

A Midyear Review Of EEOC's Gender-Related Priorities

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The U.S. Equal Employment Opportunity Commission published its draft strategic enforcement plan, or SEP, for fiscal years 2023-2027 on Jan. 10, 2023, outlining its subject matter enforcement priorities for the next five years.[1]

Notably, many of the priorities place a strong emphasis on gender-related issues, such as pregnancy and pay discrimination, which is consistent with the recent uptick in federal and state legislation involving various gender issues.

This falls under the commission's purview as, among other laws, the EEOC enforces Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, or PDA; and the Americans with Disabilities Act.

Both laws protect job applicants and employees against pregnancy discrimination.

The EEOC also enforces various laws prohibiting employers from paying employees differently based on sex — including pregnancy, gender identity and sexual orientation — among other protected characteristics, under the Equal Pay Act of 1963 and Title VII.

Now that the EEOC is in the second half of its 2023 fiscal year,[2] this article will analyze the progress the commission has made regarding its gender-related priorities, particularly in comparison to its progress in recent years.

The EEOC's Strategic Enforcement Plan

The SEP is a multiyear plan adopted by the EEOC that establishes specific enforcement priorities to guide the EEOC's efforts. The commission's first SEP was adopted for fiscal years 2013-2016, and the second for fiscal years 2017-2022.

Significantly, the current SEP was the first to be published in the Federal Register, which allowed for public comment.

According to the EEOC, the purpose of publishing the SEP was "to ensure that the future work of the EEOC will reflect the agency's values and the needs of all those who have a stake in its mission." [3]

The SEP identifies the following enforcement priorities:

- Eliminating barriers in recruitment and hiring;
- Protecting vulnerable workers and persons from underserved communities from employment discrimination;
- Addressing selected emerging and developing issues;
- Advancing equal pay for all workers;
- Preserving access to the legal system; and
- Preventing and remedying systemic harassment.

While these six priorities have remained unchanged since the inaugural SEP in 2013, the areas of focus for the commission within those priorities have varied, and the current SEP places more of a focus on a number of different gender-related issues than its predecessors.

First, in an effort to address emerging and developing issues, the commission plans to focus on employment discrimination associated with individuals affected by pregnancy, childbirth and related medical conditions, particularly as related to the COVID-19 pandemic and advancements in technology.

Under this priority, the commission will also work to address recruitment and hiring practices and policies that discriminate against certain groups, including pregnant workers and those with pregnancy-related medical conditions.

Second, the SEP makes it clear that the EEOC will continue to focus on combating pay discrimination in all its forms, including on the basis of sex under the Equal Pay Act and Title VII.

It should be noted that the EEOC is also required, under the Government Performance and Results Act Modernization Act of 2010, to develop and post a strategic plan on its website every four years.

In contrast to the SEP, which explains the commission's priorities, the strategic plan explains the EEOC's mission and processes for achieving its goals and objectives, along with approaches it will take to monitor its progress. This article addresses only the SEP and not the strategic plan.

Enforcement Efforts Related to Pregnancy, Childbirth and Related Medical Conditions

The EEOC's Prior Enforcement Efforts

Since the start of fiscal year 2011, the commission has filed a total of 44 lawsuits involving claims of pregnancy discrimination under Title VII and the PDA, a relatively low number in comparison to litigation filed related to a number of other statutes enforced by the commission.

For example, the EEOC has filed hundreds of age discrimination cases under the Age Discrimination in Employment Act of 1967 and disability discrimination cases under the Americans with Disabilities Act in the same time frame.[4]

The same can be said for monetary relief, as the commission has recovered approximately \$4.4 million in total monetary relief for victims of pregnancy discrimination through its litigation program, in contrast to the \$52 million in monetary relief recovered for victims of disability discrimination since fiscal year 2011.[5]

Recently, in fiscal year 2022, the commission filed two lawsuits under the PDA and settled a number of lawsuits related to pregnancy discrimination.[6] These settlements not only included monetary relief, but also requirements for specialized training on sex and pregnancy discrimination, revised policies and regular reports to the EEOC regarding sex and pregnancy discrimination complaints.

