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CLASS ACTION TRENDS REPORT

"Class" claims, EEOC-style

ABC Discount Superstores prides itself on undercutting any competitor's prices—and on its diversity in hiring and promotions. Consequently, ABC's executive vice president for human resources was chagrined to receive a phone call from the HR chief overseeing the Midwest district office. "We've got a bit of a situation," the HR chief said. "One of the regional managers in Ohio—he's fairly new; we just hired him away from Mega Savers—has been `gerrymandering' his management people by race. I don't know how else to put it. He assigns African-American managers into stores in 'black neighborhoods,' as he calls them, and his white managers in predominantly white areas. He said it provides for a more `enhanced shopping experience,' and 'makes customers feel more at home.' Anyhow, I talked to him and made it clear that's not how we do business at ABC. He understands now. I think only a few managers were affected."

One of the "affected" managers, however, has already placed a call to the EEOC. (A top performer in the region, the African-American manager nonetheless has repeatedly been told he's "not a good fit" whenever a position opens up at a higher-revenue store.) In the end, the Ohio regional manager has left ABC Discount Superstores defending against an EEOC pattern-or-practice claim alleging systemic companywide discrimination in hiring and promotions on the basis of race—brought on behalf of 10,000 African-American store managers and assistant store managers nationwide.

Allegations that a rogue manager in your company engaged in discriminatory conduct can be daunting enough. Allegations that your company has engaged in a systemic, companywide pattern of discrimination can have far more dire consequences, particularly when those allegations are being pursued by the Equal Employment Opportunity Commission (EEOC). In this issue of the *Class Action Trends Report*, we'll look at the challenges of defending "pattern-or-practice" litigation brought by the federal agency as plaintiff. How can employers minimize the risk that a narrow EEOC charge of discrimination will expand into a systemic lawsuit?

Central to EEOC's mission

"Tackling systemic discrimination—where a discriminatory pattern or practice or policy has a broad impact on an industry, company or geographic area—is

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A WORD FROM WILL AND STEPHANIE

Take that second look.

Just like that follow-up visit to a doctor or an extra study session before the big test, it sometimes pays to make a mountain out of a molehill when it comes to preventive practices in the workplace. Unfortunately, some readers may know all too well that individual or successive charges of discrimination filed by former employees may snowball into a systemic investigation by the United States Equal Employment Opportunity Commission (EEOC). While responding to a charge of discrimination and the concomitant information request may seem rather straightforward on many occasions, it is often worth that second look with a different set of eyes to see the potential exposures.

Picture your typical scenario: the company receives a charge of discrimination with an information request. The manager advises you the complainant is a disgruntled former employee with documented performance deficiencies. Yes, she applied for supervisory positions, but she never met the qualifications for the promotions (according to the male manager) and her performance appraisals support the manager's position. Not only that, the manager placed the complainant on a performance improvement plan and the female complainant caused numerous workplace problems. You prepare the position statement and respond to the information request: the complainant was not qualified for the promotion and the company terminated her for legitimate nondiscriminatory reasons.

Then, you receive a supplemental request for information regarding the demographics of the supervisory position for which the complainant applied—and other supervisory positions within the company. The company's supervisors are overwhelmingly male. Then, you review the next requests for information regarding the candidates for promotion to supervisory positions, the sexes of those candidates, the performance appraisals of those candidates, and the salary information. Your company is now embroiled in a systemic investigation.

Not all systemic investigations are packaged by the EEOC as such. In fact, they may start out as a lone and apparently defensible charge of discrimination. What appear as three successive but defensible charges of discrimination may also spiral into a more expansive investigation if the complainants share a common protected trait, manager, or other circumstance that could lead the EEOC to suspect systemic discrimination. These scenarios occur all too often and any respondent that does not look before responding to a charge of discrimination may be at risk.

In July 2016, the EEOC trumpeted the success of its systemic program and remarked upon a five-year, 250% increase in the number of systemic investigations over the past five years. Moreover, the EEOC claims a 94% success rate in systemic discrimination litigations over the past ten years. Not surprisingly, the costs and consequences associated with systemic investigations and litigations are quite significant. This issue will address systemic discrimination, the status of EEOC initiatives, litigations, and—of course—preventive strategies. We urge you to "make mountains out of molehills" and take a second look at your history of discrimination charges, responses, and so on, in developing a preventive strategy to avoid systemic claims.

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central to the mission of EEOC," Commission Chair Jenny R. Yang wrote in her preamble to a July 2016 EEOC report on the results of its targeted efforts in combating systemic discrimination over the past decade.

"EEOC can protect many more workers from discrimination through systemic enforcement than it can by investigating or litigating individual charges one by one," the report continues. "EEOC often receives charges from many workers alleging similar discrimination by one employer. In addition, an individual charge of discrimination can lead to an investigation that reveals other workers were harmed. Bringing one systemic action that changes the unlawful practice and provides remedies to the many workers harmed is more efficient than undertaking one individual investigation or lawsuit at a time that may not fully resolve the issue underlying the discrimination."

The EEOC no doubt found additional motivation in the U.S. Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, which made it more difficult for private discrimination plaintiffs to obtain certification to pursue classwide claims under Rule 23 of the Federal Rules of Civil Procedure. The Commission has willingly stepped in to pick up the resulting slack in this regard. In a similar vein, the sharp increase in employers' use of arbitration agreements—including class waivers—with employees has created further obstacles for private class action discrimination lawsuits; however, the EEOC is *not* restricted from bringing suit in court on behalf of employees, even if they have agreed to arbitrate their claims individually. Thus, the Commission plays an outsized role in "class" litigation.

Another factor: The Commission believes that employers too often ignore its pronouncements. Therefore, the EEOC considers the best way to obtain compliance is to leverage its resources by making an example of certain employers through systemic enforcement and lawsuits.

Convinced that it can get the biggest bang for its proverbial buck by aggressively pursuing widespread practices that allegedly have discriminatory results, then, the EEOC is not content merely to respond to discrete charges filed by individual employees. Rather, it proactively seeks out further evidence that broader patterns of bias are in play.

A "pattern or practice" or something else?

Systemic discrimination claims can be broadly broken up into two subcategories. First, pattern-or-practice claims involve allegations of intentional discrimination where the EEOC decides to invoke the Section 707 procedural mechanism in litigation. Second, there are EEOC *non*-pattern-or-practice cases. These may involve either disparate treatment claims, involving allegations of intentional discrimination, or disparate impact cases in which the EEOC does not allege intentional discrimination. In a given case, the EEOC may pursue claims of systemic discrimination where a pattern or practice of discrimination is alleged, or without any reference to an alleged pattern or practice. As an example, the EEOC sometimes pursues hostile work environment claims under a pattern-or-practice theory and sometimes it simply seeks recovery for all alleged victims of harassment.

A formidable plaintiff

Many employers would much prefer to defend a class litigation brought by a private litigant than to contend with the EEOC as the plaintiff since the EEOC brings the apparatus of the federal government to bear. There are numerous reasons why the EEOC can prove a more formidable foe, including:

- The EEOC is not required to satisfy the arduous requirements of Rule 23 in order to sue on behalf of a class.
- Pursuant to its "public guardian" role, the EEOC has expansive authority to investigate suspected discrimination beyond the specific allegations asserted by the charging party.
- To that end, the EEOC has more robust subpoena authority.
- The EEOC, in a minority of decisions, has succeeded with an argument that under Section 707 pattern-or-practice claims, it is not constrained by the 300-day statute of limitations period in which to bring discrimination claims under Section 706 of Title VII.

