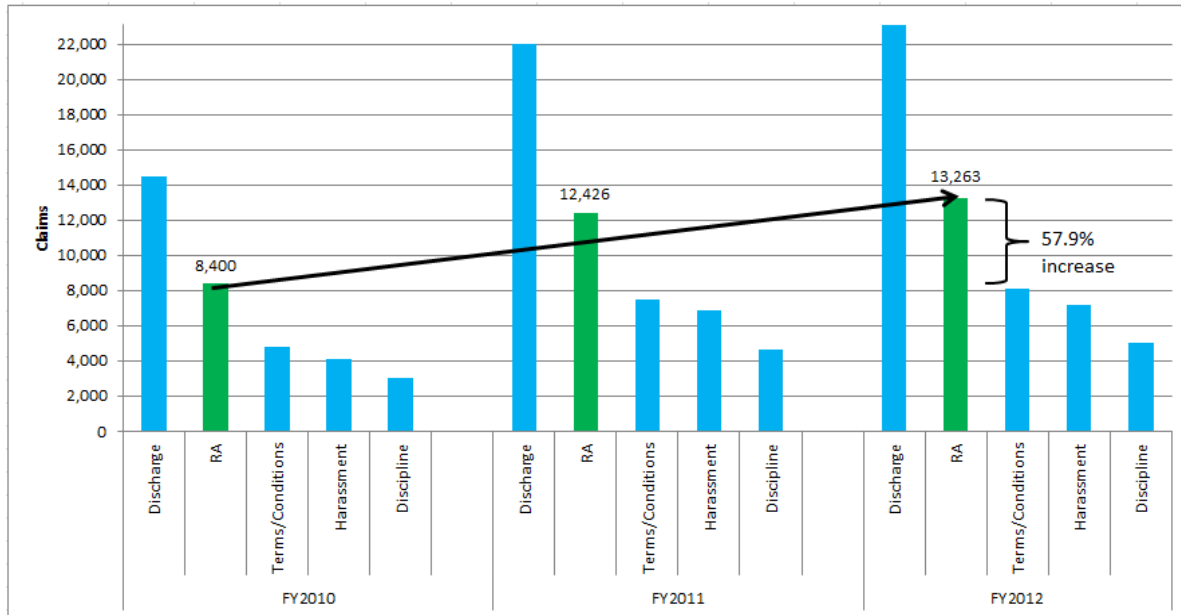
⁴⁹ The EEOC tracks charge data by statutory "issue" (*i.e.*, claim) rather than "charge" because a majority of charges raise multiple issues.

during this timeframe. In particular, between FY 2010 and FY 2012, there was a 60.1% jump in ADA claims (from 45,624 to 73,057 claims). We expect FY 2013 charge data to reflect the escalating trend illustrated below:



Further, among ADA claims, FY 2013 saw a surge in litigation activity involving leave as a reasonable accommodation. Charge data reflects a corresponding surge in the EEOC’s focus on leave issues. Recent ADA charge data shows that the category of “reasonable accommodation” was ranked second highest in terms of the common issues raised in ADA charges.⁵⁰ We expect this trend to continue in FY 2013. The growth of reasonable accommodation-related issues in charges involving ADA claims is reflected below.

⁵⁰ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STATUTES BY ISSUE, FY 2010-2012, available at http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm.



b. Substantive Trends

In FY 2013, the focus of ADA litigation continued to shift away from the meaning of “disability” to the scope of an employer’s obligation to provide reasonable accommodations. The EEOC has issued comprehensive guidance on reasonable accommodations.⁵¹ The Guidance defines an accommodation as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”⁵² Although there are no bright line rules, the EEOC’s view that an employer policy that is applied universally to all employees without allowing for an individualized assessment violates the ADA forms a theme across its FY 2013 litigation activity.⁵³

Further, the Commission aggressively pushed the envelope in terms of appropriate parameters of leave. In fact, one third of all press releases issued by the EEOC on disability discrimination in 2013 pertained to the use of leave in the workplace.⁵⁴

⁵¹ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (“2002 EEOC Reasonable Accommodation Guidance”).

⁵² *Id.*

⁵³ EEOC Commissioners Chai Feldblum and Victoria Lipnic, Joint Keynote Address at the 2013 SHRM Employment Law & Legislative Conference (Mar. 12, 2013). Commissioner Feldblum stated that since 2002, EEOC has made clear that leave may be reasonable accommodation under the ADA. She further stated that in the Commission’s view an automatic termination provision after a specified period of time is a *per se* violation of the ADA; see, e.g., Jonathan Segal, EEOC Commissioners “Chat” At SHRM Conference, NEXT (Mar. 15, 2013), available at <http://www.weknownext.com/blog/eeoc-commissioners-chat-at-the-shrm-legislative-conference>.

⁵⁴ See Press Releases, U.S. Equal Employment Opportunity Commission, available at <http://www.eeoc.gov/eeoc/newsroom/release/index.cfm> (last visited Dec. 21, 2013).

Further, many of the FY 2013 suits and settlements related to leave as an accommodation involve nontraditional disabilities (under pre-ADAAA standards).⁵⁵ The EEOC aggressively targeted an employer's refusal to accommodate a leave request in claims involving "nontraditional" disabilities including mental impairments, cancer, bipolar disorder, and HIV.⁵⁶

Another emerging trend shows that the EEOC is pushing employers to accept medical doctors' "work release" clearance for employees returning from leave. Specifically, the EEOC is increasingly challenging employers when an employee's treating physician clears the employee to return to work, but the employer rejects the physician's recommendation.⁵⁷

⁵⁵ See generally Press Releases, U.S. Equal Employment Opportunity Commission, Gannett Companies Settle EEOC Disability Discrimination Lawsuit for Almost \$50,000 (Jan. 24, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-24-13.cfm> (employee terminated after returning from medical leave because of bipolar disorder); Probat/Bauermeister to Pay \$100,000 to Settle EEOC Disability Discrimination Lawsuit (May 6, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-6-13.cfm> (employee terminated after returning from medical leave because of bipolar disorder); SITA Information Networking Computing USA Settles EEOC Disability Discrimination Suit (May 7, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-7-13a.cfm> (employee offered full-time position later terminated due to cancer surgery requirement); MISO to Pay \$90,500 to Settle EEOC Disability Discrimination Lawsuit (July 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/7-11-13b.cfm> (employee with postpartum depression terminated as opposed to granting leave as an accommodation); EEOC Sues Midwest Regional Medical Center For Disability Discrimination (July 30, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/7-30-13a.cfm> (employee diagnosed with cancer and undergoing radiation treatment placed on company-ordered leave and discharged); EEOC Sues Angel Medical Center for Disability Discrimination (Sept. 25, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-25-13.cfm> (employee who wanted to remain in full time during chemotherapy for cancer treatment denied and terminated); Alorica Pays \$135,000 to Settle EEOC Disability Discrimination Suit (Dec. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-11-13.cfm> (employee terminated after requesting additional medical leave because of bipolar disorder); Oakland Children's Hospital Sued by EEOC for Disability Discrimination (Dec. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-11-13c.cfm> (employee with breast cancer denied additional medical leave and discharged).

⁵⁶ See generally *id.*

⁵⁷ See generally Press Releases, U.S. Equal Employment Opportunity Commission, EEOC Sues Fidelity Engineering Corporation for Disability Discrimination and Retaliation (Jan. 10, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-10-13.cfm> (employee medically released to return to work after surgery, but company refused to allow stating the nature of job was too risky); Jury Verdict for EEOC Against Western Trading Company In Disability Case (Mar. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-11-13b.cfm> (employee with seizure disorder received release from doctors to work, but sent home when discovered employee had seizures off-duty); Supervalu / Jewel Food Held in Contempt for Breaching Consent Decree Settling Earlier EEOC Disability Discrimination Suit (Mar. 21, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-21-13.cfm> (company faulted for failure to send written job offers to the employees on disability leave who could return to work); Fidelity Engineering Corporation Settles EEOC Disability Discrimination and Retaliation Suit (June 10, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-10-13b.cfm> (mechanic medically released to work with no restrictions nature of job was too risky post heart surgery); Georgia Power Company Sued by EEOC for Disability Discrimination (Sept. 30, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-30-13i.cfm> (class of employees cleared by treating

What we did not see in FY 2013, however, was the EEOC's anticipated guidance on leave as a reasonable accommodation. In 2011, the EEOC specifically examined the use of leave as a reasonable accommodation during a Commissioner's Meeting.⁵⁸ At the meeting the Commission commented on the complexity of the issue and desired clarification for proper compliance with the law.⁵⁹ After the meeting audience members were encouraged to submit written comments at which point it was also announced that official guidance would be released.⁶⁰ Commissioner Feldblum's reconfirmation to the Commission may provide the impetus for new guidance in this area in FY 2014. Until then, employers will continue to struggle to apply the Commission's theories in practice.

3. EEOC Focused On Pregnancy Discrimination

Pregnancy was front and center for the EEOC in 2013. Indeed, in a February 2013 press release, the EEOC declared pregnancy discrimination to be a "widespread problem in the workplace, no matter the size of the employer."⁶¹ And in FY 2013, the EEOC made good on its SEP promise to focus on pregnancy discrimination by filing a string of pregnancy discrimination lawsuits.⁶²

As a recap: the Pregnancy Discrimination Act ("PDA") offers protections for women in the workplace affected by pregnancy, childbirth, or related medical conditions.⁶³ Under the PDA employers are not, however, required to treat a pregnant employee more favorably than the employer would treat a non-pregnant employee.⁶⁴

Some of the notable decisions on these issues offer insight into the EEOC's enforcement and litigation focus. In one single-claimant case, the plaintiff alleged she was fired on the basis of pregnancy discrimination.⁶⁵ The EEOC later filed suit in the

physicians to return to work, but employer disregarded physicians' opinions and terminated employees); Providence Hospital Sued by EEOC for Disability Discrimination (Dec. 9, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/12-9-13a.cfm> (employee placed on mandatory medical leave and discharged after leave was exhausted even though clear to work with only slight restrictions).

⁵⁸ See Meeting of June 8, 2011, U.S. Equal Employment Opportunity Commission, EEOC to Examine Use of Leave As Reasonable Accommodation *available at* <http://www.eeoc.gov/eeoc/meetings/6-8-11/>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Press Release, U.S. Equal Employment Opportunity Commission, Reed Pierce's Pays \$20,000 to Settle EEOC Pregnancy Discrimination Suit (Feb. 14, 2013), *available at* <http://www1.eeoc.gov/eeoc/newsroom/release/2-14-13.cfm>.

⁶² See Lily M. Strumwasser, *Not Without Warning: The EEOC Continues To File Barrages Of Pregnancy Discrimination Lawsuits*, EMPLOYMENT LAW LOOKOUT (Sept. 19, 2013), *available at* <http://www.laborandemploymentlawcounsel.com/2013/09/not-without-warning-the-eeoc-continues-to-file-barrages-of-pregnancy-discrimination-lawsuits/>.

⁶³ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2010)).

⁶⁴ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

⁶⁵ See Press Release, U.S. Equal Employment Opportunity Commission, Reed Pierce's Pays \$20,000 to Settle EEOC Pregnancy Discrimination Suit (Feb. 14, 2013), *available at* <http://www1.eeoc.gov/eeoc/newsroom/release/2-14-13.cfm>.

U.S. District Court for the Southern District of Mississippi.⁶⁶ After the defendant lost two motions to dismiss the case, it agreed to a \$20,000 settlement.⁶⁷ Another lawsuit alleged that an employer fired a housekeeper after she reported her pregnancy.⁶⁸ The EEOC claimed that the defendant would not allow the employee to continue to work as a housekeeper because of the potential harm that her job could cause the baby.⁶⁹ The defendant agreed to pay \$2,500 in back pay and \$25,000 in compensatory and punitive damages.⁷⁰ A third lawsuit alleged that an employer disciplined and discharged an employee on the basis of her pregnancy.⁷¹ The EEOC filed suit in the U.S. District Court for the Northern District of Mississippi.⁷² Subsequently, the parties settled the suit for \$80,000.⁷³ Further, an employee was denied time off for medical treatment to address a miscarriage and was fired after she missed five days of work.⁷⁴ The EEOC sued the employer for pregnancy discrimination.⁷⁵ Eventually, the defendant agreed to pay \$100,000 to settle the pregnancy discrimination suit.⁷⁶

The EEOC is clearly focused on breaking the “maternal wall” with its scrutiny on pregnancy discrimination. Employers can expect to see sustained enforcement and litigation activity in this area in 2014.