Comparatively, the commission filed 62 lawsuits under Title VII, 27 lawsuits under the ADA in fiscal year 2022 and seven lawsuits under the ADEA in fiscal year 2022.[7]

In its annual performance report for fiscal year 2022,[8] the commission identified the following pregnancy discrimination-related successes:

- Increased awareness about pregnancy discrimination and the laws to protect pregnant workers and job applicants in the workplace through new social media campaigns;
- Held 111 events related to accommodating pregnancy limitations; and

- Achieved significant resolutions in lawsuits involving discrimination based on pregnancy and related conditions.[9]

Finally, the EEOC had a notable win with respect to pregnancy discrimination in fiscal year 2022. In *EEOC v. Ryan's Pointe Houston LLC*,[10] the U.S. Court of Appeals for the Fifth Circuit reversed an award of summary judgment against the EEOC, holding that the EEOC had produced sufficient evidence of sex discrimination allowing a jury to find that pregnancy played a role in the defendant's decision to terminate an employee when the defendant made remarks about the employee's pregnancy.

The Fifth Circuit's decision made it clear that an employer's statement cannot be characterized simply as a stray remark when the individual who made the statement then takes adverse action against the employee.

EEOC's Current Enforcement Efforts

As noted above, a number of various pregnancy-related laws at the federal and state levels have been enacted.

On Dec. 29, 2022, President Joe Biden signed into law the Providing Urgent Maternal Protections for Nursing Mothers Act, or PUMP Act, requiring employers to provide a reasonable break time for an employee to express breast milk each time the employee has a need to express milk for one year after the child's birth. Enforcement provisions of the PUMP Act took effect on April 28, 2023.

Additionally, the Pregnant Worker's Fairness Act, or PWFA, which recently went into effect on June 27, requires covered employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth or related medical conditions, unless the accommodation will cause the employer an undue hardship.

The EEOC will now accept charges of discrimination under the PWFA for alleged incidents that occurred on or after June 27.

The EEOC recently published guidance about the PWFA,[11] and is also set to issue applicable regulations to the PWFA by late December.

At the state level, Michigan Gov. Gretchen Whitmer passed the Public Act 31 this May, amending the state's civil rights law to protect people who terminate a pregnancy from discrimination in the workplace.

Minnesota also recently passed legislation with heightened accommodation rights for pregnant workers that went into effect on July 1.

This legislation is part of an ongoing trend over the past few years of states passing statutes with broader pregnancy accommodation rights for workers.

For its part, since the beginning of fiscal year 2023, the EEOC has filed two pregnancy-related lawsuits, already equal to the number of lawsuits it filed in fiscal year 2022.

In EEOC v. Dillard's Inc., the commission alleges the defendant violated federal law when it fired an employee after she complained of discrimination and asked about a pregnancy accommodation in violation of Title VII.[12]

In EEOC v. 1901 South Lamar LLC, the commission alleges that the defendant discriminated against a female bartender in violation of the PDA by reducing her hours and terminating her because she was pregnant.[13]

Fiscal year 2023 has also seen a noteworthy win for the commission in this area. Most notably, in April, the commission certified a class of female plaintiffs in a pregnancy discrimination suit under the PDA.[14]

The complaint alleges that the U.S. Department of Homeland Security and U.S. Customs and Border Protection Agency discriminated against female employees on the basis of their sex in violation of the PDA when they were removed from their work assignments and reassigned because they were pregnant.

The commission has already settled multiple lawsuits involving pregnancy discrimination in fiscal year 2023 to the tune of over \$8 million, which is almost double the collective amount recovered for victims of pregnancy discrimination between fiscal years 2011-2022.[15]

Through the commission's voluntary conciliation process, the parties in these suits settled for monetary relief, along with injunctive relief such as:

- The implementation of policies, procedures and trainings designed to enhance the oversight of both managers and employees to help prevent future discrimination;
- Providing the EEOC with reports of any complaints of sex discrimination received by the employer as well as a description of the actions taken in response to the complaints;

- Revising or implementing policies related to discrimination;
- Appointing a coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations and maintenance of records;
- Conducting climate surveys and exit interviews with heightened attention to accommodation processes; and
- Requiring performance evaluations of managers that include consideration of compliance with EEO laws.

Efforts Related to Equal Pay

EEOC's Prior Enforcement Efforts

Equal pay has been a priority for the EEOC for over a decade, appearing in all the EEOC's SEPs since 2012.