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- The EEOC has different motivations than a private plaintiff and, therefore, can be less likely to accept an early financial settlement.

In addition, many jurisdictions, and the plain language of Title VII of the Civil Rights Act (and, by reference, the Americans with Disabilities Act), limit pattern-or-practice procedural mechanisms to the EEOC (or, in the case of state and local governments, the Justice Department).

A systemic investigation ensues

An EEOC investigation of systemic discrimination may arise several ways:

- An employee (or failed job applicant or former employee) files a discrimination charge, which the EEOC broadens into a pattern-or-practice investigation.
- A charge is filed expressly alleging the employer has engaged in a pattern or practice of discrimination.
- An EEOC commissioner files a "Commissioner's Charge," in accordance with certain antidiscrimination statutes, on behalf of allegedly aggrieved employees—without an employee ever having filed a complaint with the agency.
- If the allegations are age discrimination under the Age Discrimination in Employment Act (ADEA) or an equal pay violation under the Equal Pay Act (EPA), the EEOC launches a "directed investigation" of its own accord.

In any of these scenarios, the EEOC is authorized to undertake an expansive investigation into whether discrimination has occurred, and it may file a systemic discrimination lawsuit. For employers, the critical period for averting systemic litigation is at the pre-complaint, investigatory stage—when the EEOC's "fishing expedition" first gets underway.

"The rough equivalent of class certification comes from the EEOC investigating issues and finding a class in the investigation."

"The battle lines are really drawn before the lawsuit is filed," notes Paul Patten, a Principal in the Chicago office of Jackson Lewis. "The rough equivalent of class certification comes from the EEOC investigating issues and finding a class in the investigation. In defending EEOC lawsuits, you're trying to keep it limited to the class members they've discovered during the investigation, so what happens at this stage is the big component of the defense."

Individual vs. systemic claims

A few notable differences exist when dealing with the EEOC in the pre-suit phase when systemic discrimination claims are involved. These include:

- The agency may be less willing to engage in mediation to resolve the charge in an expedited fashion, before the Commission even makes a determination as to the merits of a charge.
- Systemic investigations tend to last many years, while individual investigations are usually completed in a year or two.
- In an individual case, the employer knows upon whom to focus its investigation and whom it has to pay to resolve the matter: the charging party. In a systemic investigation, the EEOC can get ahead of the employer and identify a class. Often, the EEOC refuses to disclose the identity of the class to the employer during the investigation.
- In an individual matter, there is usually a finite amount of information that needs to be internally investigated. With the data usually accompanying a systemic claim, an investigation can be complicated and time-consuming.

Keeping a narrow scope

The EEOC's authority to investigate discrimination is not restricted to an underlying charge of discrimination. Unlike a private litigant, who can only assert allegations in court that are "like or related" to those set forth in his or her charge, the EEOC can bring suit on any allegations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint, as long as the agency then found cause as to the new allegations (and attempted to conciliate them). Consequently, any individual charge has the potential to become a "class" investigation (even if the underlying individual charge lacks merit), as the agency may expand the scope of the inquiry into issues and potential

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victims not specified in the underlying charge. Indeed, the charging party may even settle with the employer after the charge is filed, and the EEOC can proceed to investigate class issues.

In its defense, much depends on how the employer responds to the charges of discrimination. In fact, the employer inadvertently can provoke a class investigation based on the information that it voluntarily turns over to the EEOC in the course of defending an individual charge. Therefore, the employer should respond to individual charges as narrowly as possible—both in drafting its position statement and in producing information requested by the EEOC.

Drafting the position statement

When presented with a charge, an employer must prepare a position statement responding to the allegations. One strategy to counter the EEOC's potentially expansive posture is to focus solely on the initial allegations that brought the EEOC to your door. Usually, it's best that the position statement provide information focused specifically on the individual charge. Address only the facts relating to the specific charge.

Avoid unnecessary discussion about the company's general employment policies or practices, the overall operations of the business, or national or even regional statistics. Such missteps can unwittingly invite systemic litigation. If an individual charge alleges discriminatory termination, focus solely on the charging party/employee, the conduct at issue, and the termination decision. For example:

- Include an introductory statement very briefly describing the nature of your business, but do not provide a detailed history of the company, its growth, other locations, or its size.
- Highlight your Equal Employment Opportunity (EEO) policies (or harassment policy, if applicable to the discrete charge at issue), but do not provide copies of either any additional policies or your entire employee handbook.
- Focus on the individual employee's poor performance or misconduct, giving the agency sufficient information as to the charging party to justify the EEOC's closure of its investigation.
- Limit the amount of information regarding "similarly situated" individuals (as you seek to contradict claims that the employee was the victim of disparate treatment), lest the EEOC deem the information an invitation to delve more deeply into class-related issues. If such comparative data is necessary, limit this information to the smallest possible work unit of comparable employees, such as the individual's department or an individual store location.

There are several "red flags" that may suggest the EEOC is contemplating pattern-or-practice claims. If, for example, the EEOC seeks information or data beyond the specific location, review period, or processes implicated by the underlying charge of discrimination, a systemic discrimination investigation likely is afoot. These common requests should put an employer on alert: information on how the company's data is stored and what fields of information are available, information about other corporate locations using the same processes or practices, or requests that information be provided in Microsoft Excel format.

"Class" claims continued on page 6

Certain types of allegations lend themselves readily to pattern-or-practice claims; also, certain forms of discrimination are expressly targeted by the EEOC pursuant to its Strategic Enforcement initiatives. Either way, the following are more likely to be the subject of systemic litigation:

- Failure-to-hire claims (watch for EEOC requests for job applicant data)
- Claims arising from pre-employment testing (the EEOC will request any employer validations conducted on such pre-employment screens)
- Claims arising from the use of criminal background checks
- Hostile work environment claims at an isolated location employing numerous individuals
- Claims for failing to provide accommodations to disabled employees in the administration of no-fault attendance and maximum leave policies
- Pay practices claims

"CLASS" CLAIMS **continued from page 5**

Working the numbers

Particularly when a systemic lawsuit is contemplated, the EEOC requests statistical data from an employer so that it can analyze and identify trends. When responding to such a request, conduct your own statistical analysis of the requested data before submitting it. Use the results of that analysis to shape your legal strategy and your negotiations with the EEOC. (Statistical analyses should be conducted under privilege; take steps at the onset to maintain the confidentiality of the analysis to ensure that the privilege remains intact.)

"It's pretty rare that the EEOC loses on summary judgment on systemic claims," notes Patten, looking ahead to litigation. "The EEOC usually comes armed with pretty good statistics. If the EEOC has robust statistics, even if the anecdotal evidence isn't very strong, the employer is probably going to face a trial."

A fine line

Employers must walk a fine line when responding to the EEOC's information requests. Understandably, employers react negatively to extremely broad requests for information from the EEOC and initially want to send a "See you in court" response. The EEOC's requests for information are informal, after all, and an employer has no statutory obligation to provide what the agency has requested. But, providing information that is not burdensome to obtain may be well-received by the EEOC. Cordiality is key: Employers can often negotiate with the agency investigator when they have concerns of over-reaching. Ideally, the employer can reach a workable, good-faith compromise that will provide the EEOC with the documents that it realistically needs to resolve the charge before it, while shielding the company from unnecessary, overbroad inquiries.

Keep in mind, however, that the EEOC has authority to issue administrative subpoenas for documents or other information, including testimony, and it seldom hesitates to exercise this power when an employer refuses to timely furnish requested information. Moreover, the EEOC can sue to enforce its subpoenas in federal court, and courts tend to be quite willing to enforce them.