⁶⁶ See Complaint, *EEOC v. Reed Pierce’s Sportsman’s Grille LLC*, No. 3:10-cv-00541 (S.D. Miss. Sept. 29, 2010), ECF No. 1.

⁶⁷ See Consent Decree, *EEOC v. Reed Pierce’s Sportsman’s Grille LLC*, No. 3:10-cv-00541 (S.D. Miss. Feb. 5, 2013), ECF No. 237; see also Press Release, U.S. Equal Employment Opportunity Commission, Reed Pierce’s Pays \$20,000 to Settle EEOC Pregnancy Discrimination Suit (Feb. 14, 2013), available at <http://www1.eeoc.gov/eeoc/newsroom/release/2-14-13.cfm>.

⁶⁸ See Press Release, U.S. Equal Employment Opportunity Commission, Owner of Detroit-Area Comfort Inn & Suites to Pay \$27,500 to Settle EEOC Pregnancy Bias Suit (Mar. 12, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-12-13a.cfm>.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ See Press Release, U.S. Equal Employment Opportunity Commission, Landau Uniforms Settles EEOC Pregnancy Discrimination Suit for \$80,000 (Apr. 8, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-8-13a.cfm>.

⁷² See Complaint, *EEOC v. Landau Uniforms, Inc.*, No. 2:11-cv-201 (S.D. Miss. Sept. 27, 2011), ECF No. 1.

⁷³ See Consent Decree, *EEOC v. Landau Uniforms, Inc.*, No. 2:11-cv-201 (S.D. Miss. Apr. 4, 2013), ECF No. 187; see also Press Release, U.S. Equal Employment Opportunity Commission, Landau Uniforms Settles EEOC Pregnancy Discrimination Suit for \$80,000 (Apr. 8, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-8-13a.cfm>.

⁷⁴ See Press Release, U.S. Equal Employment Opportunity Commission, Platinum P.T.S. To Pay \$100k to Settle EEOC Pregnancy Discrimination Lawsuit (Aug. 8, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-7-13a.cfm>.

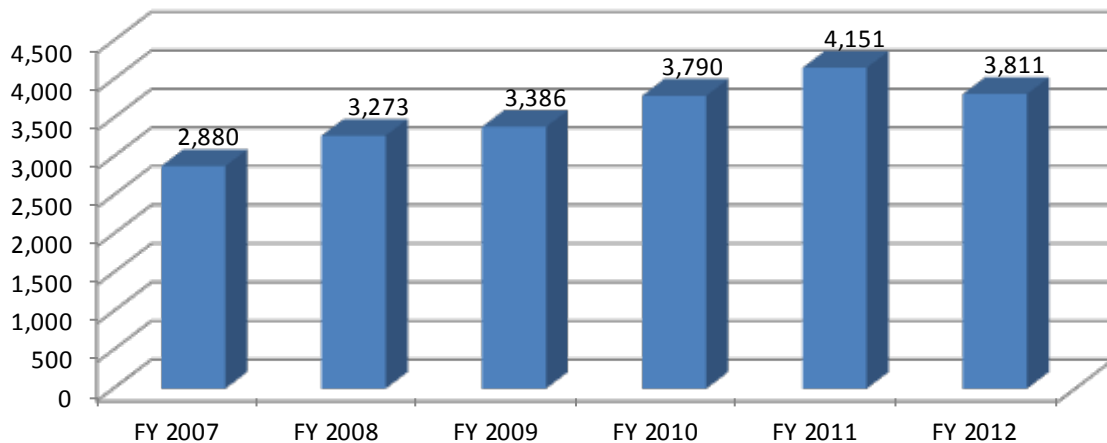
⁷⁵ See Complaint, *EEOC v. Platinum P.T.S. Inc.*, No. 5:12-cv-00139 (S.D. Tex. Sept. 4, 2012), ECF No. 1.

⁷⁶ See Consent Decree, *EEOC v. Platinum P.T.S. Inc.*, No. 5:12-cv-00139 (S.D. Tex. Aug. 8, 2013), ECF No. 45; see also Press Release, U.S. Equal Employment Opportunity Commission, Platinum P.T.S. To Pay \$100k to Settle EEOC Pregnancy Discrimination Lawsuit (Aug. 8, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-7-13a.cfm>.

4. Religion Lawsuits On The Rise In FY 2013

The EEOC has traditionally filed a number of religious discrimination claims each year, keeping this issue on the forefront of employers' minds. FY 2013 was no different. The EEOC filed 12 religious discrimination lawsuits, three more than the previous fiscal year. FY 2013 charge data is not yet available, but while FY 2012 showed a slight dip in religious discrimination charges, overall there has been a steady rise in religious discrimination charges filed with the EEOC.⁷⁷ This trend is illustrated here:

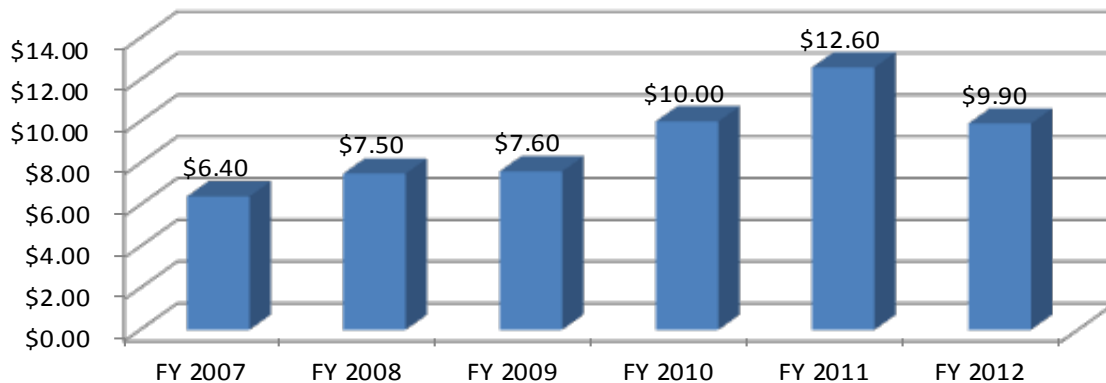
Charge Receipts - Religious Discrimination



In terms of religion-based monetary benefits, in FY 2012, EEOC secured \$9.9 million, although FY 2011 remains the high water mark thus far. We are waiting for the EEOC's year-end figures for religion-based monetary benefits, but the following table illustrates the monetary relief trends:

⁷⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGION-BASED CHARGES FY 1997-2012 (2013), available at <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm>.

Monetary Benefits (in Millions) - Religious Discrimination



During fiscal year 2013, the EEOC also settled several significant religious discrimination lawsuits. Notable religious discrimination settlements can be categorized as follows: (1) employer's failure to accommodate employee's request for religion-based leave; (2) employer's failure to accommodate employee's religious practices in the workplace; and (3) employer's failure to hire applicant based on the applicant's religious beliefs or views.⁷⁸

⁷⁸ See Gerald Maatman, Jr. and Lily M. Strumwasser, *Compliance: Religious Discrimination -- It's on the EEOC's Radar*, WORKPLACE CLASS ACTION BLOG (Nov. 13, 2013), available at <http://www.workplaceclassaction.com/2013/11/compliance-religious-discrimination-its-on-the-eeocs-radar/>; see also Press Releases, U.S. Employment Opportunity Commission, Voss Lighting to Pay \$82,500 to Settle EEOC Religious Discrimination Lawsuit (Mar. 19, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-19-13a.cfm> (settlement payment of \$82,500 to an applicant for an available operations supervisor position after it allegedly refused to hire him because of his religious beliefs); Ozarks Electric to Pay \$95,000 to Settle EEOC Religious Discrimination Suit (Mar. 25, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-25-13.cfm> (settlement payment of \$95,000 to settle allegations that employer failed to provide employee a religious accommodation by giving her a day off work to attend a religious convention); Nags Head Hotel to Pay \$45,000 to Settle EEOC Religious Discrimination Lawsuit (July 23, 2013), available at <http://www1.eeoc.gov/eeoc/newsroom/release/7-23-13.cfm> (settlement payment of \$45,000 to settle a religious discrimination lawsuit, which alleged the employer refused to provide a Seventh-day Adventist with a religious accommodation that allowed her to take her Sabbath off work); Abercrombie & Fitch Settles Two Pending EEOC Religious Discrimination Suits (Sept. 23, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-23-13c.cfm> (comprehensive settlement of two separate religious discrimination lawsuits filed on behalf of Muslim teens who wear hijabs (religious headscarves) and who allegedly had adverse employment actions taken against them as a result involving payment of \$71,000); Maita Chevrolet Settles EEOC Religious Discrimination Suit (Sept. 27, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-27-13e.cfm> (settlement payment of \$158,000 to settle an employee's claim that the employer failed to accommodate his religious practice of the Seventh-day Adventist, and instead harassed, disciplined, and discharged him because of his religion).

The EEOC's pursuit of religion cases and success in terms of leveraging settlements is a warning to employers regarding an area of increased focus. Implementing a policy that requires consideration of potential accommodations of religion-based employee requests can minimize employers' liability.

5. FY 2013 Was A Mixed Bag For Subpoena Enforcement Actions

Although the EEOC has a number of fact-finding tools at its disposal, the most aggressive -- and the most often feared by employers -- is its subpoena power.⁷⁹ In FY 2013, the EEOC resorted to court to enforce its subpoenas fewer times than in prior years, but when it did, the results were noteworthy. The Commission started the year with a big win under its belt and ended it with an embarrassing flop.

The power dynamic in investigations plays out with dogged regularity: the EEOC expects employers to comply when it flexes its investigative muscles. Employers dealing with an EEOC administrative charge that object to the EEOC's broad requests for information and documents are all too familiar with the EEOC's tactic of peppering correspondence with threats of subpoena enforcement actions as an alternative to voluntary compliance.

And when the EEOC resorts to courts, it expects to win. Courts have traditionally afforded the EEOC considerable latitude with respect to the breadth and scope of its subpoenas. A district court must arguably enforce the EEOC's subpoena if: (1) the administrative investigation is within the EEOC's authority; (2) the EEOC's demand is not too indefinite or overly burdensome; and (3) the information sought is reasonably relevant.⁸⁰ Courts broadly construe the term "relevant" and generally allow the EEOC wide access to evidence that might cast light on the EEOC's allegations against an employer.⁸¹

Interestingly, in terms of numbers of subpoena enforcement actions filed by the EEOC each year, FY 2013 bucked the overall upward trend. The EEOC filed 17 subpoena enforcement actions in FY 2013, almost half its FY 2012 and FY 2011 statistics, respectively.⁸²

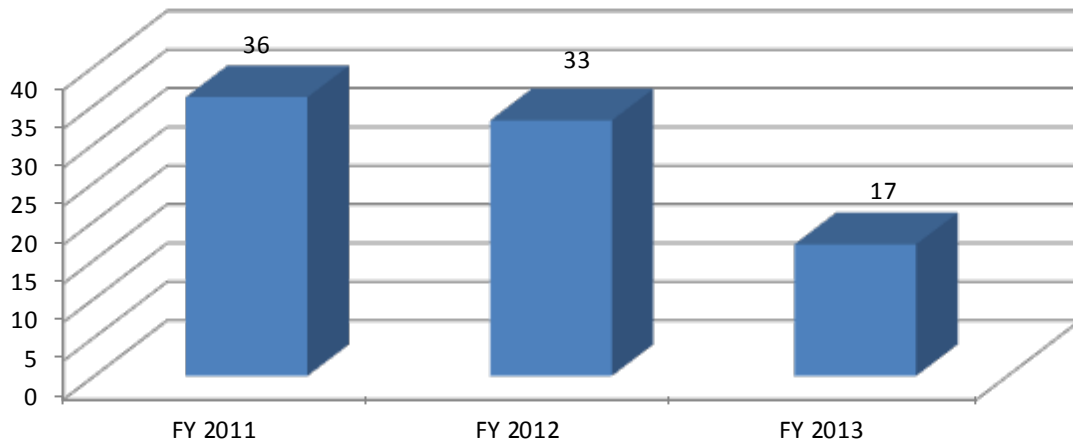
⁷⁹ 42 U.S.C. § 2000e-9; 29 U.S.C § 161(1).

⁸⁰ *EEOC v. HomeNurse, Inc.*, 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013).

⁸¹ *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-89 (1984).

⁸² EEOC FY 2013 Performance and Accountability Report ("FY2013 Report"); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 16, 2013) p. 29, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>; EEOC FY 2012 Performance and Accountability Report ("FY2012 Report"); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 19, 2012) p. 27, available at http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf; EEOC FY 2011 Performance and Accountability Report ("FY2011 Report"), U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at <http://www.eeoc.gov/eeoc/plan/2011par.cfm>.

