

Bass, Berry & Sims Presents
An Employer's Guide to Navigating
the EEOC's 2013 Initiatives

BASS
BERRY • SIMS^{PLC}



Table of Contents

Introduction	1
Background: The EEOC's Strategic Enforcement Plan	2-3
What Can Employers Expect from the EEOC?	4-6
Practical Tips for Addressing EEOC Enforcement Guidance and Staving Off EEOC Litigation	7-10
How to Handle EEOC Investigations	11
How to Handle EEOC Subpoenas	12
How to Handle Systemic Litigation by the EEOC	13-14
About Bass, Berry & Sims Labor & Employment Practice	14

Introduction

On March 14, 2013, Bass, Berry & Sims hosted an *Employer's Guide to Navigating the EEOC's 2013 Initiatives*, which featured a keynote address from EEOC Commissioner Constance Barker. Commissioner Barker shared that during next year, employers can likely expect continued aggressive enforcement and issuance of additional enforcement guidance.



CONSTANCE BARKER
EEOC Commissioner

Following Commissioner Barker's remarks, a panel of in-house attorneys from AutoZone, Inc., IASIS Healthcare and Vanderbilt University discussed the challenges employers face in seeking to comply with the EEOC's directives and ways they are overcoming those challenges. The seminar concluded with members of the Bass, Berry & Sims' Labor and Employment Practice providing insights into best practices for staving off litigation by the EEOC. This white paper outlines some of the key commentary from

Commissioner Barker's remarks and offers practical tips to employers attempting to navigate the EEOC's 2013 initiatives.



Background: The EEOC's Strategic Enforcement Plan

Last year, the EEOC approved a Strategic Plan for Fiscal Years 2012–2016. In the Strategic Plan, the EEOC set forth three objectives: (1) combating employment discrimination through strategic law enforcement; (2) preventing employment discrimination through education and outreach; and (3) delivering excellent and consistent service through a skilled and diverse workforce and effective systems. The first objective called for the development of a Strategic Enforcement Plan that would establish the EEOC's priorities and integrate the agency's: (1) investigation, conciliation and litigation responsibilities in the private and public sectors; (2) adjudicatory and oversight responsibilities in the federal sector; and (3) research, policy development and education and outreach activities. To comply with this mandate, in December 2012, the EEOC approved a Strategic Enforcement Plan ("SEP").

The SEP identifies six national enforcement priorities:

1. Eliminating barriers in recruitment and hiring
2. Protecting immigrant, migrant and other vulnerable workers
3. Addressing emerging and developing employment discrimination issues
4. Enforcing equal pay laws
5. Preserving access to the legal system
6. Preventing harassment through systemic enforcement and targeted outreach

A brief summary of the EEOC's strategy for targeting each of the six priorities is outlined below. Additional guidance can be found in the [SEP](#).

Eliminating barriers in recruitment and hiring

The EEOC plans to target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups. More specifically, the EEOC intends to target:

- exclusionary policies and practices
- the channeling/steering of individuals into specific jobs due to their status in a particular group
- restrictive application processes
- the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries)

Protecting immigrant, migrant and other vulnerable workers

Among the practices and policies the EEOC tends to target are:

- disparate pay
- job segregation
- harassment
- trafficking

Addressing emerging and developing employment discrimination issues

The EEOC has identified three emerging or developing issues:

1. Certain issues that arise under the Americans with Disabilities Act ("ADA"), including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat.
2. Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act ("ADAAA") and the Pregnancy Discrimination Act ("PDA").
3. Coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

Enforcing equal pay laws

In an effort to target compensation systems and practices that discriminate based on gender, the EEOC is encouraging the use of:

- directed investigations
- Commissioner Charges

Preserving access to the legal system

The EEOC is targeting policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes or that impede the EEOC's investigative or enforcement efforts, including:

- retaliatory actions
- overly broad waivers
- settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination
- failure to retain records required by EEOC regulations

Preventing harassment through systemic enforcement and targeted outreach

Although the EEOC recognizes that investigation and litigation of harassment claims have been successful, it believes that a more targeted approach that focuses on systemic enforcement and outreach aimed at educating employers and employees will greatly deter future violations.