Investigating the charge

While the EEOC investigation is underway, an employer also must undertake its own investigation of the allegations underlying the charge in order to:

- Discern if the facts alleged are true.
- Correct unfounded allegations.
- Inquire whether the employee has availed himself of the internal mechanisms for addressing such concerns.
- Ensure that prompt remedial action was taken, and note the corrective action.
- Confirm that the preventive measures currently in place are sufficient.
- Assess whether other employees may have experienced similar treatment.
- Identify the legal and factual issues that will come into play: *e.g.*, is this an atypical instance of allegedly discriminatory conduct—or a neutral employment practice under challenge as having a disparate impact on an entire racial group?
- Evaluate liability risks and determine whether early resolution through conciliation is appropriate.

An internal investigation is critical not only to shore up the employer's defense in anticipation of an imminent systemic litigation; it is also an opportunity to remedy any internal problems that threaten to give rise to unfair treatment, with the goal of preventing future systemic claims.

Considering conciliation

There are important procedural safeguards for employers when the EEOC is the plaintiff. For example, if, after investigating, the EEOC determines there is "reasonable cause" to believe the employer has engaged in unlawful discrimination, the agency has a statutory duty to conciliate in good faith before filing suit. After the U.S. Supreme Court's 2015 decision in *Mach Mining, LLC v. EEOC*, the extent to which the EEOC has satisfied this obligation is subject to minimal scrutiny; the procedural defense remains, however, and affords an employer the opportunity to resolve the matter voluntarily, early on, without litigation.

This strategy, carefully considered, may be the optimal solution for an employer faced with "bad facts" or potentially massive systemic liability. An employer is not

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required to conciliate, however, and there are pros and cons of doing so:

- Conciliation takes place after the EEOC has found "reasonable cause" that discrimination has occurred. There is little opportunity to dispute the merits of that determination, but only to negotiate the relief to which employees are entitled.
- The EEOC often conciliates matters without requiring publicity. If the EEOC files a lawsuit, it issues a press release as a matter of course. The potential negative impact on the company's reputation, and the prospect of claimants "coming out of the woodwork," are critical considerations.
- While conciliation can seem a less foreboding alternative to the looming possibility of EEOC litigation, it should be noted that the EEOC *threatens* far more lawsuits (as an inducement to conciliate) than it can feasibly file. The agency will likely opt to sue large employers, for maximum impact, when the particular legal issues in play are novel, or are the focus of its Strategic Enforcement initiatives. Absent these variables, the less risk-averse employer may opt to take its chances and hope that, at most, it will have to defend a complaint brought by a private litigant armed with a right-to-sue letter.

EEOC files suit

Once a lawsuit is filed, there are other legal strategies in the defense arsenal to explore. At that stage, defending an EEOC suit often dovetails with the defense of systemic lawsuits brought by private litigants. However, there are meaningful differences:

- The EEOC will typically come to the lawsuit armed with significant facts and statistics from its investigation. Employers will want to obtain these investigative materials early in the litigation. This can result in early discovery battles. The EEOC sometimes resists providing information from its investigation, claiming governmental deliberative process privilege and refusing to present its investigators.
- Courts have taken varying positions on what type of EEOC lawsuit is eligible for pattern-or-practice mechanisms and, if the court decides to bifurcate the case into Phase 1 (liability) and Phase 2 (damages), what issues are properly addressed at each stage. As examples: 1) The ADEA contains no reference to "pattern or practice"; yet, the EEOC has been able to proceed with pattern-or-practice mechanisms in the ADEA context; 2) Courts have tended to push issues of punitive damages to Phase 2, but the EEOC continues to push punitive damages into Phase 1.
- If the EEOC is proceeding on a pattern-or-practice theory, its ability to obtain bifurcation from a court is enhanced. In Phase 1, the EEOC attempts to (1) position case management orders so that discovery is focused on the defendant; and (2) have the issue of punitive damages addressed in Phase 1. Defendants have an interest in keeping Phase 1 discovery broad and having punitive damages decided in Phase 2.
- When matters are not bifurcated, it will typically be in the employer's interest to have the court impose deadlines on the EEOC to identify its class members. A significant portion of class members disclosed by the EEOC can be unenthusiastic. Noticing the depositions of these class members, and moving to exclude them when they do not appear, can be an effective way to winnow the EEOC's class.
- If the EEOC is simply seeking relief for a class without the use of a pattern-or-practice mechanism, it may be necessary to file a summary judgment motion that focuses on the facts of each class member.
- On the other hand, if the EEOC is proceeding under a novel legal theory, it may be in the employer's interest to delay expensive class discovery and instead move early for summary judgment on the EEOC's novel theory.

A fait accompli?

Despite the employer's best efforts, the EEOC may, in the end, find some basis for significantly expanding the investigation, and for including allegations of systemic discrimination in an eventual complaint. The best legal strategy, then, when receiving notice of a charge, is to respond narrowly to the agency as though only an individual claimant is involved, while preparing for a potential pattern-or-practice suit to come.

In addition to the EEOC, employers also must contend with classwide claims brought by the plaintiffs' bar. Defending private class-action discrimination lawsuits will be the topic of our next issue of the *Class Action Trends Report*. ■

When private plaintiffs pile on

An employer may find itself defending suits brought both by the EEOC *and* by private litigants. What happens when an individual plaintiff seeks to intervene in a suit that the EEOC has filed on behalf of individuals in his or her protected class? What about when the EEOC piggy-backs onto litigation brought by private plaintiffs? How does it alter the defense strategy when you're up against both?

"There are two typical scenarios," explains Paul Patten, a Principal in the Chicago office of Jackson Lewis. In the first, a private plaintiff's firm identifies a potentially viable claim, and "the EEOC tags along." As the federal agency charged with combatting workplace discrimination on a broad scale, the EEOC's role is to vindicate the rights of the public at large. Given this purpose, the EEOC pursues additional, nonmonetary forms of prospective relief aimed at altering the offending employment practices. (The private litigant, particularly when he or she is a former employee, typically has no vested interest—or standing—to pursue these remedies.)

The EEOC intervening is a rarity; it happens in maybe 1% of the Commissions filings, Patten notes. Still, the effect on an employer's litigation strategy can be dramatic.

The more common scenario, however, occurs when an individual seeks to intervene in an EEOC pattern-or-practice case. The underlying reason may be the same: while the EEOC sues on behalf of the public interest, the individual litigant steps in to ensure that her *personal* interests are protected and to pursue concessions unique to her situation.

EEOC jumps on the bandwagon. The EEOC intervening is a rarity; it happens in maybe 1% of the Commissions filings, Patten notes. Still, the effect on an employer's litigation strategy can be dramatic. "The EEOC coming into a private plaintiff's lawsuit is similar to two countries fighting a war with only armies and then an ally joins one side with a massive air force," as Patten describes it. "The defendant's strategy has been to defeat class certification and all of a sudden, the strategy is of no importance."

One high-profile example of the first scenario is the *Signal International* litigation. In that case, the EEOC sued on behalf of nearly 500 Indian guest workers who were recruited by a shipbuilding company through the federal H-2B program to perform temporary work in the U.S. following Hurricanes Katrina and Rita, and were allegedly subjected to a pattern or practice of intentional race and national origin discrimination. After 11 private lawsuits were filed alleging a variety of claims against the employer, the EEOC came on the scene. The nonprofit public interest law firm that had steered much of the private litigation—netting a $14 million jury verdict in one coordinated action—assisted the EEOC in investigating and prosecuting its case. In December 2015, the EEOC announced a $5-million settlement.