Subpoena Enforcement Actions



Though it filed half as many subpoena enforcement actions in FY 2013 as the prior two years, the results were noteworthy. In *EEOC v. Aerotek, Inc.*, 498 F. App'x 645 (7th Cir. 2013), the Seventh Circuit affirmed the district court's decision to grant the EEOC's application to enforce a subpoena against Aerotek, a staffing firm.⁸³ Despite Aerotek's argument that the EEOC lacked quorum to make a "final determination" on the subpoena, the Seventh Circuit agreed with an EEOC argument that Aerotek had waived its rights to challenge enforcement of the subpoena because its petition was untimely.⁸⁴ The court declined to address the quorum issue and affirmed the decision of the district court.⁸⁵ The EEOC quickly issued a press release touting its early FY 2013 win.⁸⁶ In the press release the EEOC warned employers to willingly turn over their files when the EEOC comes knocking at their door:

"[t]he EEOC consistently prevails in court with its subpoena enforcement actions. Prudent and penny-wise employers should consider using subpoenas as an opportunity to show the government that they complied with EEO laws and produce materials they have, in lieu of expending resources to delay the investigation."⁸⁷

⁸³ Press Release, Equal Employment Opportunity Commission, Aerotek Required by Federal Appeals Court to Comply with EEOC Subpoena (Jan. 13, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-16-13.cfm>.

⁸⁴ 29 C.F.R. § 1601.16(b).

⁸⁵ Press Release, Equal Employment Opportunity Commission, Aerotek Required by Federal Appeals Court to Comply with EEOC Subpoena (Jan. 13, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-16-13.cfm>.

⁸⁶ *Id.*

⁸⁷ *Id.*

Throughout FY 2013, the EEOC continued to use the ruling in *EEOC v. Aerotek* as a “stick” to persuade employers to comply with its administrative subpoena. For example, at the 2013 Chicago technical assistance seminar held on August 7 and 8, 2013, which Seyfarth attended, John Hendrickson, Regional Attorney for the EEOC’s Chicago District Office, cited the *Aerotek* win as one of the “Top 9” significant decisions from the EEOC’s perspective. Mr. Hendrickson, advised seminar attendees, which included human resources representatives and employers, to focus their resources on running their businesses rather than entangling with the Commission.

On the last day of the fiscal year, however, the EEOC received a stern reminder that although its subpoena authority is broad, it is not without limits.⁸⁸ On September 30, 2013, in *EEOC v. HomeNurse, Inc.*, Magistrate Judge Walter E. Johnson issued a scathing 37-page opinion chastising the EEOC for employing unreasonable and bad faith tactics used in connection with subpoenas to a small business.⁸⁹

In *HomeNurse*, the EEOC’s investigation related to a single-claimant charge alleging discrimination and retaliation based on a number of protected categories.⁹⁰ Instead of seeking information by way of requests for information, the EEOC launched its charge investigation by “conducting a raid on [the employer’s] office ‘as if it were the FBI executing criminal search warrant.’”⁹¹ Without any notice to the employer, the EEOC allegedly showed up unannounced, intimidated the employer’s staff and allegedly confiscated certain documents from the employer’s confidential personnel and patient files.⁹²

Over the next year and a half, the EEOC continued to pursue tactics that the court held “constitute[d] a misuse of [the EEOC’s] authority” including: “failure to follow its own regulations ... foot-dragging ... errors in communication which caused unnecessary expense for [the subpoenaed employer] ... and its dogged pursuit of an investigation where it had no aggrieved party.”⁹³ Given the EEOC’s arguably heavy-handed tactics, the court felt it was its duty to “stand as a bulwark” to protect the “nation’s citizens” from “powerful government agencies” intent on “running roughshod over their rights.”⁹⁴ Finding a gross overstepping and misuse of authority, the court quashed the EEOC’s subpoena and refused to order enforcement.⁹⁵

The polar opposite outcomes in *EEOC v. Aerotek* and *EEOC v. HomeNurse* offer important lessons for employers dealing with the EEOC. The *EEOC v. Aerotek* decision

⁸⁸ See Christopher DeGross and Reema Kapur, *Office Crashers: Another Court Reigns In EEOC Subpoena Authority Run Amok*, THE WORKPLACE CLASS ACTION BLOG (Oct. 3, 2013), available at <http://www.workplaceclassaction.com/2013/10/office-crashers-another-court-reigns-in-eEOC-subpoena-authority-run-amok/>.

⁸⁹ 2013 U.S. Dist. LEXIS 147686, at *43.

⁹⁰ *Id.* at *1-3.

⁹¹ *Id.* at *3.

⁹² 2013 U.S. Dist. LEXIS 147686, at *3.

⁹³ *Id.* at *44.

⁹⁴ *Id.* at *45.

⁹⁵ *Id.*

reinforces that employers responding to administrative requests for information must be cognizant of the scope and breadth of the EEOC's subpoena powers, and aware of courts' deference to the Commission's investigatory authority. However, employers are wise to take the EEOC's "friendly" advice regarding rote compliance with its requests for information with a grain of salt. The EEOC can and will use requests for information and subpoenas to fish for information to support expanding a single-claimant, discrete investigation to a systemic, wide ranging investigation as it tries to meet its annual quota (discussed above). Indeed, employers must walk a fine line between producing information and data which may be relevant to the EEOC's charge and objecting to requests for information and data which is both burdensome and irrelevant.

The *EEOC v. HomeNurse* decision is instructive not only regarding courts' impatience with the EEOC's heavy-handed tactics and misuse of its subpoena powers, it is a good checklist for winning tactics for employers. It also is a reminder to employers that federal courts are an important check on federal agencies, including the EEOC.

In essence, the *EEOC v. Aerotek* and *EEOC v. HomeNurse* opinions provide employers with goal posts delineating the scope of the EEOC's subpoena authority -- if the EEOC shoots for the space in the middle of these two posts, it is likely to score big with its subpoena enforcement actions. However, employers can take comfort that if the EEOC misuses or abuses its subpoena powers, courts will not hesitate to call a penalty and hand the EEOC a red card.

6. Novel Theories - Expanding Coverage Of Existing Laws

a. Human Trafficking In The EEOC's Crosshairs

According to the EEOC, employment discrimination laws are the "new frontier" in the war against human labor trafficking.⁹⁶ The EEOC's position is not without controversy because Congress has limited the EEOC's authority to enforce particular statutes. As an end-run to this limitation, the EEOC has pushed courts to analyze human trafficking as Title VII race or national origin discrimination claims. It has argued that "[a]nti-discrimination laws – particularly those prohibiting race and national origin discrimination as well as sexual harassment – are an integral part of the national fight against human labor trafficking."⁹⁷

The term "human trafficking" encompasses "labor" and "sex" trafficking. Federal law defines sex and labor trafficking respectively as "the recruitment, harboring, transportation, provision, or obtaining of a person" for either "the purposes of commercial sex act" or "for labor or services" which is induced or obtained "through the use of force, fraud, or coercion." Although conceptually distinct, the line between the two often blurs.

⁹⁶ See Press Release, U.S. Equal Employment Opportunity Commission, Employment Discrimination Laws 'New Frontier' In War Against Human Labor Trafficking (Jan. 19, 2011), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/1-19-11.cfm>.

⁹⁷ See *id.*

According to the Justice Department's Bureau of Justice Statistics, 14% of human trafficking incidents between 2008 and 2010 fell into the latter group of labor trafficking, with 82% deemed as sex trafficking. While sex trafficking most commonly occurs in the context of brothels, "hostess" clubs, and other sex industry settings, labor trafficking can be more varied.⁹⁸

Anti-trafficking laws exist at the federal level and in all 50 states as well as the District of Columbia. Traditional methods of counteracting human trafficking have largely focused on criminal prosecution and targeting organized crime.

Recently, the Obama Administration has made a concerted effort to raise awareness of human trafficking. In conjunction with public awareness campaigns, the White House has overseen a push across many federal agencies to tackle human trafficking from all angles. Among other things, this initiative has included the proposed adoption of rules to prevent the use of forced labor in conjunction with government contracts and creation of the National Human Trafficking Resource Center (NHTRC).⁹⁹ While the NHTRC is not a law enforcement or immigration agency, it may forward tips it receives to local, state, and/or federal law enforcement authorities if deemed appropriate.¹⁰⁰

The EEOC signaled its focus on human trafficking and forced labor as early as January 19, 2011 when, at a public hearing, it held a panel on the topic.¹⁰¹ In spring 2011, the EEOC flexed its litigation muscles when it filed lawsuits against two employers purportedly on behalf of hundreds of workers. In both lawsuits, the EEOC alleged that the employers had engaged in race and national origin discrimination when they trafficked foreign workers into the United States. In the first, the EEOC sued a marine services company alleging that it had subjected a class of approximately 500 Indian employees to human labor trafficking and a hostile work environment. In the second case, the EEOC sued a manpower agency alleging that it engaged in a pattern or practice of national origin and race discrimination, harassment, and retaliation, when it trafficked over 200 Thai male victims to agricultural farms in the U.S. Finally, the most current version of the EEOC's SEP, identifies "Protecting Immigrant, Migrant and Other Vulnerable Workers" as a national priority.¹⁰² Under this priority, the EEOC has vowed to "target disparate pay, job segregation, harassment, trafficking and discriminatory

⁹⁸ See, e.g., U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 233732, SPECIAL REPORT: CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 (2011), available at <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>.

⁹⁹ Federal Acquisition Regulation; Ending Trafficking in Persons; Extension of Time for Comments, 78 Fed. Reg. 69812 (proposed Nov. 21, 2013) (to be codified at 48 C.F.R. pts. 1, 2, 9, 22, and 52), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-21/pdf/2013-27878.pdf>.

¹⁰⁰ U.S. DEPT. OF HEALTH & HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT, FACT SHEET: NATIONAL HUMAN TRAFFICKING RESOURCE CENTER (2012), available at <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-national-human-trafficking-resource-center>.

¹⁰¹ See Meeting of Jan. 19, 2011, U.S. Equal Employment Opportunity Commission, Human Trafficking and Forced Labor, meeting transcript available at <http://www1.eeoc.gov/eeoc/meetings/1-19-11/>.

¹⁰² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FOR FISCAL YEARS 2012-2016, available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.”¹⁰³

Further, the FY 2013 PAR highlights the Commission’s strategic partnerships with other governmental and non-governmental organizations to address human trafficking. For example, the Commission is actively involved with the President’s Interagency Task Force to Monitor and Combat Human Trafficking (“PITF”), and the Senior Policy Operating Group (“SPOG”). Further, during FY 2013, the EEOC worked on developing the new Federal Strategic Action Plan on Services for Victims of Human Trafficking, which is designed to improve coordination of these services across the federal government. The EEOC also provided testimony at two hearings of the Inter-American Commission on Human Rights, one on human trafficking in the United States and the other on the rights of migrant farm workers. Finally, Mr. Lopez represented the Commission at the May 2013 annual meeting of the PITF.

Although human exploitation should not be tolerated, the EEOC is not well-equipped to lead the charge. The plain language of Title VII prohibits discrimination based on race, color, religion, national origin, or sex. The EEOC’s assertion that Title VII covers “human trafficking” is in fact a novel extension of Title VII, well beyond statutory language and the EEOC’s enforcement authority as defined by Congress. Because the EEOC can only bring suit under its specified statutory authority, human trafficking claims must be shoehorned into one of Title VII’s protected categories.

To do this, the EEOC must draw unsupported inferences to tie human trafficking allegations to discrimination on the basis of race, sex or national origin. This forces the EEOC to litigate human trafficking by proxy — it must convince a court that individuals targeted for their economic vulnerability are necessarily targeted for their national origin, race, or sex. Although the two often coincide, a correlation is not automatic and making this connection in each instance dilutes the force of the EEOC’s arguments. In sum, the unintended consequence of the EEOC’s tactics is to direct the parties’ and courts’ attention away from human trafficking to address whether the facts support a claim for discrimination under a recognized protected category.

In addition to lacking a legal mandate to pursue human trafficking cases, the EEOC also lacks the resources. The EEOC admits that it is a cash-strapped organization. For example, in a September 23, 2013 open letter, P. David Lopez, EEOC General Counsel, acknowledges that the EEOC only brings suit in less than 1% of cases.¹⁰⁴ Furthermore, the continued efficacy of the agency – as cautioned by the union representing EEOC employees – has been repeatedly called into question in the face of

¹⁰³ *Id.*

¹⁰⁴ See Letter from P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission, to Wall Street Journal (Sept. 22, 2013), *available at* <http://online.wsj.com/news/articles/SB10001424127887323808204579085193112065508>.

continuing budget cuts.¹⁰⁵ The EEOC, employers and workers are better served if the EEOC focuses its resources on staying within its legal mandate.

b. EEOC Push For Protections Against Sexual Orientation Discrimination

Although gender identity and sexual orientation are not explicitly protected by Title VII, proposed legislation along with recent administrative and federal court decisions (which follow loosely on the heels of the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013)) signal a trend toward formal protection against this type of discrimination in the workplace.