Equal pay is an issue that has historically plagued female employees. Over the past five years, women filed 90.4% of the 5,003 charges filed with the EEOC under the EPA and 64.4% of the 19,427 wage charges filed under Title VII.[16]

Relative to this priority, fiscal year 2022 saw six lawsuits filed by the EEOC under the EPA.[17] Further, the EEOC's annual performance report for fiscal year 2022 included the following "successes" related to equal pay enforcement:

- Resolving significant compensation discrimination cases during the administrative process;
- Filing nine lawsuits raising compensation discrimination claims, five of which alleged that women were paid less than their male counterparts; and
- Holding 192 outreach sessions involving issues related to equal pay.[18]

Additionally, the EEOC has collected workforce demographic information from certain private employers and federal contractors since 1966 through Component 1 of its EEO-1 form.

In 2016, the EEOC voted to add Component 2 to the EEO-1 form, which allowed the EEOC to collect pay data from certain private sector employers and federal contractors. The EEOC then collected pay data from employers in 2017 and 2018.

In an effort to solicit feedback and recommendations for future data collections, the EEOC commissioned an independent study of the collected data in 2020. The study's key findings included the following:

- Federal pay data collection is a necessary tool to find and fight pay discrimination effectively;
- The EEOC achieved extremely high response rates for this first-time data — about 90%, approximately 70,000 employers in a two-year collection period; and
- The collected pay data may help the EEOC better focus its resources to identify potential pay discrimination.[19]

Looking forward, though the EEOC is not currently collecting pay data, it has stated that it will use the findings from the above-referenced study to guide future pay data collection, as well as "seek and carefully consider the views of employees, employers, unions and members of the public." [20]

The EEOC has also made it clear that it would never "use pay data, by itself, as the sole evidence of pay discrimination." [21] Instead, it would use pay data, together with other information, to inform next steps in a charge investigation.

EEOC's Current Enforcement Efforts

The current SEP focuses on the commission's intent to challenge practices it believes contribute to pay disparities in the workplace, including:

- Employer policies and practices that encourage secrecy around pay;
- Reliance on past salary history to set pay; and
- Requiring applicants to disclose expected pay rates during the application stage.

The commission's focus in this area is consistent with the growing focus on pay disparities across protected groups and pay transparency nationwide.

Legislation requiring employers to affirmatively provide wage range information to applicants and/or employees has already gone into effect in California, Colorado, Connecticut, Maryland, Nevada, Rhode Island and Washington.

New York state's new pay transparency law will go into effect on Sept. 17. New York City's pay transparency law is already in effect.

Illinois and Hawaii also have pending pay transparency legislation waiting to be signed into law by their respective governors.

The commission has already filed two pay discrimination lawsuits in the fiscal year 2023.

In EEOC v. Medsurant Holdings LLC, the commission alleges that the defendant violated Title VII and the EPA by paying a female technician less than male technicians on the basis of sex and by retaliating against her for complaining.[22]

In EEOC v. Inova Home Health LLC, the commission alleges that the defendant violated Title VII and the EPA by paying female employees less than male coworkers for performing equal work under similar working conditions.[23]

The commission has also settled a number of lawsuits related to pay discrimination in fiscal year 2023.[24] These settlements include both monetary and injunctive relief.

For example, in EEOC v. Lacey's Place LLC Series Midlothian d/b/a Lacey's Place, in addition to monetary relief, the parties entered into a four-year consent decree requiring the defendant to develop and distribute a written policy against sex-based pay discrimination and retaliation, conduct anti-discrimination training and conduct a pay equity study of current district manager pay.

Finally, the EEOC has launched its "Level the Paying Field" equal pay social media campaign to commemorate the EPA's 60th anniversary, which was June 10, 2023. The campaign will last through Aug. 20, and will coincide with the FIFA Women's World Cup 2023.

As part of the campaign, the commission has asked the public to create their own videos on social media showing support for equal pay. The EEOC has also made available infographics and informational posters for employers.

The campaign comes on the heels of the U.S. Women's National Soccer Team and U.S. Men's National Soccer Team's historic pay equity agreement in 2022. The EEOC filed an amicus brief on the female players' behalf during the preceding legal battle.

Conclusion

The EEOC's recent enforcement trends related to pregnancy discrimination and pay transparency more than halfway into the fiscal year have already been on par with recent years' enforcement trends.

Given the SEP priorities and recent enactment of pregnancy discrimination and pay transparency laws, along with the fact that the EEOC tends to file a majority of its lawsuits at the end of the fiscal year, we certainly expect the EEOC's enforcement efforts in these areas to surpass previous years.

If these trends continue, the number of pregnancy and pay discrimination charges and EEOC-initiated litigation will surely increase in the coming years, along with general public awareness of such discrimination.

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[1] Federal Register, U.S. Equal Employment Opportunity Commission – Draft Strategic Enforcement Plan, <https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan>.