Another notable example is the 1998 Mitsubishi Motors case, in which the EEOC obtained a $34 million consent decree—the largest ever in a sexual harassment suit at the time—brought on behalf of several hundred female employees. The EEOC settlement came a year after Mitsubishi paid $9.5 million to resolve a private sexual harassment suit brought by 29 employees.

The dynamics that most commonly lead to the EEOC intervening are as follows: A plaintiff's counsel with significant experience and resources grows impatient with a characteristically deliberate EEOC investigation, requests a right to sue. The EEOC grants the right to sue. The plaintiff files a class action lawsuit. In the meantime, the EEOC continues its investigation, finally finding reasonable cause and then filing its own lawsuit or intervening.

"When the EEOC intervenes in an already pending class action lawsuit, we often see the case settle right away," Patten said.

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Private plaintiffs intervene. The more common scenario is when an individual seeks to join the EEOC's case as an intervenor. Under Title VII (and the Americans with Disabilities Act), the individual who filed the underlying charge that prompted the EEOC's investigation, as a matter of right, can intervene in an EEOC suit. This is a common occurrence because once the EEOC files a lawsuit, the charging party is precluded from filing his or her own separate action.

When a party has intervened, it adds complexities to the defense of a systemic discrimination suit.

A court typically allows other individuals in the protected class to intervene in an EEOC suit as well, if the individual asserts that the EEOC does not adequately represent his or her interests. (On the other hand, if the EEOC does not file suit, but the charging party does, the EEOC may be allowed to intervene in the private action, at the court's discretion, if the agency certifies that the suit "is of general public importance." As a practical matter, courts permit the EEOC to intervene in most instances.)

Added wrinkles. When a party has intervened, it adds complexities to the defense of a systemic discrimination suit. For example:

- The EEOC collects no attorneys' fees for successful resolution of a lawsuit. When a private plaintiff intervenes, attorneys' fees are added to the calculus.
- An intervening private plaintiff can bring to bear statutory claims for which the EEOC is not authorized to obtain relief. Most notably, private plaintiffs may seek relief under Section 1981 which, unlike Title VII, provides for uncapped punitive and compensatory damages, and a four-year statute of limitations.
- An EEOC intervention can be highly disruptive. Prior to the EEOC's intervention, the employer has likely built its defense strategy largely around defeating class certification. Once the EEOC intervenes, defeating class certification will no longer carry the day for the employer. Instead, the employer will need to pivot to unique EEOC procedural issues and facts relating to substantive liability.
- Procedural defenses that may have pruned a class or kept the matter out of court may not apply to the EEOC. Examples here include severance and arbitration agreements. In many jurisdictions, a well drafted arbitration agreement will force individuals signing the agreement into individual arbitration proceedings. Likewise, employees who signed severance agreements will be barred as class members in a private Rule 23 proceeding. The Supreme Court has found the EEOC can proceed in court regardless of whether an employee has signed a settlement agreement. Several lower courts have also found that the EEOC can seek relief for class members who have waived their rights under a severance agreement, with the amount of the severance payment serving only as a set-off.

When faced with such a scenario, guidance from outside counsel with experience navigating these particular challenges is invaluable. ■

The ADEA is different

Aside from the charging party in the EEOC case, a private litigant is not foreclosed from bringing a Title VII claim even though the EEOC has already done so on behalf of employees. With respect to suits brought under the Age Discrimination in Employment Act (ADEA), however, individuals within the protected class of employees may not file their own separate action once the EEOC sues on behalf of that class. In this situation, where the EEOC files its ADEA lawsuit first, courts do not permit the charging party to intervene.

The legislation

Although lawyers continue to mount vigorous attacks against EEOC investigations that expand from a single discrimination charge into classwide allegations of discrimination, the EEOC, at least *legislatively*, is on solid ground when it moves from individual to systemic charges. Through individual charges, Commissioner Charges, and directed investigations, the EEOC can cast its investigative net broadly when it learns of potential discrimination and finds reasons to believe discrimination may be more widespread—or even involve a different type of discrimination—than initially alleged.

Perhaps most concerning for employers is the EEOC's authority to initiate systemic litigation when the agency deems it appropriate and determines that conciliation efforts have fallen short of the mark ...

Initiating and investigating charges. The EEOC is charged with enforcement of Title VII, the Americans with Disabilities Act (ADA), the ADEA, the Genetic Information Nondiscrimination Act (GINA), and the Equal Pay Act (EPA). The agency is authorized to accept individual charges of employment discrimination under all of these antidiscrimination laws. However, there are other ways in which a charge of discrimination may be initiated and investigated. Under Title VII, 42 U.S.C. Sec. 2000e-5(b), the EEOC's administrative process is triggered by a charge "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer...has engaged in an unlawful employment practice." A Commissioner Charge is on exactly the same footing as an individual charge: There is no "reasonable cause" requirement prior to bringing the charge. The EEOC is likewise authorized to file Commissioner Charges under the ADA and GINA.

Directed investigations. In addition, the EEOC may use directed investigations under the ADEA (29 U.S.C. Sec. 626), the EPA (29 U.S.C. Sec. 206(d), and Section 11 of the FLSA (29 U.S.C. Sec. 211). What does that mean? It means there is no requirement that the agency's investigation be tied to either an individual or a Commissioner's charge of discrimination. These investigations may be initiated by EEOC field office directors. Directed investigations have a strong potential to result in a systemic charge.

Muscle that works. Of course, in order to be effective in its enforcement efforts, the EEOC needs the muscle to carry out its mission. That means having the ability to compel employer cooperation during investigations and the ability to obtain a final remedy where discrimination has in fact occurred. To that end, Congress has equipped the EEOC with subpoena power that is generally viewed as fairly broad. (*See* 42 U.S.C. Sec. 2000e-9, which incorporates 29 U.S.C. Sec. 161, giving the EEOC the same power to summon witnesses and take testimony as given the National Labor Relations Board under the National Labor Relations Act.).

Perhaps most concerning for employers is the EEOC's authority to initiate systemic litigation when the agency deems it appropriate and determines that conciliation efforts have fallen short of the mark (42 U.S.C. Sec. 2000e-5), including through pattern-or-practice lawsuits (42 U.S.C. Sec. 2000e-6). It's not uncommon in systemic cases for employers to find the agency's efforts at conciliation weak or inadequate. As noted, in the wake of the Supreme Court's *Mach Mining* decision, the scope of judicial review is limited and narrow, making it difficult for employers to make much headway arguing the EEOC fell short of statutory procedural requirements.

Curbing systemic litigation. Not everyone is pleased, however, with the agency's expansive authority. Legislative efforts launched in the current Congressional session would bring the EEOC's systemic program under greater scrutiny by both lawmakers and the public. While the EEOC has long believed that it gets the greatest bang for its buck through systemic litigation, employers find the agency's systemic efforts among the most costly to defend and litigate. Not surprisingly, there has been strong, consistent

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pushback against the systemic litigation program from both employers and lawmakers.