On August 13, 2013, the EEOC Office of Federal Operations ("OFO") held that discrimination on the basis of perceived sexual orientation is covered under Title VII. The OFO concluded that "Title VII's prohibition on the basis of sex includes discrimination on the basis of 'gender' . . . [and] fail[ure] to conform to gender-based expectations."¹⁰⁶ The OFO decision connected offensive, anti-homosexual language with sex discrimination by noting that "the words 'f-g' and 'f—ot' are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying their belief that a male is not as masculine or as manly as they are."¹⁰⁷ That link rendered the comments illegal sex discrimination.

While the OFO's decision only provides protection to federal workers, in September 2013, the Fifth Circuit adopted a similar analysis of the gender stereotyping of a private employee in *EEOC v. Boh Brothers Construction Co. LLC*, 731 F.3d 444 (5th Cir. 2013).¹⁰⁸ An en banc majority of ten judges determined that an employee who was harassed because he was not considered "manly enough" had established a claim for sex-based harassment under Title VII finding that harassment based on gender-stereotypes can be actionable harassment "because of sex" under Title VII.¹⁰⁹

Although this issue seems ripe for further litigation, protecting employees from discrimination on the basis of sexual orientation and gender identity might not be just a

¹⁰⁵ See Christopher DeGroff and Gerald Maatman, Jr., *Budget Woes May Significantly Impact EEOC – But Should Employers Worry Too?*, WORKPLACE CLASS ACTION BLOG (Feb. 1, 2013), , available at <http://www.workplaceclassaction.com/2013/02/budget-woes-may-significantly-impact-eec-but-should-employers-worry-too/>.

¹⁰⁶ See Abigail Cahak and Erin Dougherty Foley, *ENDA the Line: Anticipating the Next Change to the Federal Law Landscape – Sexual Orientation and Gender Identity*, Employment Law Lookout (Oct. 15, 2013), available at <http://www.laborandemploymentlawcounsel.com/2013/10/from-waterhouse-to-windsor-anticipating-the-next-change-to-the-federal-law-landscape-sexual-orientation-and-gender-identity/>.

¹⁰⁷ *Id.*

¹⁰⁸ Dennis A. Clifford & Christopher J. DeGroff, "*Macho Man Discrimination*" – *The EEOC Scores Fifth Circuit Win In Gender-Stereotype Suit*, THE WORKPLACE CLASS ACTION BLOG (Oct. 3, 2013), available at <http://www.workplaceclassaction.com/2013/10/macho-man-discrimination-the-eec-scores-fifth-circuit-win-in-gender-stereotype-suit/>.

¹⁰⁹ *Id.*

semantic exercise much longer. Although somewhat more common at the state and local level,¹¹⁰ protection of sexual orientation and gender identity by the federal government has been unsuccessfully pursued for nearly two decades. In fact, the Employment Non-Discrimination Act has been introduced nearly every year since 1994.¹¹¹

In April 2013, ENDA was introduced in the U.S. Senate once more.¹¹² In November 2013, the Senate passed the bill and it was referred to the U.S. House of Representatives. The proposed law would formally prohibit employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity.

A recent letter to House Speaker John Boehner calls for broad bipartisan support for the bill.¹¹³ The December 3, 2013 letter -- signed by five Democrat and five Republican House members -- urges Speaker Boehner to bring the bill to a vote.¹¹⁴ It remains to be seen whether ENDA may meet more resistance in the GOP-dominated House. However, several aspects of the bill might give interested Republicans the necessary political traction to support the proposed law. For example, the bill would limit the law to disparate treatment claims, exempt religious organizations and the military, and prohibit the EEOC from requiring employers to collect statistics about relevant workforce demographics. Notably, ENDA has strong support from members of the EEOC, including Commissioner Feldblum, who helped draft the bill.¹¹⁵

Key takeaway for employers is that the EEOC favors protecting sexual orientation and gender identity in the workplace whether it is through an expansive reading of Title VII or in the form of new legislation. Employers should expect the EEOC to continue to look for opportunities to bring headline-grabbing charges or lawsuits challenging workplace policies or practices that conflict with the EEOC's broad reading of Title VII to include protection of sexual orientation and gender identity.

c. EEOC Focus On Veterans

To set the table for our discussion of veterans issues: according to the United States Department of Labor, in November 2013 the unemployment rate for veterans of the Gulf

¹¹⁰ *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN, available at http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf.

¹¹¹ *Employment Non-Discrimination Act: Legislative Timeline*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline> (last visited Dec. 19, 2013).

¹¹² *Bill Summary & Status - 113th Congress (2013-2014) - S.815 - Major Congressional Actions*, THE LIBRARY OF CONGRESS - THOMAS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN00815:@@R> (last visited Dec. 19, 2013).

¹¹³ See Jacqueline Klimas, *John Boehner faces bipartisan pressure to allow gay-rights vote*, WASH. TIMES, Dec. 4, 2013, available at <http://www.washingtontimes.com/news/2013/dec/4/john-boehner-faces-bipartisan-pressure-allow-gay-r/> (discussing the letter).

¹¹⁴ *Id.*

¹¹⁵ *Chai Feldblum, Commissioner*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at <http://www.eeoc.gov/eeoc/feldblum.cfm> (last visited Dec. 19, 2013).

War-era II was 9.9%¹¹⁶ — about three percentage points higher than the general population.¹¹⁷ According to the United States Department of Defense, in 2011 the median age for male veterans was 64 while the median age for female veterans was 49.¹¹⁸ These statistics reflect potential obstacles for veterans seeking employment.

This trend has not gone unnoticed. The Obama Administration has made addressing and improving veterans' employment issues a priority. Responding to that call, on November 16, 2011, the EEOC held a meeting to discuss barriers to employment for veterans.¹¹⁹ In February 2012, the EEOC issued additional guidance for both employers¹²⁰ and wounded veterans¹²¹ as to their rights under the ADA and the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

In FY 2013, the EEOC has continued its focus on the unique challenges veterans face when returning to civilian life. Indeed, between October 1, 2012 and June 30, 2013, the EEOC conducted 144 outreach events focused on veterans, that reportedly drew 15,751 individuals.¹²² The EEOC's efforts are ongoing and unlikely to end as more veterans reenter the workforce after serving in Iraq, Afghanistan, and other conflict areas.

USERRA, which is enforced by the U.S. Departments of Labor ("DOL") and Justice ("DOJ"), prohibits discrimination on the basis of active duty status or service obligations and protects the reemployment rights of individuals who leave civilian jobs for uniformed service. Although the EEOC does not directly enforce USERRA, its emphasis on USERRA education together with its ADA outreach is an example of the EEOC's stated objective to pursue interagency partnerships to maximize the use of its resources. Indeed, the FY 2013 Performance and Accountability Report ("PAR") highlights the Tri-

¹¹⁶ *Table A-5. Employment status of the civilian population 18 years and over by veteran status, period of service, and sex, not seasonally adjusted*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/empsit.t05.htm> (last modified Dec. 6, 2013).

¹¹⁷ *Table A-1. Employment status of the civilian population by sex and age*, BUREAU OF LABOR STATISTICS, available at http://www.bls.gov/news.release/empsit.t01.htm#cps_empsit_a01.f (last modified Dec. 6, 2013).

¹¹⁸ NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, PROFILE OF VETERANS: 2011, at 19 (March 2013), available at http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2011.pdf.

¹¹⁹ *EEOC Issues Revised Publications on Employment of Veterans with Disabilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 28, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-28-12.cfm>. Gulf War-era II are those who served anywhere in the world between September 2001 and the present.

¹²⁰ *Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm (last visited Dec. 19, 2013).

¹²¹ *Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/eeoc/publications/ada_veterans.cfm last visited Dec. 19, 2013).

¹²² SHARON E. DEBBAGE ALEXANDER, WOUNDED WARRIORS RETURNING TO WORK: WHAT EMPLOYERS NEED TO KNOW ABOUT THEIR RESPONSIBILITIES UNDER THE AMERICANS WITH DISABILITIES ACT, at slide 16 (2013) (on file with authors).

Agency (EEOC, DOJ, and DOL) Working Group as a significant interagency partnership.¹²³

Unlike USERRA, however, the ADA is directly enforced by the EEOC. Literature released by the EEOC in connection with its outreach highlights several service-related impairments that may be considered disabilities under the ADA, including: Traumatic Brain Injury, Post-traumatic Stress Disorder, hearing loss, major depression, spinal injuries and paralysis, burns, and amputations.¹²⁴ Further, the ADA prohibits discrimination or retaliation on the basis of a *perceived* disability. With regard to veterans, this can include a perception resulting from a disability rating made by the U.S. Department of Veterans Affairs (“VA”). Although the VA and ADA use different standards, the EEOC will likely argue that individuals qualified as disabled by the VA also meet the ADA standards as a result of the ADA Amendments Act of 2008.¹²⁵

Importantly, the EEOC has expressed concern that veterans may be unaware of their rights under the ADA and USERRA. Employers should take note because veterans as a group may fall squarely within one or more of the EEOC’s national enforcement priorities set out in its 2013-2016 Strategic Enforcement Plan, including protecting what it considers are “vulnerable populations” and eliminating barriers in recruitment and hiring. In light of the significant resources the EEOC devoted in FY 2013 to outreach events targeted at veterans, this is a likely area of continued interest in FY 2014.

7. Settlement Figures Reveal High-Value Targets

The EEOC is undoubtedly a metrics-driven agency, and the number of dollars the Commission secures through enforcement and litigation each year are perhaps the most significant number for the EEOC. Monetary recoveries are the focus of the majority of the EEOC’s press releases, and play prominently in every public communication. This is no surprise - monetary recoveries are the foundation of the

¹²³ FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 4 (2013), available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹²⁴ *Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm (last visited Dec. 19, 2013); *Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/eeoc/publications/ada_veterans.cfm.

¹²⁵ On May 15, 2013, the EEOC issued four revised publications related to protections against disability discrimination addressing changes to the definition of disability made by the ADA Amendments Act of 2008 (“ADAAA”), effective January 1, 2009. The ADAAA’s expanded definition of disability makes it easier for the EEOC and private plaintiffs’ counsel to assert that individuals with a wide range of impairments are protected by the ADA. Further, the EEOC focused its FY 2013 enforcement and litigation activity on “nontraditional” disabilities. See Courtney Bohl and Laura Maehtlen, *EEOC Issues Revised Guidance On The Rights of Employees With Cancer, Diabetes, And Intellectual Disabilities Under The ADA*, WORKPLACE CLASS ACTION BLOG (May 26, 2013), available at <http://www.workplaceclassaction.com/2013/05/eeoc-issues-revised-guidance-on-the-rights-of-employees-with-cancer-epilepsy-diabetes-and-intellectu/>.

agency's legitimacy and political viability, which in turn affects budget appropriations.¹²⁶ In the FY 2013 PAR, Chair Berrien highlighted the budgetary pressures facing the agency, noting "[t]he EEOC's accomplishments are especially noteworthy in light of extraordinary fiscal constraints and operational challenges in FY 2013"¹²⁷

Notwithstanding the EEOC's diminished budget and a pared-down workforce in FY 2013, the Commission reported a record high recovery of \$372.1 million in monetary benefits through its private sector administrative enforcement activities, \$160.9 million of which came from mediation resolutions.¹²⁸ This was a measurable increase over FY 2012 numbers when the EEOC recovered \$365.4 million in monetary benefits, which itself was a record-breaking year.¹²⁹ It would appear on the surface that the EEOC has achieved its goal of making "more with less" - but did it really? In the last year, we have seen a strong movement by the EEOC across the country to insist that parties to EEOC charges disclose the monetary terms of settlements to the agency. In some cases, the EEOC has refused to close its administrative file until it receives this information, even where the employer and the charging party have agreed to confidentiality. These tactics have pushed many employers to simply disclose these figures, and the EEOC, in turn, reports these settlements in its "win" column. Thus, the year-over-year monetary increases highlighted by the government may be more a function of data collection than actual increased effectiveness.¹³⁰

Apart from the bottom-line numbers, it is useful for employers to be aware of the types of issues and claims that the EEOC was able to leverage to early resolution via settlement. Not surprisingly, systemic litigation resulted in a number of significant, seven-figure settlements. For example, in *EEOC v. Carrols Corp.*,¹³¹ the EEOC alleged sexual harassment and retaliation claims against Carrols Corp. (the world's largest Burger King franchisee) on behalf of 89 women who were purportedly the target of harassment. But the merits of the EEOC's claims were never tested in court, as the action settled for \$2.5 million representing compensatory damages and lost wages.