It is important to note that the EEOC intends to take a targeted approach to the enforcement of these priorities, meaning that these priorities will receive a greater share of the EEOC's time and resources.

What Can Employers Expect from the EEOC?

Commissioner Barker's remarks during her visit to Bass, Berry & Sims focused on the ways in which the EEOC is currently targeting the priorities set forth in the SEP. A summary of Commissioner Barker's commentary follows.

One of the priorities the Commissioner addressed is the adverse impact of facially neutral recruitment and hiring practices, such as criminal background and credit checks, on protected classes. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect. The term "disparate impact," as utilized below, refers to the adverse impact a facially neutral practice has on a protected class.

> A policy of conducting across-the-board background checks (i.e., performing background checks on every employee) will raise a red flag for the EEOC.

In April 2012, the EEOC issued "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq." Given this guidance, Commissioner Barker warned that if an employer utilizes criminal background checks to make employment decisions, the employer must be prepared to defend such use to the EEOC. A policy of conducting across-the-board background checks (i.e., performing background checks on every employee) will raise a red flag for the EEOC. The Commissioner further cautioned that an employer conducting a criminal background check in order to comply with state law is not, in and of itself, a defense.

According to Commissioner Barker, the EEOC's guidance relies heavily on national statistics that African-American and Latino males experience a higher frequency of criminal convictions than other segments of the population. Based on these statistics, the EEOC contends that under a theory of disparate impact, an employer's use of criminal background checks disproportionately impacts African-American and Latino males.

Another focus of the EEOC is the use of credit checks by employers. Credit check litigation, like criminal background check litigation, also is based on a theory of disparate impact.

Commissioner Barker also alerted employers that there are national statistics demonstrating that African-Americans and Latinos have higher rates of unemployment and are also unemployed for longer periods of time than other segments of the population. Given these

statistics, the EEOC is concerned that the use of unemployment status as a factor in screening applicants can have a disparate impact on these groups.

The Commissioner also discussed emerging and developing employment discrimination issues under the ADA. One area of focus for the EEOC is the application of the ADA to employment situations involving employees who are the victims of domestic or dating violence, sexual assault or stalking. For example, if an employer has an employee who has been a victim of domestic violence that employer should recognize, according to Commissioner Barker, the potential physical, emotional or psychological issues that the employee may face and that the EEOC may take the position that such issues may warrant accommodation under the ADA.

Commissioner Barker also noted that there has been increased attention on the question of whether pregnancy, in and of itself, constitutes a disability under the ADA. If this is the case, the EEOC may at some point take the position that all pregnant women may be entitled to a reasonable accommodation.

During a Q&A session, the Commissioner also addressed concerns regarding the interaction between the ADA and leave policies. Although the EEOC has not formally issued any guidance on the interaction of leave policies and the ADA, Commissioner Barker cautioned that employers should ensure that their leave policies, at a minimum, include an intent to comply with any obligations of the employer under the ADA. This is particularly important for employers who have leave policies that state employment will automatically terminate after an employee has been on leave for a specified period of time (e.g., six months or one year). Policies that provide for automatic termination without any reference to the ADA or indication that the employer will engage in the individualized interactive process prior to discharging an employee under such a policy will likely run afoul of the ADA.

> Employers should ensure that their leave policies, at a minimum, include an intent to comply with any obligations of the employer under the ADA.

The Commissioner devoted some time during her remarks to a discussion of the methods and/or ways in which the EEOC intends to enforce its priorities, including investigations into systemic discrimination, directed investigation and Commissioner Charges. As stated in the



SEP, and emphasized by Commissioner Barker, the EEOC will continue to focus on systemic discrimination and systemic litigation. As a result, employers likely will see continued attempts by the EEOC to utilize aggressive and broad investigations and litigation to ferret out discrimination.

Employers also should expect to see the EEOC conduct more directed investigations under the Equal Pay Act. Commissioner Barker reminded employers that the EEOC can conduct a directed investigation under the Equal Pay Act if it has reason to believe that the employer has engaged in discriminatory practices. No individual charge is required to prompt such investigations.

