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Keeping Up with the EEOC: 10 Key Takeaways from its Just-Released Draft Strategic Enforcement Plan

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The U.S. Equal Employment Opportunity Commission ("EEOC") released a draft strategic enforcement plan for 2023 through 2027 (the "SEP"), which outlines its areas of priority and enforcement goals.[1]Within these priorities, the SEP calls out a range of emerging topics including artificial intelligence ("AI"), the recently enacted Pregnant Workers Fairness Act of 2022 ("PWFA"), and lingering issues relating to the COVID-19 pandemic. The draft is open for a comment period until February 9, 2023 to gather further input from stakeholders.

10 Key Takeaways for Employers

1. **Artificial Intelligence (AI):** The EEOC plans to focus on the use of AI tools in recruitment, screening, hiring, promotion, and other employment decisions. Since launching its initiative on algorithmic fairness in October 2021, the EEOC has been increasing its focus on AI. In May 2022, for example, the EEOC issued its first technical guidance on AI and filed its first enforcement action alleging algorithmic discrimination.[2] The EEOC also announced a public hearing scheduled for January 31, 2023 regarding the use of automated systems and AI in employment decisions.[3] The federal government is not the only regulator in this space. New York City, for example, passed a law that requires employers using AI tools to perform a bias audit and fulfill certain posting requirements.[4] Employers can expect more cases to be brought by the EEOC in addition to ongoing regulation at the state and local levels.
2. **Pay Equity:** The EEOC has signaled that it intends to use pay data to identify employers for pay equity cases, using directed investigations and Commissioner charges. In addition, the SEP suggests that the EEOC will challenge the use of salary history and requests for desired salary when setting pay. This follows on the heels of many local and state pay transparency laws, including in New York City, California, and Colorado, which require employers to post salary ranges in job advertisements and aim to enable workers to ask about and share their pay with coworkers.[5]
3. **Pregnancy Discrimination:** The EEOC plans aggressive enforcement of the newly-enacted PWFA, which requires employers to make reasonable accommodations for pregnancy-related medical conditions.[6] The PWFA also specifically prohibits employers from requiring pregnant employees to take paid or unpaid leave if another reasonable accommodation can be provided. Notably, the PWFA explains that the EEOC will issue regulations, which will include "examples of reasonable accommodations addressing known limitations related to the pregnancy, childbirth, or related medical conditions," by December 23, 2023.
4. **Current Events:** The EEOC will aim to address the discrimination based on race, religion, national origin and gender influenced by or arising as backlash in response to local, national, or global events.

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5. **Settlement, Confidentiality, Non-Disparagement, and Arbitration Agreements:** The EEOC plans to target releases, confidentiality agreements, and arbitration agreements that it believes improperly restrict access to the legal system. This is part of a broader trend at the state and local level, as well as with other federal agencies like the National Labor Relations Board ("NLRB"), Securities Exchange Commission ("SEC"), and the Federal Trade Commission ("FTC").[7] Additionally, the Speak Out Act, which prohibits the enforcement of pre-dispute non-disclosure and non-disparagement clauses in disputes relating to claims of sexual assault or sexual harassment, was signed into law just last month on December 7, 2022.[8] Although the EEOC's authority in this area is questionable (and it lost a prior challenge regarding the use of severance agreements[9]), the EEOC will likely continue to bring attention to these types of agreements.
6. **Targeted Industries:** The SEP identifies the purported lack of diversity in certain industries, such as construction and "high tech" (without any cited evidence), as areas of particular concern. Indeed, EEOC Chair Burrows has previously spearheaded a hearing to examine purported discrimination in the construction sector with a particular emphasis on women and people of color.[10] The EEOC has already begun targeting these industries in 2022 and employers can expect the EEOC to continue bringing enforcement actions in this space.
7. **Vulnerable Populations:** The EEOC defines vulnerable populations who it believes cannot easily obtain relief on their own behalf to include immigrants, individuals with arrest or conviction records, LGBTQI+ individuals, older workers, low-wage workers, Native Americans, and individuals with limited literacy or English proficiency. This is not a new area of focus, as the EEOC has been focused on expanding access to jobs for workers from underrepresented communities through its Hiring Initiative to Reimagine Equity ("HIRE") launched in January 2022.[11]
8. **Recruitment and Hiring:** The EEOC will place special emphasis on recruitment and hiring, aiming to eliminate barriers arising from purportedly exclusionary job advertisements or restrictive or inaccessible application systems. This focal point is likely to dovetail with the use of emerging technologies such as AI and machine learning.
9. **Systemic Harassment:** The EEOC likely will look to bring systemic harassment cases on all protected bases as one of its "key subject matter priorities." The SEP underscores that the EEOC is determined to "combat this persistent problem," as over 34 percent of the charges it received between 2017 and 2021 included an allegation of harassment.
10. **COVID Again:** The EEOC says that while it hopes discrimination directly associated with COVID-19 will decline as the nation recovers from the pandemic, it will maintain its focus on COVID-19-related employment discrimination, including cases relating to vaccine accommodations, medical inquiries, and pandemic-related stereotyping.

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[1] Draft Strategic Enforcement Plan (Jan. 10, 2023), https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan.

[2] For more information, please see Gibson Dunn's Client Alert, Keeping Up with the EEOC: Artificial Intelligence Guidance and Enforcement Action.

[3] EEOC, *Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier*, https://www.eeoc.gov/next-commission-meeting.

[4] The law's enforcement has been postponed until April 15, 2023 (from January 1, 2023)

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as the City's Department of Consumer Worker Protection will host a second public hearing on January 23, 2023 regarding the proposed rules aimed at clarifying the many ambiguities in the law. For more information, please see Gibson Dunn's Client Alerts, New York City Proposes Rules to Clarify Upcoming Artificial Intelligence Law for Employers, New York City Enacts Law Restricting Use of Artificial Intelligence in Employment Decisions.

[5] For more information, please see Gibson Dunn's Client Alerts, New York City Enacts Pay Transparency Law Requiring Salary Ranges in Job Postings, California Enacts Pay Transparency and Disclosure Requirements Effective January 1, 2023, Colorado's Department of Labor and Employment Takes Hard Line on Remote Jobs that Exclude Colorado Applicants to Escape Challenging Aspects of the Equal Pay for Equal Work Act's Posting Requirements.

[6] For more information, please see Gibson Dunn's Client Alert, Complying With The Pregnant Workers Fairness Act: Considerations For Employers (*Forthcoming*).

[7] *See, e.g.*, Non-Compete Clause Rulemaking, Fed. Trade Comm'n (Jan. 5, 2023). For more information, please see Gibson Dunn's Client Alert, FTC Proposes Rule to Ban Non-Compete Clauses.

[8] For more information, please see Gibson Dunn's Client Alert, Biden Signs "Speak Out Act" Limiting the Enforceability of Non-Disclosure and Non-Disparagement Clauses in Sexual Harassment Cases.

[9] *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 343 (7th Cir. 2015) (affirming dismissal of EEOC's claim that CVS' allegedly confusing severance agreements violated Title VII by leading former employees to believe they were prohibited from filing charges with the EEOC). The Seventh Circuit underscored that the EEOC's authority under Title VII "does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes." *Id.* at 341.

[10] EEOC, *EEOC Shines Spotlight on Discrimination and Opportunities in Construction* (May 17, 2022), https://www.eeoc.gov/newsroom/eeoc-shines-spotlight-discrimination-and-opportunities-construction.

[11] EEOC, *Hiring Initiative to Reimagine Equity (HIRE) Fact Sheet*, https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire-fact-sheet.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or Jason Schwartz and Katherine Smith.

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