¹²⁶ The EEOC's FY 2013 budget was \$370 million. On July 17, 2013, the House Appropriations Committee approved by voice vote a fiscal year 2013 appropriations bill that includes funding for the EEOC. Under the measure, the EEOC would be funded at \$355 million, a slight decrease. Michael Rose, *House Appropriations Committee Approves Amendment Targeting EEOC's ADEA Rule*, LABOR & EMPLOYMENT LAW RESOURCE CENTER (BNA) ISSN 2156-2849 (Jul. 17, 2013).

¹²⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 21, 2013) p. vi, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹²⁸ *Id.* at 28-29.

¹²⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 21, 2013) p. 27, available at http://www.eeoc.gov/eeoc/plan/upload/2012par_1.pdf.

¹³⁰ Christopher DeGroff, Reema Kapur, and Gerald L. Maatman, Jr., *Big Bang Or Fizzle? EEOC Internal Annual Report Reveals FY2013 Booms And Busts*, EEOC YEAR-END COUNTDOWN BLOG (Dec. 17, 2013), available at [http://www.eeoccountdown.com/2013/12/17/big-bang-or-fizzle-eeoc-internal-annual-report-reveals-fy2013-booms-and-busts/](http://www.eeocountdown.com/2013/12/17/big-bang-or-fizzle-eeoc-internal-annual-report-reveals-fy2013-booms-and-busts/).

¹³¹ Press Release, *Carrols Corp. To Pay \$2.5 Million to Settle EEOC Sexual Harassment and Retaliation Lawsuit*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 9, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-9-13.cfm>.

Similarly, the EEOC leveraged a \$1 million settlement in *EEOC v. Mantanio, Inc., et al.*¹³² where it alleged that a manager of IHOP restaurants subjected women to sexual harassment, including sexual comments, innuendo, and unwanted touching. In *EEOC v. Interstate Distributor Company*,¹³³ the EEOC secured nearly \$5 million in settlement based on allegations that trucking workers were being automatically terminated by Interstate for requesting leaves of absence greater than 12 weeks. Plus, in *EEOC v. Dillard's*,¹³⁴ EEOC claimed that Dillard's, a national retail chain, enforced a maximum-leave policy that limited the amount of medical leave an employee could take and failed to engage in the interactive process with the employees. The EEOC further alleged that Dillard's longstanding national policy and practice of requiring all employees to disclose personal and confidential medical information in order to be approved for medical leave violated ADA requirements. The action settled for \$2 million. Recent data confirms the EEOC's focus on disability discrimination, harassment, and retaliation, making these types of claims easy targets for the EEOC to bring headline-grabbing systemic lawsuits and leverage the threat of litigation costs and exposure to muscle early settlements. Specifically, as we discussed in a previous section, "maximum leave policies" and "100% return to work policies" are high-value targets for the EEOC. Further, sexual harassment and retaliation claims are also at the forefront of recent EEOC enforcement and litigation activity.¹³⁵ Given the exposure in connection with systemic lawsuits, companies can seldom afford to test the EEOC's allegations before a jury regardless of the merits.

The EEOC also recovered substantial amounts of money through its conciliation process. Of note, the EEOC reached a conciliation agreement where the employer agreed to provide a \$21.3 million to a purported class of over 200 African-Americans subjected to racial discrimination.¹³⁶ The EEOC alleged that the employer engaged in various discriminatory conduct including harassment, denial of promotions, and unfavorable job assignments. The conciliation agreement was the result of a systemic investigation prompted by 78 charges filed with the EEOC. All in all, over \$40 million

¹³² Press Release, *Owners of Albuquerque-Area IHOPs to Settle EEOC Sexual Harassment Suit for \$1 Million*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 13, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-13-12b.cfm>.

¹³³ Press Release, *Interstate Distributor Company to Pay Nearly \$5 Million to Settle EEOC Disability Suit*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 9, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm>.

¹³⁴ Press Release, *Dillard's to Pay \$2 Million to Settle Class Action Disability Discrimination Lawsuit by EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 18, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-18-12.cfm>.

¹³⁵ Christopher DeGroff and Gerald Maatman, Jr., *Rash of Significant Settlements Signals EEOC Means Business About Retaliation*, EEOC YEAR-END COUNTDOWN (Feb. 5, 2013), available at <http://www.eeocountdown.com/2013/02/05/rash-of-significant-settlements-signals-eeoc-means-business-about-retaliation/>; Gerald L. Maatman, Jr. and Christopher DeGroff, *EEOC Kicks Off 2013 Settling Sex Harassment And Retaliation Lawsuits*, EEOC YEAR-END COUNTDOWN (Feb. 10, 2013), available at <http://www.eeocountdown.com/2013/02/10/eeoc-kicks-off-2013-settling-sex-harassment-and-retaliation-lawsuits/>.

¹³⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 21, 2013) p. 32, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

was recovered through the EEOC's systemic investigative work and conciliation process.¹³⁷

These cases demonstrate that it is imperative for employers to be aware of the EEOC's enforcement and litigation trends and to review and revise their own policies and practices so that they are not the low-hanging fruit ripe for the next record-breaking settlement.

E. Trends In The EEOC's 2013 Enforcement Statistics

In recent years, the EEOC has consistently highlighted two key internal metrics: driving down backlog and reducing its charge inventory. In FY 2012, the EEOC reduced its pending charge inventory by 10%, setting a benchmark against which to measure FY 2013 performance.¹³⁸ The EEOC did not meet this benchmark this year - at the close of FY 2013, the EEOC pending charge inventory showed a modest increase of 469 charges.¹³⁹ In terms of charge receipts, in FY 2013 the EEOC received 93,727 charges, a 6,000 charge decrease from the prior three fiscal years.¹⁴⁰ The EEOC resolved 97,252 charges in FY 2013. Finally, the EEOC reported a 21-day drop in its average charge processing time, presently at 267 days.¹⁴¹

The EEOC gave itself high marks for securing \$372.1 million in monetary benefits based on the resolution of administrative charges, \$6.7 million more than recoveries in FY 2012. According to the EEOC's tally, this is the highest level of monetary relief ever obtained by the Commission through the administrative process.

As discussed in a previous section, the uptick in monetary recoveries may be driven, at least partially, by recent policy changes within the Commission requiring disclosure of the monetary terms of settlement agreements as a condition of approving settlement agreements. Thus, "record" recoveries could simply mean that the EEOC is now collecting more quality data regarding settlements.

F. The EEOC's Likely Focus Areas In 2014

1. The Conciliation Requirement In Flux - Mixed Messages From The Circuit Courts Of Appeal

If FY 2013 was an important year for the concept of conciliation for the EEOC, FY 2014 may be a game-changing one. On December 20, 2013, the Seventh Circuit gave the EEOC an early Christmas present when it held that an alleged failure to conciliate is not

¹³⁷ *Id.*

¹³⁸ FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 4 (2013), p. 3, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 4 (2013), p. 3, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

an affirmative defense to the merits of a discrimination claim. In doing so, the Seventh Circuit broke from the majority of the Circuit Courts of Appeal and gave new life to the EEOC's stalwart belief that it should police its own conciliation process -- a thought that is chilling to most employers. Because of the critical importance of the legal issues involved with this issue, we review the evolving case law regarding the EEOC's pre-suit conciliation requirement in detail here.

a. EEOC's Pre-Suit Conciliation Obligation

Each of the statutes that the EEOC is charged with enforcing requires that once the government finds reasonable cause to believe that a charge of discrimination is true, it must try to eliminate the "unlawful employment practice by informal methods of conference, conciliation, and persuasion."¹⁴² But if the EEOC is unable to secure from the employer "a conciliation agreement acceptable to" the EEOC, despite its good faith efforts, the EEOC may file suit against the employer.¹⁴³

b. Divided Legal Landscape

Although there is a circuit split regarding the applicable standard of review, as of the close of FY 2013, all appellate courts to rule on the issue had held that the EEOC's conciliation efforts are subject to at least some degree of judicial review. The Fourth, Sixth, and Tenth Circuits apply a deferential standard, declining to delve deeply into the substance of the EEOC's conciliation attempts.¹⁴⁴ The Second, Fifth, and Eleventh Circuits, on the other hand, apply a three-step test and heightened scrutiny to determine whether the EEOC has met its conciliation obligations.¹⁴⁵

c. EEOC's Newly Minted Theory And Playbook

Recently, however, the EEOC has taken a bold new stance, asserting in federal courts in Illinois, Arizona, and Texas that its conciliation efforts are not subject to judicial review at all, relying on complicated legal wranglings under the Administrative Procedures Act ("APA").

¹⁴² 42 U.S.C. § 2000e-5(b) (2010); see also 42 U.S.C. § 12117(a) (2010) (incorporating Title VII's enforcement mechanisms for ADA complaints).

¹⁴³ 42 U.S.C. § 2000e-5(f)(1) (2010); see also 29 U.S.C. § 626(b) (2010) ("Before instituting any action under [the Age Discrimination in Employment Act], the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion.").

¹⁴⁴ *EEOC v. Mach Mining, LLC*, No. 11-CV-879-JPG-PMF, 2013 WL 319337, at *2 (S.D. Ill. Jan. 28, 2013) (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)).

¹⁴⁵ *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1037 (D. Ariz. 2013) (citing *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2nd Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)).

For example, in *EEOC v. Swissport Fueling, Inc.*,¹⁴⁶ the EEOC sued Swissport on behalf of dozens of African employees—including 21 workers the EEOC did not identify prior to filing suit—alleging hostile work environment, failure to promote on the basis of race, retaliation, and constructive discharge.¹⁴⁷ Swissport moved for summary judgment on its affirmative defense that the EEOC failed to conciliate in good faith, and in response, the EEOC argued that its conciliation efforts are not reviewable under the APA. The EEOC relied on *Ward v. EEOC*,¹⁴⁸ in which the Ninth Circuit held that the agency’s internal processing and investigation of a charge is not reviewable under the APA.¹⁴⁹ The court distinguished *Ward*, however, because there, the agency had declined to sue; where the EEOC chooses to pursue litigation, on the other hand, its investigation, determination, and conciliation efforts become subject to judicial review because they are statutory pre-conditions to suit.¹⁵⁰ Rejecting the EEOC’s position outright, the court held, “[t]he Administrative Procedure Act does not bar this Court from determining as a matter of law whether the EEOC satisfied its statutory duties.”¹⁵¹

The EEOC mounted similar APA arguments in two district courts in Illinois and one district court in Texas. In *EEOC v. St. Alexius Medical Center*,¹⁵² the EEOC sued SAMC, claiming that it failed to accommodate the charging party’s disability and terminated her in violation of the ADA. After SAMC asserted as an affirmative defense that the disability claims were barred for failure to conciliate in good faith, the EEOC moved for judgment on the pleadings on that defense, arguing that *EEOC v. Caterpillar, Inc.*¹⁵³ barred judicial review of its conciliation efforts. In *EEOC v. Caterpillar*, the Seventh Circuit held that the EEOC’s finding of probable cause was not reviewable, relying on several cases holding that an agency’s decision whether to file a complaint or to find reasonable cause is not reviewable under the APA. In denying the EEOC’s motion, the court in *EEOC v. St. Alexius* emphasized that the holding in *EEOC v. Caterpillar* was limited to the probable-cause determination and did not address whether the EEOC’s conciliation efforts were judicially reviewable. The court specifically declined to “read [*EEOC v.*] *Caterpillar* as having implicitly disagreed with the consensus . . . that the EEOC’s pre-suit conciliation efforts are subject to at least *some* level of judicial review; when the Seventh Circuit departs from such a consensus, it does so explicitly.”¹⁵⁴ But then came *EEOC v. Mach Mining, LLC*.

¹⁴⁶ 916 F. Supp. 2d 1005 (D. Ariz. 2013).

¹⁴⁷ *Id.* at 1014.

¹⁴⁸ 719 F.2d 311 (9th Cir. 1983).

¹⁴⁹ *Id.* at 313-14.

¹⁵⁰ *Swissport*, 916 F. Supp. 2d at 1035-36.

¹⁵¹ *Id.* at 1036.

¹⁵² No. 12 C 7646, 2012 WL 6590625 (N.D. Ill. Dec. 18, 2012).

¹⁵³ 409 F.3d 831 (7th Cir. 2005).