According to Commissioner Barker, employers also may see an increase in the use of Commissioner Charges in the coming years. Any of the five EEOC Commissioners has the authority to issue a Commissioner's Charge without the sworn affidavit of a charging party, if the Commissioner has a reasonable belief that an employer is engaging in unlawful discriminatory conduct. Commissioner Barker believes that Commissioner Charges are appropriate to protect certain vulnerable populations. For example, where there are young Latina women who because of language and cultural barriers may be reluctant to report acts of sexual violence against them in the workplace.

In the coming years, Commissioner Barker noted that she would like to see the EEOC shift its focus away from enforcement through litigation to preventing discrimination or stopping discrimination that does occur through education, mediation and conciliation. As a former management-side employment attorney, Commissioner Barker understands the challenges facing businesses, particularly small businesses, in attempting to comply with employment-related regulations. With that in mind, she has initiated an EEOC Small Business Task Force that looks for ways the EEOC can provide ready information to small businesses in a format that is easy to understand.



Practical Tips for Addressing EEOC Enforcement Guidance and Staving Off EEOC Litigation

Navigating the EEOC's enforcement guidance on recruitment and hiring

As noted above, the EEOC is focusing its efforts on eliminating barriers in recruitment and hiring by targeting a number of recruitment and hiring practices that tend to disproportionately “weed out” applicants from a protected class, including criminal background checks and pre-employment testing.

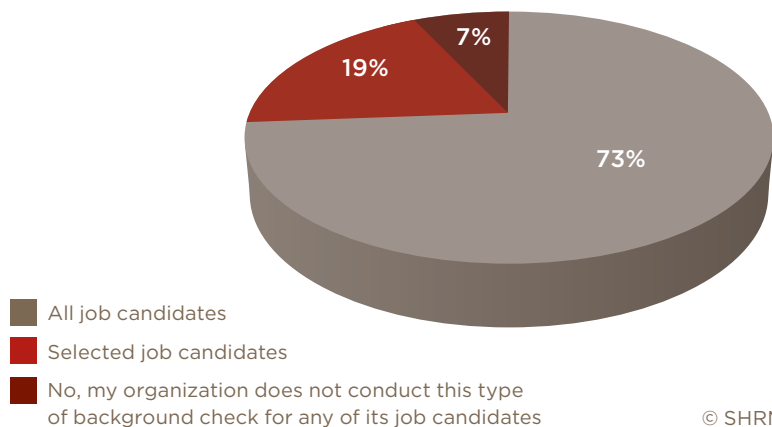
National polls have found that 92 percent of private employers conduct some form of criminal background check on applicants for at least some of their positions. These background checks are intended to reduce risk in the workplace and to establish employers' due diligence in the hiring process. However, the EEOC takes the position that blanket exclusion policies, such as a policy that automatically precludes any candidate with a felony conviction from consideration for any position, are illegal. Instead, the EEOC insists employers should undertake an individualized assessment of each candidate to ensure the criminal record is accurate (e.g., no convictions mistakenly associated with the applicant) and that there is a rational foundation for using the conviction as a reason for excluding the applicant from consideration for a particular job position. An employer must be prepared to articulate the reason why a particular conviction precludes an applicant/employee from eligibility for the position to which s/he has applied.

Employers who wish to avoid becoming a target for the EEOC with respect to their hiring and recruitment practices should consider:

- eliminating practices that exclude applicants based on any criminal record
- conducting an individualized assessment that considers the nature and functions of the specific job for which the candidate is being considered, the nature and gravity of the offense and the time elapsed since the offense
- training hiring managers on discrimination laws and how to implement the targeted screening process
- keeping information about applicants' and employees' criminal records confidential

Employers also should remember pre-employment tests must be job-related and consistent with business necessity to survive scrutiny.

Does your organization, or agency hired by your organizations, conduct criminal background checks for any job candidates?