Two bills introduced in the 114th Congress (2015-2016) in January 2015 include provisions targeting the systemic program:

- The *Litigation Oversight Act of 2015* (H.R. 549) would amend the Civil Rights Act of 1964 to require the EEOC to approve or disapprove by majority vote whether the Commission should commence or intervene in litigation involving: (1) multiple plaintiffs; or (2) an allegation of systemic discrimination or a pattern or practice of discrimination. It also would give Commission members the power to require the EEOC to approve or disapprove by majority vote whether the Commission commences or intervenes in any litigation. The EEOC would be required, within 30 days after commencing or intervening in litigation pursuant to such an approval, to post on its public website information regarding the case, including the allegations and causes of action, and each Commissioner's vote on commencing or intervening in the litigation.
- The *EEOC Transparency and Accountability Act* (H.R. 550) would direct the EEOC to provide information on its public website about each case brought in court by the EEOC after a judgment is made with respect to any cause of action. The information would denote, among other things, cases of systemic discrimination, including pattern-or-practice discrimination, and instances in which the EEOC was ordered to pay fees and costs, which seems more likely to occur in systemic cases (think *CRST Van Expedited, Inc.* and its $4-million-plus attorney fee award against the agency, which has gone up to the Supreme Court and back down to the Eighth Circuit) or a sanction was imposed against the agency.

H.R. 550 would also amend the Civil Rights Act of 1964 to bar the EEOC from bringing a suit unless it exhausts its obligation to engage in an informal conciliation and certifies that conciliation is at impasse. The determination of whether the EEOC has engaged in a *bona fide* conciliation would be subject to judicial review. Again, this provision would be most useful in curbing agency abuses in systemic cases, where employers often cite concerns that the EEOC has failed to provide sufficient information or has expended inadequate efforts to conciliate effectively. The bill also would require the EEOC Inspector General to notify Congress of any sanctions, fees, or costs imposed on the EEOC by a court and to investigate those cases, and the EEOC to report to Congress on the steps being taken to reduce such instances.

The EEOC Transparency and Accountability Act *(H.R. 550) would direct the EEOC to provide information on its public website about each case brought in court by the EEOC after a judgment is made with respect to any cause of action.*

Both bills were considered at a House Education and the Workforce Subcommittee on Workforce protections hearing in March 2015. As of the time of publication, no further action has been taken on either measure. ■

The caselaw

Where does the EEOC's authority to bring "systemic" or "pattern-or-practice" cases come from? In *General Telephone Co. of the Northwest Inc. v. EEOC*, a 1980 decision, the U.S. Supreme Court pointed out that Title VII, Section 706(f)(1) authorizes the EEOC, after charges against a private employer are filed with it (and it is unable to successfully conciliate), to bring a civil action against the employer. In that case, following sex discrimination charges filed by four employees of a phone company, the EEOC sued, alleging discrimination against female employees in four states and seeking injunctive relief and back pay for the women affected by the challenged practices. The EEOC did not seek class certification under Rule 23, and the Supreme Court ruled that the EEOC may seek classwide relief under Sec. 706(f)(1) without being certified as the class representative under Rule 23.

"... the EEOC need look no further than Sec. 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."

The Supreme Court held: "Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than Sec. 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."

The Supreme Court's decision in *General Telephone* is the foundation for systemic litigation today. Here's a look at two recent, key cases addressing the EEOC's authority to pursue systemic relief:

Systemic discrimination in hiring?

The EEOC sued a national retailer, alleging that the employer had a nationwide procedure that discouraged the hiring of black and Hispanic applicants for many of the hourly and salaried positions at its stores. After two motions to dismiss (both granted in part and denied in part), the EEOC filed a third amended complaint alleging both Sec. 706 claims (for aggrieved *individuals* who were challenging unlawful employment practices on an individual or classwide basis) *and* Sec. 707 or representative claims (alleging a pattern or practice of *systemic* discrimination challenging widespread bias throughout a company on a *group* basis).

Sec. 706 and/or Sec. 707? There are significant differences between the two statutory sections. Under Sec. 706, economic damages, including compensatory and punitive damages, are available, but under Sec. 707—brought by the EEOC on its own behalf—only equitable relief and damages (*e.g.,* back pay) are available. Another significant aspect of Sec. 707 pattern-or-practice claims is that they historically have followed a separate burden-shifting framework, the "*Franks/Teamsters*" approach. This model, set forth by the Supreme Court, is an alternative to the *McDonnell Douglas* framework for establishing a *prima facie* case of discrimination. Specifically, once plaintiffs show the existence of a discriminatory pattern or practice, the burden shifts to the employer to prove individuals were not in fact victims of that practice. Basically, proof of a discriminatory pattern or practice creates a rebuttable presumption in favor of individual relief. This approach is definitely not employer-friendly.

In the lawsuit against the retailer, the EEOC sought to rely on this alternate *Franks/Teamsters* standard of proof for its Sec. 706 class hiring claim (something it had argued unsuccessfully earlier). The employer moved for summary judgment, asking the court to dismiss the Sec. 706 claims and accusing the EEOC of impermissibly bringing a pattern-or-practice claim under this provision based on the *Franks/Teamsters* model to recover compensatory and punitive damages by merging "Sec. 706 and 707 into a single, non-existent 'hybrid claim.'"

EEOC could proceed under Sec. 706. In a June 2016 decision, the Fifth Circuit rejected the employer's argument that pattern-or-practice claims under Title

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VII may be brought only under Section 707, which has no damages remedy. The court held that nothing prevented the EEOC from proceeding under Section 706 and still using the *Franks/Teamsters* proof framework, which relies on representative rather than individualized evidence of liability.

The Sixth Circuit Court of Appeals had tackled the same question in a 2012 decision. It held that the EEOC was not restricted to using *McDonnell Douglas* when it acts pursuant to Sec. 707 but could employ the *Franks/Teamsters* framework. While Sec. 706 lacks the explicit authorization found in Sec. 707 for suits under a pattern-or-practice theory, the appeals court explained that "relevant Supreme Court precedent suggests that the exclusion of pattern-or-practice language from Sec. 706 does not mean that the EEOC may utilize a pattern-or-practice theory only when bringing suit under Sec. 707." In fact, as the court noted, *Franks* itself was brought pursuant to Sec. 706.

"... Congress did not prohibit the EEOC from bringing pattern-or-practice suits under Section 706 and, in turn, from carrying them to trial with sequential determinations of liability and damages in a bifurcated framework."

Further support could be found in Supreme Court precedent, specifically, the *General Telephone* decision, which held that Sec. 706 entitled the EEOC to seek classwide relief without adhering to Rule 23 procedures. "It strains credulity to suggest that, in the course of granting the EEOC permission to sidestep Rule 23 in suits brought on behalf of a class and pursuant to Sec. 706, the Court intended to require that the Commission prove each class member's claim in the manner set forth in *McDonnell Douglas*," the Fifth Circuit wrote, recognizing that a bifurcated proof framework could be used in a Section 706 action. The High Court repeated its *General Telephone* holding earlier this year in *CRST Van Expedited, Inc. v. EEOC*, indicating that the case remained good law even though it was decided before the 1991 amendments made damages available in Section 706 actions. This was enough to persuade the Fifth Circuit. "We conclude," the court wrote, "that Congress did not prohibit the EEOC from bringing pattern-or-practice suits under Section 706 and, in turn, from carrying them to trial with sequential determinations of liability and damages in a bifurcated framework."

The employer also asserted that using the *Teamsters* bifurcated framework for proving pattern-or-practice claims here would offend both due process and the Seventh Amendment, especially if its liability for punitive damages were determined under the *Teamsters* framework. The appeals court was not persuaded, however, saying the complexities of this case did not make it "categorically impossible to apply the *Teamsters* framework to a §706 action."

EEOC needn't name names. The Fifth Circuit further held the EEOC is not required to identify an aggrieved individual by name to satisfy the statutory requirements of investigation and conciliation prior to bringing its pattern-or-practice suit. The employer contended that the required investigation by the EEOC never occurred because the EEOC never identified alleged victims of discrimination and did not give the employer enough information to allow it to identify those individuals. District courts had divided on this issue as to the EEOC's investigation requirement, and no appeals court had squarely addressed it. Here, the Fifth Circuit ruled that the EEOC was not required to identify any aggrieved individuals by name.