¹⁵⁴ *St. Alexius*, 2012 WL 6590625, at *2.

d. A Positive Texas Case And Potentially Game-Changing Ruling From The Seventh Circuit

In *EEOC v. Mach Mining, LLC*,¹⁵⁵ the EEOC alleged that Mach Mining's hiring practices discriminated against women, claiming that Mach Mining has never hired a female worker for a mining-related position. The EEOC unsuccessfully moved for summary judgment on Mach Mining's failure to conciliate affirmative defense, again arguing that, under *Caterpillar*, its conciliation process was not subject to judicial review.¹⁵⁶ In rejecting the EEOC's argument, the district court expressly adopted the reasoning in *St. Alexius* holding that the consensus among courts is that the EEOC's pre-suit obligations are subject to at least some level of review.¹⁵⁷ The court also rejected the EEOC's argument that the holding in *EEOC v. Caterpillar* (that the pre-suit reasonable-cause determination is non-justiciable) is inconsistent with a holding that the conciliation process is reviewable, noting that the Fourth Circuit has held that the reasonable-cause determination is not reviewable but applies deferential review to the conciliation process.¹⁵⁸ In a footnote, the court pointed out that the EEOC had not offered any case law to support its argument that the APA was relevant to the court's decision.¹⁵⁹

Not accepting defeat, the EEOC moved for reconsideration or to certify the justiciability issue for appeal, this time adding an APA angle to its arguments.¹⁶⁰ The court quickly distinguished three of the four cases on which the EEOC relied, since none of them addressed conciliation, let alone whether conciliation efforts are reviewable.¹⁶¹ The district court found that the fourth case actually supported judicial review of conciliation. The Seventh Circuit specifically stated that "the EEOC must pursue conciliation," and the district court reasoned that "[w]ithout court review this statutory command is meaningless."¹⁶² However, the district court certified its order for appellate review. The Seventh Circuit was asked to decide whether federal courts may review the EEOC's conciliation efforts at all, and, if yes, to decide the appropriate standard of review.¹⁶³

Thus, at the close of FY 2013 (which wraps up in September 2013), the fate of the EEOC's APA argument was unknown. Two important decisions since that time have dramatically altered the landscape. First came *EEOC v. Bass Pro Outdoor World, LLC*, a Texas district court decision that rejected the EEOC's argument.¹⁶⁴ But in a shot

¹⁵⁵ No. 11-CV-879-JPG-PMF, 2013 WL 319337 (S.D. Ill. Jan. 28, 2013).

¹⁵⁶ *Id.* at *4.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *4 n.1.

¹⁶⁰ *EEOC v. Mach Mining, LLC*, No. 11-CV-879-JPC-PMF, 2013 WL 2177770, at *1-2 (S.D. Ill. May 20, 2013).

¹⁶¹ *Id.* at *2.

¹⁶² *Id.* (citing *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994)).

¹⁶³ *Mach Mining*, 2013 WL 2177770, at *6-7; see *In Re EEOC* (*EEOC v. Mach Mining, LLC*), No. 13-8012 (June 28, 2013).

¹⁶⁴ Christopher J. DeGroff and Julie G. Yap, *It's Not Just A Speed Bump: The EEOC Loses Another Battle In Its War On The Mandatory Conciliation Process*, WORKPLACE CLASS ACTION BLOG (Oct. 9, 2013),

thrown up after the buzzer had sounded, the EEOC received a gift in the *EEOC v. Mach Mining* case, with the Seventh Circuit accepting the government's argument that nobody - including the courts - can look over its shoulder in the conciliation process.¹⁶⁵ Though other appellate courts have considered whether the EEOC's conciliation efforts are subject to judicial review, the Seventh Circuit is the first to address the EEOC's argument that its conciliation efforts are not reviewable under the APA. The *Bass Pro / Mach Mining* schism highlights an important area of conflict between the Circuits that may land this issue before the Supreme Court.

By way of recap, in *EEOC v. Bass Pro Outdoor World, LLC*,¹⁶⁶ the EEOC alleged that Bass Pro and Tracker Marine, LLC failed to hire African-American and Hispanic applicants because of their race and national origin, respectively, in violation of Title VII. The EEOC moved for partial summary judgment on whether it satisfied its obligation to engage in pre-suit conciliation.¹⁶⁷ The district court in Texas summarily rejected the EEOC's arguments that its conciliation efforts are not reviewable under the APA or the principle of separation of powers and held as a matter of law that the EEOC's conciliation efforts are subject to judicial review.¹⁶⁸

The court noted that the APA creates a cause of action for a private individual who believes he has suffered wrong as a result of agency action; it is not relevant where, as in *Bass Pro*, the agency has filed the lawsuit.¹⁶⁹ It held it need not "consider whether there exists a final agency action or whether conciliation is committed to agency discretion by law," because those questions apply only to suits filed under the APA, not to cases filed by an agency under another statute.¹⁷⁰ The court also rejected the EEOC's argument that its sovereign immunity precludes the court from granting defendants relief, such as dismissal or a stay: "[i]t would make little sense for Congress to impose certain conditions precedent on the EEOC's authority to bring suit if the EEOC could just turn around and claim sovereign immunity from judicial enforcement of that condition."¹⁷¹

The Seventh Circuit reached the opposite conclusion. In deciding whether to allow the "failure to conciliate" defense to stand, the Seventh Circuit considered: (1) the language

available at <http://www.workplaceclassaction.com/2013/10/its-not-just-a-speed-bump-the-eeoc-loses-another-battle-in-its-war-on-the-mandatory-conciliation-process/>.

¹⁶⁵ Christopher DeGroff, Gerald L. Maatman, Jr., & Howard M. Wexler, *Seventh Circuit Gives Employers A Lump of Coal And Says Bye-Bye To Failure To Conciliate Defense*, WORKPLACE CLASS ACTION BLOG (Dec. 21, 2013), available at <http://www.workplaceclassaction.com/2013/12/seventh-circuit-gives-employers-a-lump-of-coal-and-says-bye-bye-to-failure-to-conciliate-defense/>.

¹⁶⁶ Christopher J. DeGroff and Julie G. Yap, *It's Not Just A Speed Bump: The EEOC Loses Another Battle In Its War On The Mandatory Conciliation Process*, WORKPLACE CLASS ACTION BLOG (Oct. 9, 2013), available at <http://www.workplaceclassaction.com/2013/10/its-not-just-a-speed-bump-the-eeoc-loses-another-battle-in-its-war-on-the-mandatory-conciliation-process/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

of Title VII; (2) whether there is a workable standard for such a defense; (3) whether the defense might fit into the broader statutory scheme set forth by Congress in Title VII; (4) the Court's prior decisions; and (5) the decisions from other courts recognizing the "failure to conciliate defense" as appropriate.¹⁷²

In rejecting the "failure to conciliate" defense, the Seventh Circuit held that "Title VII contains no express provisions" for this defense and, in support of the EEOC's position, makes clear that "conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the process is to remain confidential."¹⁷³ The Seventh Circuit also held that cutting against the "failure to conciliate" defense is the fact that no workable standard of review exists by which District Courts can meaningfully judge whether the EEOC conciliated in good faith.¹⁷⁴ Specifically, the Seventh Circuit held that "[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers – not to mention using confidential and inadmissible materials as evidence – unless its review were so cursory as to be meaningless."¹⁷⁵

In terms of the statutory scheme of Title VII, the Seventh Circuit held that the "failure to conciliate" defense does not comport with Congress' intent since, "offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute."¹⁷⁶ Similarly, the Seventh Circuit determined that "if an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly – whatever that might mean – the employer's incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle."¹⁷⁷ In rejecting the argument advanced by the employer and numerous *amici* supporting the "failure to conciliate" defense, and the fact that Congress intended for courts to watch over the EEOC to ensure that they comply with their pre-suit obligation, the Seventh Circuit opined that "[we] are not persuaded . . . that EEOC field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court."¹⁷⁸

Finally, after noting that District Courts within the Seventh Circuit have exhibited "consistent skepticism toward employer's efforts to change the focus from their own conduct to the agency's pre-suit actions," it turned to case law from other circuits and

¹⁷² Christopher DeGross, Gerald L. Maatman, Jr., & Howard M. Wexler, *Seventh Circuit Gives Employers A Lump of Coal And Says Bye-Bye To Failure To Conciliate Defense*, WORKPLACE CLASS ACTION BLOG (Dec. 21, 2013), available at <http://www.workplaceclassaction.com/2013/12/seventh-circuit-gives-employers-a-lump-of-coal-and-says-bye-bye-to-failure-to-conciliate-defense/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

noted that “our decision makes us [the Seventh Circuit] the first circuit to reject explicitly the implied affirmative defense of failure to conciliate.”¹⁷⁹ The Seventh Circuit then noted that its decision “may complicate an existing circuit split more than it creates one. . . .”¹⁸⁰ The Seventh Circuit declined to follow the “three part inquiry” that the Second, Fifth, and Eleventh Circuits use to evaluate conciliation as well as the “minimal level of good faith” inquiry engaged in by the Fourth, Sixth, and Tenth Circuits to evaluate the EEOC’s pre-suit conciliation obligation, and held that “while we respect the views of our colleagues in these circuits, we also recognize our duty to decide our cases independently and to disagree when we must.”¹⁸¹

The Seventh Circuit concluded its decision by reiterating that going forward it will not review the EEOC’s pre-suit obligations because, “if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, our review of those procedures is satisfied.”¹⁸²

e. Re-Match In FY 2014?

In 2013, the EEOC pressed its view that the courts do not have any authority to review how it conducts the conciliation process in a very public way. Commissioner Feldblum advanced this newly-minted theory in a panel discussion at the 2013 National ABA EEO conference.¹⁸³ According to Commissioner Feldblum, the question of what is a quality investigation should not be dictated by courts. She said that the EEOC is already, on its own, examining its conciliation process and courts should not intrude on this function. The EEOC’s position is that as long as it has engaged in good faith conciliation, that is enough. According to the EEOC, there is no room for further judicial review of its investigation process.

Now, the Seventh Circuit has, in effect, condoned the EEOC’s “shoot first, aim later” litigation tactics that we have reported on previously. In doing so, the Seventh Circuit side-stepped the serious concerns revised by other courts (e.g., *EEOC v. CRST*, *EEOC v. Bloomberg* and *EEOC v. Peoplemark*). Employers in the Seventh Circuit are arguably left without any meaningful recourse to determine whether the EEOC’s conciliation efforts were made in good faith and the “failure to conciliate” defense is no more.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Christopher DeGross, Matthew Gagnon, & Reema Kapur, *Saying Goodbye To The Failure To Conciliate Defense – Seventh Circuit Set To Decide Whether Courts Have Any Power To Review EEOC Conciliations*, THE WORKPLACE CLASS ACTION BLOG (May 28, 2013), available at <http://www.workplaceclassaction.com/2013/05/saying-good-bye-to-the-failure-to-conciliate-defense-seventh-circuit-set-to-decide-whether-courts/>.

However, in light of the *EEOC v. Bass Pro* decision that expressly rejected the EEOC's (and now Seventh Circuit's) position that its conciliation efforts are not subject to judicial review by application of the APA, we expect that it is only a matter of time before the Supreme Court accepts a *certiorari* petition and weighs in on the availability of the "failure to conciliate" defense. In the meantime, all employers – not just those in the Seventh Circuit – should expect the EEOC to enter 2014 asserting its position vigorously in light of this decision and to continue to advance the argument that its conciliation efforts are not subject to judicial review.

f. Implications

If the courts do not police conciliation, who will? The EEOC claims that it should police its own efforts. Ironically, at the same time as it has made this argument, the EEOC has dragged its heels on moving ahead with the a Quality Control Plan ("QCP") – the very Plan that was dedicated, at least in part, to ensuring that the EEOC conducted quality conciliations. To date, the EEOC has failed to develop a meaningful QCP and has delayed a Commission vote on the draft QCP until FY 2014. Further, after the Commission votes (and presumably approves) the draft QCP, FY 2014 will serve as a baseline year. Specifically, in FY 2014, the EEOC will apply QCP criteria to a "statistically significant sample of investigations and conciliations" to develop projected targets for improved quality standards. Thus, according to the Commission, it will not "measure" the quality of its investigations or conciliations until FYs 2015 and 2016.

The *EEOC v. Mach Mining* decision shifts the power dynamic for employers within, and potentially even outside, the Seventh Circuit entering the conciliation process with the EEOC. Employers suffer specific and often dramatic reputational harm the instant the EEOC files suit. If the EEOC's position wins the day, then it will be able to use this as a cudgel to force its will on employers. And, employers will be left without any recourse to judicial oversight to determine whether the EEOC's conciliation efforts were made in good faith.