[2] The EEOC FY 2023 spans from October 1, 2022, to September 30, 2023.

[3] U.S. Equal Employment Opportunity Commission, Comment Period Open for EEOC Strategic Enforcement Plan, <https://www.eeoc.gov/newsroom/comment-period-open-eeoc-strategic-enforcement-plan>.

[4] U.S. Equal Employment Opportunity Commission, Fact Sheet on Recent EEOC Pregnancy-Discrimination Litigation, <http://www.eeoc.gov/fact-sheet-recent-eeoc-pregnancy-discrimination-litigation>; U.S. Equal Employment Opportunity Commission, EEOC Litigation Statistics, FY 1997 through FY 2022, <https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2022>.

[5] U.S. Equal Employment Opportunity Commission, Fact Sheet on Recent EEOC Litigation- Related Developments Under the Americans with Disabilities Act (Including the ADAAA), <https://www.eeoc.gov/fact-sheet-recent-eeoc-litigation-related-developments-under-americans-disabilities-act-including>.

[6] See, e.g., EEOC v. Dollar General Corp., No. 2:22-cv-00198 (N.D. Ga. 2022); EEOC v. Walgreens Co., No. 1:22-cv-05357 (W.D. La. 2022); EEOC v. Heartfelt Home Healthcare Services Inc., No. 1:22-cv-00280 (W.D. Pa. 2022).

[7] See supra note 5.

[8] U.S. Equal Employment Opportunity Commission, 2022 Annual Performance Report (APR), <https://www.eeoc.gov/2022-annual-performance-report-apr>.

[9] Id.

[10] EEOC v. Ryan's Pointe Houston LLC, No. 19-20656 (5th Cir. 2022).

[11] U.S. Equal Employment Opportunity Commission, What You Should Know About the Pregnant Workers Fairness Act, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>.

[12] EEOC v. Dillard's Inc., No. 23-cv-01943 (N.D. Ga. 2023).

[13] EEOC v. 1901 South Lamar LLC, No. 23-cv-539 (W.D. Tex. 2023).

[14] Decision on the Class Agents' Motion for Class Certification, Gabaldon, et al v. Mayorkas, et al, EEOC No. 450-2017-00086X (Apr. 21, 2023), https://federalnewsnetwork.com/wpcontent/uploads/2023/05/2023_04_21_EEOC_Decision_Class_Cert.pdf.

[15] See, e.g., EEOC v. A.V.I. Sea Bar & Chophouse LLC d/b/a A.V.I. Sea Bar and Chophouse and Corporate Caterers of Wichita, No. 2:21-cv-2428 (D. Kan. 2022); EEOC v. Heartfelt Home Healthcare Services Inc., No. 1:22-cv-00280 (W.D. Pa. 2022); EEOC v. Arubaanse Luchtvaart Maatschappij Nv Inc. d/b/a Aruba Airlines, No. 1:23-cv-20597 (S.D. Fla. 2022).

[16] EEOC Data Highlights - 2023 Equal Pay Infographic, https://www.eeoc.gov/sites/default/files/2023-06/EEOC%20Data%20Highlights%20-%202023%20Equal%20Pay%20Infographic-1_508%20final_0.pdf.

[17] See supra note 5.

[18] See supra note 9.

[19] U.S. Equal Employment Opportunity Commission, What You Should Know: The National Academies' Evaluation of Compensation Data Collected Through the EEO-1 Form, <https://www.eeoc.gov/wysk/what-you-should-know-national-academies-evaluation-compensation-data-collected-through-eeo-1#:~:text=pay%20data%20from%3F-,The%20EEOC%20collected%202017%20and%202018%20pay%20data%20from%20private,covering%20over%20100%20million%20workers.>

[20] Id

[21] Id.

[22] EEOC v. Medsurant Holdings LLC et al, No. 3:23-cv-00501 (M.D. Tenn. 2023).

[23] EEOC v. Inova Home Health LLC et al, No. 1:23-cv-00264 (E.D. Va. 2023).

[24] See e.g., EEOC v. Lacey's Place LLC Series Midlothian d/b/a Lacey's Place, No. 2:22-cv-02161 (C.D. Ill. May 26, 2023); EEOC v. Mechanical Design Systems, Inc., No. 8:22-cv-02463 (D. Md. May 9, 2023); EEOC v. Jerry's Chevrolet Inc. et al., No. 21-cv-02464 (D. Md. Nov. 30, 2022).

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