Although the EEOC told the employer it had identified an estimated 100 individuals who were victims of discriminatory hiring, it did not provide specific names, and the employer claimed this also violated the agency's conciliation duty. Since *Mach Mining*, only one court of appeals had considered whether the EEOC can meet its conciliation duty without naming individual class members. In *Arizona ex rel. Horne v. Geo Group, Inc.*, the Ninth Circuit concluded that it could. The Fifth Circuit agreed. Even if the EEOC did not initially provide the names of specific victims, it informed the employer about the class it had allegedly discriminated against—African-American and Hispanic applicants. Plus, the parties negotiated for 11 months, including face-to-face

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meetings about the charges, so the employer was clearly on notice of the claims against it. Under *Mach Mining*, the EEOC's conciliation efforts were sufficient.

EEOC's evidence sufficient. The employer also argued that the EEOC's pre-suit investigation was deficient because it relied on statistical and anecdotal evidence, rather than evidence about specific aggrieved individuals, thus neglecting its duty to investigate its Sec. 706 claims. Again, the Fifth Circuit was not convinced, stating: "Since the EEOC is authorized to bring a pattern-or-practice suit under Section 706, the fact that it focused on pattern-or-practice evidence instead of individual claims during the investigation and conciliation process is of no consequence."

A pattern or practice of sex discrimination?

In another pending EEOC pattern-or-practice litigation, Sterling Jewelers Inc. has asked the U.S. Supreme Court to review a Second Circuit opinion that revived a nationwide pattern-or-practice sex discrimination suit against the company, a significant victory for the EEOC. The court of appeals had applied the Supreme Court's *Mach Mining* decision to the EEOC's *investigation* duty, reversing a finding that the EEOC failed to conduct a nationwide investigation before filing suit and holding that the lower court improperly reviewed the *sufficiency* of the agency's investigation, rather than *whether* there was an investigation.

According to the petition for *certiorari* in *Sterling Jewelers Inc. v. EEOC*, the Second Circuit should *not* have applied *Mach Mining*'s ruling on the EEOC's pre-suit duty to *conciliate* a question about its pre-suit duty to *investigate*. The error is so obvious, the petition asserts, that the Court should grant *certiorari* and summarily reverse.

Only limited judicial review. Although *Mach Mining* did not address the EEOC's obligation to investigate, the court of appeals concluded that judicial review of an EEOC investigation is similarly limited, with the sole question on review being whether the agency conducted an investigation. To show that it fulfilled its pre-suit investigation obligation, the EEOC needed to show it took steps to investigate whether there was a basis for alleging widespread discrimination. The Second Circuit said that, as with the conciliation process, an affidavit from the EEOC stating that it performed its investigative obligations and outlining the steps taken to investigate the charges will usually suffice.

Permitting courts to review the sufficiency of an EEOC investigation would "effectively make every Title VII suit a two-step action," in which the parties would first litigate the question of whether the EEOC had a reasonable basis for its initial finding before litigating the merits of the suit, the appeals court reasoned. Such extensive judicial review would "expend scarce resources" and delay and divert EEOC enforcement actions from furthering the purpose behind Title VII.

EEOC testimony. In *Sterling Jewelers*, the primary EEOC investigator's testimony, coupled with the documents in the investigative file, demonstrated that the EEOC's investigation was nationwide, said the court. Between 2005 and 2007, the EEOC received 19 charges from female employees at Sterling Jewelers stores in nine states across the country, 16 of which alleged a companywide "continuing policy or pattern and practice" of sex discrimination in regard to promotion and compensation. The investigator testified that he investigated all of those charges as "class charges."

Moreover, the expert's statistical analysis, based on companywide computerized data, found that Sterling Jewelers paid and promoted men at statistically significant higher rates than similarly situated women nationwide. The EEOC also obtained the employer's nationwide policies governing pay, promotion, and nondiscrimination. Additionally, the 2,600-page investigative file showed that the EEOC requested and obtained numerous documents related to the charges, including witness statements; the company's responses to individual allegations; the charging parties' personnel documents; companywide job descriptions; EEO-1 reports; and the expert's statistical analysis. Rejecting the employer's assertions as to the "laundry list" of steps the EEOC failed to take in investigating, the Second Circuit declined to "second guess" the choices made by the agency. ■

Regulatory roundup

Concerned that employers too often ignore its pronouncements (the latest such guidances cover harassment avoidance, LGBT rights, retaliation, and the intersection of the ADA and leaves of absence), the EEOC believes the best way to obtain compliance is to leverage its resources by making an example of certain employers through systemic enforcement and lawsuits. On July 7, Commission Chair Jenny R. Yang issued a report on the EEOC's efforts in that vein over the last decade.

According to the report: The number of systemic investigations conducted by the EEOC increased 250% in the past five years.

In 2006, the EEOC set a goal to improve its systemic discrimination enforcement efforts. At that time, it had pockets of systemic expertise and successes at some of its district offices. Its aim was to build on this expertise and establish a comprehensive, nationwide systemic discrimination program. Not only does the EEOC prioritize large, nationwide systemic matters, it rewards investigators who latch on to systemic issues and encourages district offices to bring fewer individual and small class claims of discrimination. Systemic harassment claims (now, often based on race or national origin) drive eight-figure settlements and enhance cases where the EEOC challenges other practices, such as promotion.

The numbers. "Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission" reviews the EEOC's record in combatting systemic discrimination over the last 10 years, and offers a glimpse of the EEOC's systemic program going forward. According to the report:

- The number of systemic investigations conducted by the EEOC increased 250% in the past five years.
- The EEOC has a 94% success rate in its systemic discrimination lawsuits over the last 10 years.
- The agency has tripled the success rate for conciliation of systemic matters from 21% in 2007 to 64% in 2015.
- From 2006 through 2015, the EEOC obtained nearly $355 million in monetary relief for more than 48,000 employees through its systemic litigation program. The EEOC has tripled the amount of monetary relief recovered for individuals from fiscal years 2011 through 2015 as compared to that recovered in the first five years after beginning its systemic initiative in 2006.
- Over the past 10 years, 70,000 individuals have received jobs, wages, and benefits as a result of EEOC systemic investigations and lawsuits. The number of individuals obtaining such relief dwarfs the relief obtained from individual investigations and lawsuits, the agency notes.

In particular, the EEOC reports high-value successes in the following areas:

- **Title VII disparate treatment hiring.** These include matters where the EEOC alleged an employer discriminated by not hiring women, African-Americans, or Hispanics. The EEOC also highlights certain matters where it alleged discriminatory promotion (but only one in the last five years).
- **Hostile work environment.** The EEOC references five matters where harassment was a component of the claim that each settled for between $8.9 million and $21.3 million. These matters alleged the hostile work environment was directed against employees because of their race or national origin.
- **ADA accommodations.** The EEOC reported particular success challenging rigid maximum leave/no-fault attendance policies and "100% healed" practices. The EEOC provides examples of several seven- and eight-figure settlements where it alleged an employer disciplined or terminated disabled employees pursuant to leave or attendance policies instead of providing a reasonable accommodation to the disabled employees.
- **Terms and conditions of employment.** The EEOC notes successes in obtaining significant relief for immigrants, migrant workers, and disabled adults who, it says, were subject to substandard working conditions, threats, and intimidation. Sometimes

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these cases also contain a hostile work environment component.