2. Edge-Of-The-Envelope Investigatory Techniques

At times, the EEOC is challenged by the reality that it is difficult for it to find the "victims" it claims to represent. In its zealous attempts to identify claimants, the EEOC has in previous years resorted to radio advertising, public "outreach" events, and social media. In FY 2013, however, the EEOC took its trolling for claimants to a new level - by sending a blast email to employees at their business addresses without warning their employer in an effort to drum up claimants for an age bias pattern or practice lawsuit.¹⁸⁴

¹⁸⁴ See Christopher DeGross, *Update on CNH v. EEOC - Can The EEOC Troll For Plaintiffs By Sending A Blast Email to Business Email Addresses?*, WORKPLACE CLASS ACTION BLOG (Sept. 10, 2013), available at <http://www.workplaceclassaction.com/2013/09/update-on-cnh-v-eecoc-can-the-eeoc-troll-for-plaintiffs-by-sending-a-blast-email-to-business-email-addresses/>

On August 1, 2013, Case New Holland, Inc. and CNH America LLC, launched precedent-setting federal court litigation against the EEOC and one of its Investigators from the Philadelphia District Office (collectively “EEOC”) conducting an age discrimination investigation against the CNH plaintiffs. The lawsuit was filed by Seyfarth Shaw in the U.S. District Court for the District of Columbia. It was assigned to District Judge Reggie Walton.¹⁸⁵

The CNH complaint alleges that the EEOC violated the APA and the Fourth and Fifth Amendments to the U.S. Constitution by sending a blast e-mail to the CNH e-mail addresses of 1,169 current employees, including managers, for the purpose of trolling for “alleged victims of discrimination,” without prior notice to CNH and without any finding that CNH had violated the Age Discrimination in Employment Act (“ADEA”). The blast email asked recipients to respond to a vague questionnaire. The questionnaire followed CNH’s production of over 600 MB of data in response to the EEOC’s request for all HRIS information regarding over 10,000 employees, and one and a half years of no activity by the EEOC. At issue in the litigation is whether the EEOC has overreached by sending out a blast e-mail to business addresses, thus bypassing the employer, as part of its investigation of an ADEA charge. The EEOC has moved to dismiss the complaint.

The EEOC’s latest tactics have understandably captured the interest of the business community. The National Association of Manufacturers has asserted in legal papers that the EEOC’s tactic ran afoul of the Fifth Amendment’s takings clause. Recently, the EEOC filed papers downplaying this unprecedented move by minimizing the effects of its actions. It told the court that it “merely sent a brief electronic survey to certain employees.”¹⁸⁶ According to the EEOC, even if the blast email “resulted in a brief interruption...such an interruption resulting from a federal investigation pursuant to statutory authority is envisioned by the ADEA” and does not warrant compensation.¹⁸⁷ The EEOC argues that the blast email was within its investigatory power to communicate with employees and challenged the employer’s ability to show harm.

The EEOC has been historically criticized for not identifying victims early in its litigation, and the strategy behind the blast e-mail may have been a misguided effort to address these criticisms. It remains to be seen how the EEOC’s arguments will fare in court. In the interim, employers should watch out for similar envelope-pushing tactics.

3. Substantive Predictions

a. Continued Focus On ADA

As discussed above, under the SEP ADA enforcement and litigation continues to overshadow other bases of discrimination. We predict that the trends explored above will continue unabated in FY 2014.

¹⁸⁵ *Id.*

¹⁸⁶ EEOC Rips NAM’s 5th Amendment Claim In Blast E-Mail Row, Employment Law 360.

¹⁸⁷ *Id.*

b. Hiring And Recruitment - Disparate Impact Theory

The EEOC views itself as uniquely qualified to handle claims regarding hiring discrimination. Specifically, the SEP expressly provides that because these claims “raise challenging and complicated issues affecting all of the protected classes...the EEOC is better situated than the private bar to address given its investigatory authority and access to data.”¹⁸⁸

One hiring theory the EEOC has aggressively pursued in recent years is its attack on using background checks in the hiring process. FY 2013 was particularly significant in terms of the EEOC bringing disparate impact claims pursuant to Title VII related to employers’ use of neutral background screening tools in connection with hiring and recruitment. First, two separate courts dismissed the EEOC’s lawsuits “showcasing” its disparate impact theories.¹⁸⁹ Second, notwithstanding these setbacks, the Commission filed two additional lawsuits alleging the same theory.¹⁹⁰

The rationale behind these suits is rooted in the EEOC’s April 25, 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII.¹⁹¹ The Guidance starts from the premise that “national data support a finding that criminal record exclusions have a disparate impact” and stems from the EEOC’s E-RACE (Eradicating Racism and Colorism in Employment) Initiative.¹⁹² The Guidance also cites studies finding that criminal records are often incomplete and inaccurate. The Guidance states that “Title VII does not necessarily require individualized assessment [of the circumstances surrounding a criminal conviction] in all circumstances [in connection with the hiring decision]” but suggests that employers may be challenged by the EEOC if they do not do so.¹⁹³ Although the

¹⁸⁸ See U.S. Equal Employment Opportunity Commission, Fiscal Year 2013 Performance and Accountability Report, p. 8-9, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

¹⁸⁹ See Gerald L. Maatman, Jr., Pamela Q. Devata, and Howard M. Wexler, *Court Dismisses EEOC’s Background Check Lawsuit Based On Its Reliance On “Laughable” And “Unreliable” Expert Report Filled Of “Errors and Analytical Fallacies”*, EEOC YEAR-END COUNTDOWN (Aug. 9, 2013), available at <http://www.eeocountdown.com/2013/08/09/court-dismisses-eeocs-background-check-lawsuit-based-on-its-reliance-on-laughable-and-unreliable-expert-report-filled-of-errors-and-analytical-fal-2/>; Pamela Q. Devata, Gerald L. Maatman, Jennifer A. Riley, and David J. Rowland, *EEOC Cannot Prove Disparate Impact Claim As Court Throws Cold Water On Its “Race-Rating” Theory*, WORKPLACE CLASS ACTION BLOG (Jan. 31, 2013), available at <http://www.workplaceclassaction.com/2013/01/eeoc-cannot-prove-disparate-impact-claim-as-court-throws-cold-water-on-its-race-rating-theory/>.

¹⁹⁰ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Suit Against Two Background Employers for Use of Criminal Background Checks (June 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

¹⁹¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE, No. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

¹⁹² The E-RACE Initiative, EEOC, available at <http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm>.

¹⁹³ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE, No. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT

Guidance is not law, the EEOC is hoping to legitimize and codify its views by way of lawsuits alleging disparate impact claims based on the use of background screening tools.

The basic framework of a disparate impact claim under Title VII involves three steps. First, the EEOC must demonstrate through statistical evidence that a neutral criminal background check policy disproportionately affects a protected class.¹⁹⁴ In the *EEOC v. Kaplan* and *EEOC v. Freeman* cases, discussed more fully below, the EEOC failed at the outset because its statistical evidence was faulty. Second, if the EEOC meets its burden, an employer must prove that screening for applicants' criminal histories is job-related and consistent with business necessity.¹⁹⁵ Third, the EEOC still can succeed if it shows that the employer refuses to adopt an available alternative that serves the employer's legitimate needs but has a lesser disproportionate effect on a protected class.¹⁹⁶

EEOC v. Freeman involved a nationwide pattern or practice lawsuit brought by the EEOC alleging that Freeman, Inc., a service provider for corporate events, unlawfully relied on credit and criminal background checks that caused a disparate impact against African-American, Hispanic, and male job applicants.¹⁹⁷ On August 9, 2013, district court dismissed the EEOC claims and granted summary judgment in favor of Freeman.¹⁹⁸ The EEOC's case hinged on its ability to demonstrate through statistical evidence that Freeman's use of credit and criminal background checks had a disproportionate impact on protected classes.¹⁹⁹ However, the court held that the EEOC's statistical analysis was so full of errors that it had no choice but to completely disregard the EEOC's expert report.²⁰⁰ Without an expert, the EEOC had no statistical proof of disparate impact and the court dismissed the case.²⁰¹

The *EEOC v. Freeman* opinion is interesting, in particular, because in deciding the case the Judge defended employers' use of screening tools and questioned the logic behind the EEOC's challenge to facially neutral background screening practices. In particular, the opinion provides:

DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) p. 14, available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

¹⁹⁴ *EEOC v. Freeman*, No. 8:09-cv-2573, at 11 (D. Md. Aug. 8, 2013), available at <http://www.workplaceclassaction.com/files/2013/08/2013-08-09-Memorandum-Opinion-c.pdf>.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

¹⁹⁷ See Gerald L. Maatman, Jr., Pamela Q. Devata, and Howard M. Wexler, *Court Dismisses EEOC's Background Check Lawsuit Based On Its Reliance On "Laughable" And "Unreliable" Expert Report Filled Of "Errors and Analytical Fallacies"*, EEOC YEAR-END COUNTDOWN (Aug. 9, 2013), available at <http://www.eeocountdown.com/2013/08/09/court-dismisses-eeocs-background-check-lawsuit-based-on-its-reliance-on-laughable-and-unreliable-expert-report-filled-of-errors-and-analytical-fal-2/>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

“Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States.”²⁰²

As to the EEOC’s theory that use of criminal background checks has a disparate impact on minorities, the opinion states:

“Because of the higher rate of incarceration of African-Americans than Caucasians, indiscriminate use of criminal history information might have the predictable result of excluding African-Americans at a higher rate than Caucasian. However, this is simply not the case.”²⁰³

Similarly, in *EEOC v. Kaplan Higher Education Corp.*,²⁰⁴ the EEOC sued Kaplan claiming that its use of credit as a hiring criterion had a disparate impact on African-American applicants. On January 28, 2013, district court granted summary judgment to the defense and dismissed the EEOC’s first lawsuit challenging the use of credit reports in the hiring process on the grounds that such a screen adversely impacts African-Americans.²⁰⁵ The court excluded EEOC’s expert reports and testimony of its expert as inadmissible because the EEOC failed to show that the expert’s methodology was reliable.²⁰⁶ Further, the court tossed the EEOC’s entire case because without expert testimony, the EEOC could not prove its disparate impact theory.

The dismissal of the EEOC’s claims by the courts in *EEOC v. Freeman* and *EEOC v. Kaplan* were crippling but not fatal blows to the EEOC’s Title VII disparate impact theories. Significantly, in both cases the courts did not reach the merits of the EEOC’s claims; rather, the courts held that the methodology the EEOC chose to prove its claims was flawed. Undeterred by the recent losses, the EEOC filed a pair of high profile lawsuits in June 2013 and is appealing the decision in the *EEOC v. Kaplan* case.²⁰⁷

In addition to its losses in court, state officials have fired back at the EEOC for its disparate impact theory. For example, after EEOC filed lawsuits against BMW and Dollar General, the chief legal officers representing the states of Alabama, Colorado,

²⁰² *EEOC v. Freeman*, No. 8:09-cv-2573, at 2 (D. Md. Aug. 8, 2013), available at

<http://www.workplaceclassaction.com/files/2013/08/2013-08-09-Memorandum-Opinion-c.pdf>.

²⁰³ Pamela Q. Devata, Gerald L. Maatman, Jennifer A. Riley, and David J. Rowland, *EEOC Cannot Prove Disparate Impact Claim As Court Throws Cold Water On Its “Race-Rating” Theory*, WORKPLACE CLASS ACTION BLOG (Jan. 31, 2013), available at <http://www.workplaceclassaction.com/2013/01/eeoc-cannot-prove-disparate-impact-claim-as-court-throws-cold-water-on-its-race-rating-theory/>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Abigail Rubenstein, *6th Circ. Urged Not To Reinstate EEOC Credit Check Suit*, LAW 360 (Oct. 16, 2013, 3:16 PM), available at <http://www.law360.com/articles/480726/6th-circ-urged-not-to-reinstate-eeoc-credit-check-suit>.

Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia sent a joint letter to the five commissioners of the Equal Employment Opportunity Commission (“EEOC”) blasting its position that “employers’ use of bright-line criminal background checks in the hiring process violates Title VII...”²⁰⁸ Their criticism fell into three categories. First, the EEOC’s Guidance and recent lawsuits are not grounded in existing law and EEOC is trying to expand Title VII protection to former criminals.²⁰⁹ The letter points out that the EEOC’s Guidance does not reflect an obligation codified in any employment discrimination statute and to date, no court has accepted the theory on the merits.²¹⁰ Second, even if there are policy reasons to extend protections regarding consideration of criminal histories to individuals with criminal backgrounds, the attorney generals argue that Congress and not the EEOC should dictate such a policy.²¹¹ Finally, the letter states, that on a practical level the individualized assessment that is required under the Guidance is financially burdensome and crippling for employers.²¹² In the letter, the State Attorney Generals asked the EEOC to withdraw pending lawsuits against BMW and Dollar General.²¹³

On August 20, 2013, Chair Berrien responded to the letter and defended the EEOC’s policies.²¹⁴ She took the position that the updated guidance merely “clarifies and updates the EEOC’s longstanding policy in this area.”²¹⁵ In its response, the EEOC simply repackaged the 2012 guidance itself and did not address the substantive issues or critiques.²¹⁶

The latest chapter in this saga occurred on November 4, 2013, when the State of Texas sued the EEOC for issuing its 2012 Guidance.²¹⁷ The lawsuit argues that the EEOC did

²⁰⁸ See Letter from Patrick Morrissey, W. Va. Attorney Gen., et al., to EEOC Commissioners (July 24, 2013) at p. 1, available at <http://www.eeocountdown.com/files/2013/07/EEOC-Letter.pdf>; see also Christopher DeGross, Reema Kapur, and Gerald L. Maatman, Jr., *State AGs Warn The EEOC: Your “Misguided” Position On Criminal Background Screens Is “Gross Federal Overreach”*, EEOC YEAR-END COUNTDOWN (July 26, 2013), available at <http://www.eeocountdown.com/2013/07/26/state-ags-warn-the-eeoc-your-misguided-position-on-criminal-background-screens-is-gross-federal-overreach/>.

²⁰⁹ See Letter from Patrick Morrissey, W. Va. Attorney Gen., et al., to EEOC Commissioners, (July 24, 2013) at p. 2, available at <http://www.eeocountdown.com/files/2013/07/EEOC-Letter.pdf>.

²¹⁰ *Id.* at p. 3.

²¹¹ *Id.* at p. 4.

²¹² *Id.* at p. 4-5.

²¹³ *Id.* at p. 5.

²¹⁴ See Gerald L. Maatman, Jr., and Howard M. Wexler, *EEOC Responds To Attorneys’ General Criticism Of EEOC’s “Misguided” Position On Criminal Background Screens*, WORKPLACE CLASS ACTION BLOG (Sept. 23, 2013), available at <http://www.workplaceclassaction.com/2013/09/eeoc-responds-to-attorneys-general-criticism-of-eeocs-misguided-position-on-criminal-background-screens/>.

²¹⁵ Letter from Jacqueline A. Berrien, Chair, Equal Employment Opportunity Commission, to Patrick Morrissey, W. Va. Attorney Gen., et al., (Aug. 29, 2013) at p. 2, available at <http://www.eeoc.gov/eeoc/newsroom/wysk/upload/EEOC-Response-to-AG-Letter.pdf>.

²¹⁶ See *id.*

²¹⁷ See Christopher DeGross and Paul Kehoe, *The Background Backlash Continues – Texas Sues The EEOC Over Its Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Nov. 6, 2013), available at <http://www.workplaceclassaction.com/2013/11/the-background-backlash-continues-texas-sues-the-eeoc-over-its-criminal-background-guidance/>.

not have the authority to issue this rule and that the EEOC's position that Title VII trumps conflicting state laws violates state sovereignty.²¹⁸

The EEOC is not giving up on this theory - all signs point to the EEOC continuing its scrutiny of employers' use of background screening tools in connection with hiring and recruitment. Although, for now, the EEOC's disparate impact theory is alive, it will be aggressively litigated in FY 2014.

c. National Origin Discrimination In The Spotlight

National origin discrimination has been a regional hot spot for certain EEOC districts in years past. The SEP, however, pushed national origin issues into the spotlight when it highlighted "protecting immigrant, migrant, and other vulnerable workers" as a national priority.²¹⁹

Consistent with that goal, on November 13, 2013 the EEOC held a public meeting to address issues and concerns regarding Title VII national origin enforcement, with a particular emphasis on immigrant workers.²²⁰ During that meeting, Commissioners and participants explored barriers to enforcement in light of the country's large immigrant population and examined the common forms of discrimination immigrants face.

Throughout the year, Commissioners were heavily involved in the issue. Commissioner Yang, who helped organize the November 13, 2013 public meeting, supports targeting national origin discrimination "through coordinated enforcement, outreach, and training efforts."²²¹ She also represents the EEOC on the Federal Interagency Working Group affiliated with the White House Initiative on Asian American and Pacific Islanders ("WHIAAPI").²²² WHIAAPI "works to improve the quality of life and opportunities for

²¹⁸ See *id.*

¹⁰⁷ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 21, 2013), at 1, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

²²⁰ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Meeting Highlights Challenges to Title VII National Origin Enforcement (Nov. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-13-13.cfm>; see also Paul Kehoe, *The EEOC's Public Meeting on National Origin Discrimination – Is Additional Guidance In The Works?*, WORKPLACE CLASS ACTION BLOG (Nov. 13, 2013), available at <http://www.workplaceclassaction.com/2013/11/the-eeocs-public-meeting-on-national-origin-discrimination-is-additional-guidance-in-the-works/> (discussing the EEOC's meeting).

²²¹ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Meeting Highlights Challenges to Title VII National Origin Enforcement (Nov. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-13-13.cfm>.

²²² *Written Testimony of Lucila Rosas EEOC Lead Coordinator, Immigrant Worker Team*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at <http://www.eeoc.gov/eeoc/meetings/11-13-13/rosas.cfm> (Dec. 21, 2013).

Asian Americans and Pacific Islanders by facilitating increased access to and participation in federal programs where they remain underserved.”²²³

At the American Bar Association’s 2013 National Conference on Equal Employment Opportunity Law, Mr. Lopez participated in a panel discussion with other government attorneys, during which he took a hard line position on national origin discrimination.²²⁴ Specifically, he stated that an employer is presumed to have retaliated against any employee on the basis of national origin status if the employer knows or has reason to know of his or her immigrant or undocumented status and takes any adverse action. A bold position to be sure. The EEOC’s move to equate “immigrant status” with national origin is troubling for a number of reasons, not the least of which: immigrant status is not a protected category under federal laws. In fact, the Seventh Circuit has explicitly rejected the notion that “national origin discrimination” encompasses “discrimination based on citizenship or immigration status.”²²⁵

The obligations of employers with regard to foreign-born employees are particularly confusing, creating significant legal risks for the business community. Immigration attorneys have highlighted conflicts between civil rights and immigration laws that place employers in a difficult position. For example, immigration law enforced by the U.S. Immigration and Customs Enforcement Agency provides that “[e]mployers determined to have knowingly hired or continued to employ unauthorized workers . . . will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted.”²²⁶ This is in direct conflict with the EEOC’s agenda to use employment discrimination laws to protect immigrants in the workforce, including undocumented immigrants, and this tension is likely to be addressed in FY 2014.

While it is unclear whether the EEOC will undertake to revise its national origin guidance issued in December 2002 (following the September 11, 2001 attacks), generally speaking, an initial step to updating guidance is to hold a public hearing. Updated guidance would likely provide more context for the regulated community, but may ultimately make it more difficult for employers to comply with the EEOC’s view of Title VII. However, employers do not have the luxury to wait for the Commission to provide clarity; they should review their policies and disciplinary practices to determine whether they are in compliance with Title VII or if the policy needs additional consideration.

²²³ *About the White House Initiative on Asian Americans and Pacific Islanders*, THE WHITE HOUSE, available at <http://www.whitehouse.gov/administration/eop/aapi/about> (last visited Dec. 20, 2013).

²²⁴ AMERICAN BAR ASSOCIATION SECTION OF LABOR & EMPLOYMENT LAW (2013), at 3, available at http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/mw_eeo2013brochure.authcheckdam.pdf.

²²⁵ See *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012) (“Thus, national origin discrimination as defined in Title VII encompasses discrimination based on one’s ancestry, but not discrimination based on citizenship or immigration status.”).

²²⁶ *Fact Sheet: Form I-9 Inspection Overview*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY (June 26, 2013), available at <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>.

d. More Genetic Discrimination Lawsuits May Be On The Horizon

Although Title II of the Genetic Information Nondiscrimination Act (“GINA”) went into effect relatively recently (November 21, 2009), the EEOC has made it a priority. The SEP specifically highlights “emerging and developing issues,”²²⁷ which includes genetic discrimination.²²⁸ Furthermore, the agency has had significant success enforcing the law during FY 2013.

GINA “prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by the statute from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.”²²⁹ “Genetic information” broadly includes an individual’s genetic tests, family medical history, and the genetic tests of his or her family members.

On May 7, 2013, the EEOC filed suit against an Oklahoma-based fabric distributor for violating GINA when it asked for an applicant’s family medical history during its post-offer medical examination.²³⁰ Along with the lawsuit, the parties filed a consent decree settling the case in exchange for \$50,000 and actions to prevent future violations. A week later, the EEOC filed a suit against a New York nursing and rehabilitation center for conducting post-offer, pre-employment medical exams of applicants, which included a request for a family medical history.²³¹

Charges and lawsuits invoking GINA may have broader implications under the EEOC’s authority because—as evidenced in the two cases discussed above—GINA allegations may go hand-in-hand with ADA claims.²³² This overlap raises the stakes for employers who may potentially face liability for their employment practices under both laws.

In light of the EEOC’s high success rate for these novel claims and the language contained in the SEP, the agency seems poised to seek to increase its win record in

²²⁷ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 16, 2013), at 1, *available at* <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

²²⁸ Press Release, U.S. Equal Employment Opportunity Commission, Fabricut to Pay \$50,000 to Settle EEOC Disability and Genetic Information Discrimination Lawsuit (May 7, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/5-7-13b.cfm> (“One of the six national priorities identified by the EEOC’s Strategic Enforcement Plan is for the agency to address emerging and developing issues in equal employment law, which includes genetic discrimination”).

²²⁹ *Genetic Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *available at* <http://www.eeoc.gov/laws/types/genetic.cfm> (Dec. 20, 2013).

²³⁰ Press Release, U.S. Equal Employment Opportunity Commission, Fabricut to Pay \$50,000 to Settle EEOC Disability and Genetic Information Discrimination Lawsuit (May 7, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/5-7-13b.cfm>.

²³¹ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Class Genetic Information Discrimination Suit Against Corning Rehab Center (May 16, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/5-16-13a.cfm>.

²³² See also *EEOC v. Western Trading Co.*, No. 10-cv-02387, 2013 U.S. Dist. LEXIS 86788 (D. Colo. Jun. 20, 2013) (EEOC sued employer alleging claims for disability discrimination, failure to accommodate, and unlawful co-mingling of personnel and medical records, all in violation of the ADA).

2014. In FY 2013, it demonstrated its commitment to seek out potential violations of GINA and devote its resources to aggressive enforcement in this area of law. In FY 2014, as the EEOC seeks to pad its winning streak, employers would be wise to evaluate their policies in light of GINA's prohibitions.

G. Conclusion

The SEP was launched at the close of 2012, but employers only started to see its impact in FY 2013. It is not hyperbole to say that the SEP ushered in a transformation of the EEOC's docket. A variety of overlapping and interrelated factors including the adoption of national priorities, implementation of annual quotas as performance measures, and limited budgets and resources, have coalesced into an agency-wide focus on systemic and multi-claimant litigation. In FY 2014, we expect to see the EEOC consolidating its docket even more by pursuing the biggest and best lawsuits and systemic investigations. Further, as the Commission re-allocates more resources to its Systemic Initiative, we expect to see an accelerating trend of the EEOC partnering with other governmental and non-governmental agencies, and the private bar as it leverages external resources.

We have also observed that the EEOC is increasingly focused on making law, rather than enforcing it. It is pushing the boundaries of its own authority, in terms of substantive focus, procedural arguments, and investigative techniques. In FY2014, we fully expect to see the EEOC looking for that next, novel theory that will keep it at the top of employers' minds.

Equally notable is the EEOC's view of its own place in the legal universe. At the same time it is resisting, tooth and nail, judicial oversight, it is dragging its heels on internal controls. To date, the EEOC has rebuffed calls for increased transparency and external accountability by issuing draft internal control documents that are so vague so as to be essentially meaningless. The EEOC's message is clear -- the way it does its business is a housekeeping issue and not up for discussion. Emboldened by recent victories, we expect that trend to carry over in FY 2014.

Thus, in FY 2013, the EEOC set in motion potentially game-changing theories and practices that will be aggressively litigated in FY 2014. A critical element in employers' defensive arsenal is knowing about these theories before it is too late - an element we humbly hope is achieved in part through this publication.



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