© SHRM 2010

Addressing emerging and developing issues under the ADA

The focus for employers seeking to comply with the ADA has shifted from determining whether an employee qualifies as disabled under the ADA (because of the expansive definition of disability) to whether an employer has engaged in the interactive process. Though the interactive process is not an affirmative legal duty for employers, courts and juries routinely look to whether and to what extent the employer attempted to determine if an employee's disability could reasonably be accommodated without creating an undue hardship for the employer.

- > The focus for employers seeking to comply with the ADA has shifted from determining whether an employee qualifies as disabled under the ADA to whether an employer has engaged in the interactive process.

Given the new focus on the interactive process, employers would be wise to revisit their ADA policies. Often, "disability" is listed among several other protected classifications in an employer's anti-discrimination policy. Employers should consider creating a specific ADA policy that informs employees they may request reasonable accommodation and states the employer's commitment to providing reasonable accommodation if doing so does not create an undue hardship. Such a policy lays the groundwork for initiating the interactive process and for establishing the employer's good faith intention to work with employees to determine reasonable accommodations. Additionally, the policy should detail the procedure for requesting a reasonable accommodation, including to whom the request should be directed and the steps for engaging in the interactive process.

The effectiveness of this policy in curtailing ADA litigation depends on implementation of the interactive process on the ground, from the moment a need for reasonable accommodation arises. Employers must conduct detailed policy training on the "front lines," with HR personnel and managers, so that good policies are translated into good practices. Finally, employers will see the greatest gains if they standardize implementation of the new policy across job positions and facilities so that employee requests for accommodations are handled similarly. Some employers create forms for use by all employees requesting a reasonable accommodation under the ADA. The forms, completed by the employee and an HR representative, outline the employee's request for accommodation and the steps taken as part of the interactive process to determine what, if any, accommodation was provided and the reasons for the decision. Larger employers may want to have all such forms reviewed by regional or corporate HR personnel to ensure consistency of practice. Any challenging requests for accommodation should be sent to corporate HR representatives or legal counsel for advice on how best to address the situation.

The interaction between other leave policies such as the Family and Medical Leave Act ("FMLA") and the ADA is another area of increased concern for many employers. The EEOC has made clear that employers who automatically terminate employees who have exhausted a particular maximum amount of leave time are at risk. According to the EEOC, these automatic-termination

policies do not permit employers to engage in a good faith, interactive process with employees who have used all of their allotted leave but may often require additional time or other reasonable accommodation to address a disability. As such, an employer's leave policy should state that "the company will evaluate the personal circumstances of the employee as well as the company's operational needs before making a decision to terminate employment at the end of the employee's leave."

Addressing the expanding scope of coverage for sexual identity under Title VII

In recent years, the EEOC and, in turn, the courts have begun expanding the protections of Title VII to include transgender individuals under the sexual-stereotyping theory. While sexual stereotyping has been recognized for decades as a basis for sex discrimination under Title VII of the Civil Rights Act of 1964, the theory has been extended over the last few years to include transgender individuals. Under the sexual-stereotype theory, a transgender individual is discriminated against when s/he is treated differently because s/he does not conform to cultural expectations of masculine and feminine self-presentation. Beyond just staying informed of these and other developing trends in the law, employers should work with their outside counsel and HR managers to ensure that their policies are up-to-date and effectively implemented. It is a good rule of thumb to review policies annually but employers should be prepared to update policies as needed, including multiple times within a year.

Avoiding EEOC scrutiny with respect to women, immigrant, migrant, and other vulnerable workers

In prioritizing the protection of women, immigrant, migrant, and other vulnerable workers, the EEOC has said it will target disparate pay practices, job segregation and harassment. To avoid becoming a target of EEOC enforcement, employers should evaluate the composition of their workforce, both in total and at various wage points to ensure equal opportunity in hiring and promotion. A good place for employers to start this evaluation is their EEO-1 report. Employers also should evaluate their starting pay, average pay and average income for jobs to determine what, if any, discrepancies there are between male and female employees. If an employer discovers a discrepancy in compensation, they should determine whether there is a valid justification for the discrepancy.