- **Staffing firms.** The EEOC lists a number of favorable settlements where the staffing agencies allegedly had a practice of referring applicants based on client preferences for employees of a certain race, color, sex, national origin, age, or absence of disability.

Much of the EEOC's focus is on more nuanced forms of discrimination (e.g., disparate impact cases where there is no intentional discrimination, but a rule or a test disproportionately excludes females or racial minorities).

Looking forward. Having developed expertise in the categories listed above, the EEOC likely will continue to pursue these types of cases in the future. The report provides clues to the agency's intentions in aspirational statements and disclosures about the EEOC's investments and nationwide teams.

- **Pay discrimination.** While the EEOC specifies no successes in the past five years, it has assigned social science analysts to each district office who will be available to consider complex "pay gap" issues. Moreover, although not mentioned in the report, the EEOC plans to gather pay data from employers required to file EEO-1 reports beginning in 2018 and to use that data to analyze charges and employer trends.
- **Background checks.** The EEOC reports only a few successes in challenging criminal background checks. However, the report reiterates the EEOC's commitment to scrutinizing background checks for unlawful disparate impact against racial minorities. The report lists only three agencywide teams: one of those teams is focused on background checks (the other two are focused on LGBT coverage and ADA leave policies).
- **Tests.** Like the EEOC's challenges to background checks, the EEOC's concern with tests and assessments is that these selection criteria have an unlawful disparate impact. The report lists only one recent success challenging an employer's use of a test as a selection device. However, it makes several references to the EEOC's interest in scrutinizing tests and assessments.

Systemic goals. In 2013, pursuant to its strategic enforcement plan, the EEOC set a baseline measure of 20% for the proportion of systemic cases in its litigation docket, and set annual goals that gradually increased to 22-24% in fiscal year 2016. This is a significant increase from the 13% of systemic lawsuits in the active docket in 2008. The agency's proportion of systemic cases has been within or above this range, reaching a high of 25% in fiscal year 2014.

The EEOC also set a metric for obtaining targeted equitable relief (TER), which is relief obtained in resolution of a charge that explicitly addresses the discriminatory employment practices at issue in a case, and provides remedies to the victims of discrimination. Specifically, the agency established a baseline of 64%

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Harassment task force: the results are in

Also this past summer, the EEOC reported on the findings of its Select Task Force on the Study of Harassment in the Workplace. The report, authored by EEOC Commissioners and task force co-chairs Chai R. Feldblum & Victoria A. Lipnic, was issued in June 2016, and found that workplace harassment continued to be a "persistent problem" yet often goes unreported. Still, nearly a third of the EEOC's 90,000 charges received in 2015 included harassment allegations (on all bases—not just sex).

Perhaps the most noteworthy finding of the task force's 18-month investigation: harassment training has been largely ineffective at combatting the problem. "[I]t's been too focused on simply avoiding legal liability," Feldblum and Lipnic contend. Their report provides detailed recommendations for employers on developing anti-harassment training, designing policies, and implementing procedures for complaints, reporting, and investigating harassment.

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of conciliations and lawsuit resolutions containing TER in fiscal year 2013. Based on charge and lawsuit data, the agency also developed goals to increase resolutions with TER to 65-70% by fiscal year 2016. For fiscal year 2015, the agency exceeded this target with 81.2% of conciliation and lawsuit resolutions obtaining TER, which is 1,270 out of a total of 1,565 resolutions. The percentage of resolutions obtaining TER has increased steadily over the past three years.

Use of systemic tools. The EEOC's 2006 systemic report recommended the increased use of Commissioner Charges and directed investigations as a means of pursuing systemic investigations. These tools had been "severely underutilized by the agency," according to the EEOC's latest report—and is a "highly effective tool for determining whether discrimination is likely to have occurred." Since 2006, in fact, the EEOC says it has found reasonable cause that discrimination occurred in 81% of Commissioner Charges investigated (*i.e.*, 84 out of 104 investigations).

The EEOC also noted that it would make further use of the agency's charge data—a key source of information on which industries have higher levels of certain allegations—to root out those areas and industries "where government enforcement is most needed."

The EEOC reports that more than 75% of Commissioner Charges were opened during investigations of a charge filed by one individual, where evidence suggested there was a broader policy or practice in play affecting additional workers or raising further issues of discrimination (or related violations of the law). As one example, the EEOC touted its nationwide investigation of some 40 charges brought against a national cellular carrier and its affiliates, and allegations that its uniform no-fault attendance policy violated the ADA. The numerous individual charges did not cover all of the corporation's related entities; a Commissioner Charge was approved naming all of those entities. The result: a consent decree securing $20 million in relief for hundreds of employees.

The EEOC also noted that it would make further use of the agency's charge data—a key source of information on *which* industries have higher levels of certain allegations—to root out those areas and industries "where government enforcement is most needed." The use of this information is even more critical in areas where workers face barriers in reporting violations against specific employers leaving many claims unreported, or may be unaware of a broader pattern of discrimination, according to the EEOC. Additionally, demographic information collected from the agency's EEO-1 form provides more data to assist the EEOC in identifying patterns of segregation and potential hiring barriers. Research on emerging employer practices—screening devices, tests, and other practices—will provide further systemic enforcement fodder. ■

Prevention pointer: One bad apple: dealing with the rogue manager

By Brian T. Benkstein and Elizabeth S. Gerling

Even employers who implement all the right policies and procedures face the potential of rogue managers who engage in wrongful conduct. While some of these prevention pointers may be stating the obvious for compliance-conscious organizations, too often employers fail to take the relatively simple steps beyond appropriate policies that can significantly increase the chances of success in defending the case of a rogue manager—or allow an employer to avoid such cases altogether.

Assuming an employer has compliant policies in place, the keys for employers to avoid or reduce liability in the case of one "bad apple" manager are training, enforcement, feedback, and proof.

Training. Employers should conduct routine trainings on discrimination policies, including manager training on policies and on how to handle complaints or reports of discrimination in a timely, sensitive, and appropriate manner. All employees should also receive training to ensure they understand their rights and reporting options. All reporting mechanisms should have fail-safe provisions so the complaining employee can bypass the manager who is engaging in the wrongful behavior.

Appropriate policies and training may allow the employer to avoid punitive damages and establish a good-faith defense, allowing the employer to avoid or reduce damages. In *Cooke v. Stefani Mgmt. Servs.*, a 2001 vicarious liability case, for example, the Seventh Circuit declined to impose punitive damages on an "innocent party," stating that if the employer had no knowledge of the rogue manager's conduct, there was nothing it could have done "beyond the general policies and training it did provide—to ensure compliance with Title VII." (The appeals court was guided by the Supreme Court's 1999 decision in *Kolstad v. American Dental Ass'n*, which set the standard for awarding punitive damages in Title VII cases.)

Enforcement. Employers must consistently put into practice and enforce the policies and procedures set forth in documents like employee handbooks. Employers should take care when developing and drafting policies to ensure the enforcement mechanisms are consistent with actual company practices. Then, employers must always follow through on those enforcement mechanisms and discipline any employee, including managers, who violates anti-discrimination policies.

Feedback. In addition to enforcement, employers can regularly solicit feedback from employees to encourage reports of inappropriate conduct. Organizations can use anonymous hotlines or surveys, 180-degree reviews on supervisors, regular reminders of policies, or any other appropriate method that encourages employees to come forward with any discrimination concerns. Continuous feedback keeps the company and supervisors in check and gives employees the tools to address issues before the need for a formal complaint.