Preserving access to the legal system

With respect to preserving access to the legal system, employers should take the following steps to avoid unwanted EEOC scrutiny:

- ensure that handbooks and policies expressly prohibit retaliation against employees who exercise their rights

- make sure that employees are aware of how and to whom they make complaints of discrimination and/or harassment
- conduct regular employee training and specifically address retaliation
- when having employees sign release agreements, make certain the agreement does not prohibit the employee's right to file a charge with the EEOC

With respect to immigrant, migrant and other vulnerable workers, employers should remain cognizant of language barriers that may limit an employee's understanding of his or her rights under employment-related regulations.

Preventing harassment through systemic enforcement and targeted outreach

Although serious issues arise with respect to class treatment of harassment issues, certainly the EEOC has indicated its intent to pursue systemic enforcement in this arena. Employees who file charges with the EEOC are certainly likely to allege that their former or fellow co-workers were subjected to similar conduct. In such cases, the plaintiff employee will allege the defendant employer allowed the harassment to exist and persist in its workplace to such a degree that it constitutes a pattern or practice of harassment that affects a class of employees (not just one employee or a few employees), and the employer failed to take remedial action, or tolerated the harassment, even after it was made aware of the offending behavior. Consequently, harassment training and taking prompt and effective remedial action when you first become aware of a problem is essential to staying off the risk of a systemic harassment claim. For many employers, determining the degree of discipline required to effectively remedy and prevent future harassment can be a challenge. Employers are not required to discharge alleged harassers in order to effectively remedy the harassment, but given the EEOC's propensity towards systemic enforcement, employers face an increased risk if they do something other than discharge.

In general, employers should be aware that individual charges, regardless of whether they arise out of an allegation of harassment, may become systemic cases based on an EEOC investigation.



How to Handle EEOC Investigations

An increase in the EEOC's enforcement efforts means a likely increase in the number of EEOC investigations. Whereas the EEOC's requests for onsite investigations were once rare, such requests are becoming more routine. The current administration has invested in hiring more attorneys and these attorneys are providing more guidance to investigators, especially as it concerns identifying potential systemic discrimination cases. The key for any employer to remember about EEOC onsite investigations is not to be intimidated. Investigations by the EEOC are civil, rather than criminal, in nature.

Ideally, employers should schedule the EEOC onsite investigation far enough in the future to permit time to conduct an internal investigation so they are not surprised by anything during the EEOC's investigation. Employers should never agree to an impromptu visit by the EEOC.

When the onsite investigation is scheduled, make sure to know who will be attending and challenge the response, if appropriate. Employers do not have to agree to the attendance of attorneys for charging parties. Employers also may try to limit the scope of the investigation at the outset by working with the investigator to identify documents, witnesses and issues that will be part of the investigation.

In preparing for an onsite investigation, review all employment records and be certain that all filing is in order. Has the company given the investigator everything that was requested and agreed upon? Are there any stray documents, such as medical paperwork, misfiled in a personnel file rather than a separate medical file? Are all posters up-to-date and properly displayed? Prepare in advance the requested records for the investigator and have them ready for review. Bring any additional records requested to the investigator. If the investigator would like copies of records, offer to make the copies after the investigator flags the specific requested documents. Make an additional copy of everything produced to retain for company records.

Select a location for the interviews and document review by the EEOC investigator. A conference room is ideal, providing needed space and privacy, but the location also should be one that limits incidental access to employees who have not been selected for interviews. Escort interviewees to and from their interviews. Employers are permitted to attend management-level-employee interviews and should do so.

Interview and prepare those employees who have been identified by the EEOC as witnesses prior to their meeting. Discuss with the employee the scope of the EEOC investigation and what the investigator is likely to cover. Encourage employees to be honest and cooperative but not to overshare or add information unnecessarily. Instruct employees not to sign statements without having read them and advise employees to obtain a copy of any statements signed. Most importantly, reiterate the company's non-retaliation policy for filing a charge with the EEOC and participating in an EEOC investigation.



How to Handle EEOC Subpoenas

To be enforceable, a subpoena must request information reasonably related to the investigation and the investigation must be reasonably related to the charge filed. While the EEOC does have broad



investigative powers, it is not permitted to undertake a fishing expedition.

Increased enforcement by the EEOC also will mean that employers will see the EEOC making more frequent use of its subpoena power. Employers may, within five days of receipt, object to the subpoena and petition for its revocation or modification. If a District Office issued the subpoena, the petition should be submitted to the District Director; if a Commissioner issued the subpoena, the petition should be submitted to the EEOC General Counsel. The Director or General Counsel will make a determination that is subject to review by the Commission before it issues a final determination. If the petition is denied and an employer continues to refuse to comply, the EEOC may file suit in federal court to enforce the subpoena. If the subpoena is issued under the Age Discrimination in Employment Act or Equal Pay Act, there is no administrative appeal process and the EEOC may file a petition in federal court for enforcement of the subpoena.

How to Handle Systemic Litigation by the EEOC

There are four predicates to litigation when the EEOC seeks to bring a class claim:

1. A charge
2. An investigation reasonably related to the charge
3. A cause determination
4. Reasonable conciliation efforts

Employers should note that EEOC class claims are not subject to the evaluative factors as class claims brought under Federal Rule of Procedure 23 — typicality, commonality, numerosity, and adequate representation. However, most courts have held that class action cases by the EEOC are subject to the 300-day (or 180-day) statute of limitations.

Because the EEOC has made systemic litigation a focus, employers should have an initial

response plan for when and if they find themselves being sued by the EEOC under a class claim theory. The following steps should be taken by employers, in consultation with their attorneys, following notice of a class action by the EEOC:

- Assess scope of the claims being asserted and preserve all evidence
- Assess need for public relations expertise
- Assess the merits of filing a motion to dismiss with a focus on whether the claims were within the scope of the underlying EEOC charge and whether adequate conciliation was attempted by the EEOC
- If not already done, investigate the claims being alleged and which employees are potential claimants. There are two broad issues that immediately should be explored: (1) whether there is evidence the employer has engaged in unlawful discrimination, and (2) whether the class approach is appropriate, i.e. if there were common practices directed toward the employees
- Assess the best strategy for moving forward. There are a number of options that may be available to employers in addition to moving forward with the litigation including self-correction or some other form of mitigation and/or settlement

In conclusion, the 2012 approval of the EEOC's SEP provides guidance to employers who wish to take proactive steps to ensure EEO compliance and avoid the Commission's scrutiny. It is clear there will be a rise in Commissioner Charges, but there are steps employers can take to protect their company both preventatively and in light of EEOC investigations, subpoenas and



systemic litigation. The Commission's concern for disparate impact means employers should be careful about using criminal and credit background checks in hiring decisions, keeping in mind that any pre-employment test must be job-related and consistent with business necessity. With respect to the ADA, it is important that employers engage in the interactive process with employees who request reasonable accommodation, including those employees who have used allotted FMLA leave time and are in danger of automatic termination. Other issues that should be evaluated in light of the SEP are sexual identity under Title VII, preserving access to the legal system with respect to retaliation, discriminatory pay practices and harassment. It is important that employers are aware that individual charges have the potential to become systemic. Finally, if a company is subject to an investigation, subpoena or even systemic litigation, it is important for employers, with the help of their legal counsel, to be prepared, organized and, most importantly, know their rights in dealing effectively with the EEOC.

About our Labor and Employment Practice

The members of the firm's Labor and Employment Practice have decades of experience in management side labor practice and employment law litigation and counseling. Clients include union and non-union companies, as well as public and private employers ranging from Fortune 500 companies to small locally-owned businesses.

Our team provides these services:

- age, race, sex, religious, national origin and disability discrimination charges
- wrongful discharge claims
- retaliatory discharge issues under state and federal law
- defamation
- tortious interference with contracts
- breach of enforcement of non-compete agreements
- wage and hour non-compliance
- breach of fair representation
- I-9 non-compliance
- ERISA litigation

We provide in-office counseling and training to HR managers, front line managers and supervisors on preventive measures such as management training in unlawful harassment and advice and guidance in resolving issues before they develop into lawsuits. We also have a dynamic audit practice, which allows a client to be proactive in identifying potential problems and resolving them before they become crises.