Proof. None of these prevention pointers will effectively prevent or reduce employer liability without proof. Proof begins with acknowledgment by all employees of policies, as well as trainings and any enforcement or disciplinary actions. Essentially, employers must "lock in" any rogue manager on the company's policies and his or her knowledge of them. It will be hard for a supervisor to disclaim knowledge of a reporting policy if he or she acknowledged the policy, acknowledged receipt of training on the policy, and acknowledged a prior written warning on a similar issue under the policy.

This requires documenting all disciplinary actions even if the action is a verbal reminder. Employers should publicize policies and reporting procedures where employees have easy access to them. One rogue manager's conduct is likely to impact the employer less if the employer can show a jury its deliberate and purposeful attempts to prevent discrimination.

What's trending?

Noteworthy developments in class litigation since our last issue:

EEOC lawsuits

A federal court in Nebraska disposed of numerous claims asserted by the EEOC and intervening employees in a complex, long-running religious and national origin discrimination case brought on behalf of (or by) Somali Muslim meatpacking employees who contended their employer unlawfully denied their request for prayer breaks during Ramadan. In these bifurcated proceedings, Phase 1 had addressed the EEOC's pattern-or-practice claims; Phase 2 was to address all individual claims for relief, and those claims for which no pattern-or-practice liability had been found in Phase 1. After trial on Phase 1, the court ruled in favor of the employer, concluding that it would suffer undue hardship if it were forced to accommodate the prayer time requests. Still remaining in Phase 2 were the EEOC and several individual intervenors—employees who were terminated after they staged a work stoppage to protest the denial of their religious accommodation request. Some of their claims were dismissed on procedural grounds. However, the court did allow some of the intervenors who had not filed administrative charges with the EEOC to rely on the single-filing or "piggy-back" rule to satisfy their exhaustion requirement to filing suit, rejecting the employer's argument that the rule only applies to class actions. (The law on this point varies by circuit.) On the other hand, the court also held, relying on the "law of the case" doctrine, that the EEOC could not seek recovery on behalf of 18 individuals who were previously dismissed by the court for failure to prosecute their claims. Despite the EEOC's distinct interests in the litigation, the agency was in privity with these individuals, the court concluded, and thus could not take "a second bite of the apple" on their behalf.

Despite the EEOC's distinct interests in the litigation, the agency was in privity with these individuals, the court concluded, and thus could not take "a second bite of the apple" on their behalf.

A California dried fruit processor must pay $1.47 million in damages after the EEOC obtained a default judgment against the company in a sexual harassment and retaliation suit alleging that the employer permitted two male supervisors to sexually harass a class of female employees. The EEOC alleged that the supervisors conditioned employment and promotions on the female employees' performing sexual favors, engaged in unwanted physical touching and leering, stalked female employees, and fired employees when they complained about the sexual harassment. The court awarded the maximum allowed by the statute, offset by a previous settlement. In 2015, the defendant's predecessor settled the EEOC claim against it for $330,000 and a five-year consent decree, which included injunctive relief.

Wage and hour cases

Cert. granted. Class and collective wage-hour actions continue to proliferate. Here's a sampling of class or collective actions that have been certified (conditionally or otherwise) by the federal district courts in recent months:

- Servers at a national restaurant chain franchise who claimed they should have been paid the regular (*i.e.*, non-tip credit) rate for the non-tipped duties they performed before, during and after their shifts;
- Tipped restaurant workers who claimed non-tipped employees were unlawfully included in their tip pool;
- Bakery route sales delivery drivers who contended they were improperly classified as exempt outside salesmen under the FLSA;
- Delivery drivers for a national pizza chain who brought claims under the Massachusetts Tips Law alleging their franchisee employer was required to remit to them the delivery charges it billed patrons;
- Construction laborers who claimed their employer issued a paycheck for their first 40 hours of work per week, but had a separate real estate management company or other third-party entity issue a check for all hours in excess of 40—circumventing FLSA overtime requirements;

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- Cellular technicians who traveled to various states servicing cellular towers and who claimed their employer should have included their "drive time" wages as part of their regular rate in calculating overtime;
- Retail employees at an athletic shoe store chain who asserted they should have been paid for the time spent waiting to have their bags inspected before leaving the store at the end of their shifts;
- Field engineers who performed physical and manual labor for a company that serviced the oil and gas industry, and alleged they were wrongly classified as FLSA-exempt;
- Security officers who claimed they were improperly classified as independent contractors and thus wrongly denied overtime pay; and
- Home-based staffing company employees who alleged they were not paid for the time spent logging onto and off of computer applications, or spent on hold waiting to speak to technical support staff (the court certified the class after invalidating their employment agreement, which required employees to litigate wage and hour claims only through individual arbitration).

Cert. denied. On the other hand, among the numerous court decisions *refusing* to grant certification, two novel cases are worth noting:

- Servers who worked at one in a chain of Japanese restaurants could not bring an FLSA collective action against the other restaurants in the chain, even though none of the named plaintiffs worked at those entities, "based on the composition of a future collective." A federal district court in South Carolina held the "future collective" theory was insufficient to satisfy the standing requirement, and the servers had not alleged any kind of joint employment relationship that would have otherwise conferred standing as to those defendants on their tip-pool and unauthorized-deduction claims.
- A federal court in the Middle District of Florida—a key jurisdiction for class wage litigation—refused to certify both an FLSA collective action and a Rule 23 class action (alleging violations of the state constitution's minimum wage provisions) in the same litigation because it held the two were "mutually exclusive and irreconcilable" given the likelihood of confusion presented by the FLSA opt-in requirement vs. the Rule 23 opt-out requirement. Although other courts in the Eleventh Circuit have determined that FLSA collective actions are capable of "traveling together" with state minimum class action claims brought under Rule 23, the court in this case was unconvinced and rejected the plaintiffs' reliance on the U.S. Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, in which the plaintiff had moved to certify both types of classes. Instead, the court looked to controlling Eleventh Circuit precedent from 1975, which held that Florida state-law class actions under Rule 23 and FLSA collective actions were mutually exclusive.

"Gig" economy litigation

In "gig" economy news, a federal court in California has rejected a proposed $100 million settlement that would have resolved claims brought on behalf of a class of more than 240,000 rideshare app drivers, who contended they were misclassified as independent contractors. Even if the court were to approve a likely $84 million in relief, it said—a 90-percent discount from the estimated verdict amount of $854.4 million for non-Private Attorney General Act (PAGA) claims against the rideshare company—it was not willing to let the class waive an additional $1 billion in potential PAGA recovery in exchange for a $1 million additional payout. The court did not find the settlement's nonmonetary relief to be sufficient, either.

Other drivers looking to sue the rideshare tech company found themselves forced to arbitrate—in accordance with their arbitration agreements—their putative class action wage claims arising from their independent contractor status. Also, pursuant to a delegation clause in those arbitration agreements, the Ninth Circuit in a separate case held it was for an arbitrator to decide whether drivers' putative Fair Credit Reporting Act claims, alleging their access to the driver app was improperly shut down based on the results of their credit reports, were arbitrable. The appeals court also held the arbitration agreements were enforceable under California law.

A restaurant delivery app company faces a lawsuit brought by delivery drivers after a federal court in California denied the company's motion to dismiss proposed class claims. Here, too, the drivers alleged they were misclassified as

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independent contractors, and that they should have been paid for all of the time they spent on their shifts, during which they were required to be in their cars in a particular assigned area and available to accept assignments.

Franchises

On the franchise front, a federal court (again, in California!) held that a jury could reasonably find a national restaurant chain was a joint employer of restaurant crew members who worked for eight franchisee restaurants and, therefore, could be jointly liable in a putative class action wage suit contending the workers were forced by management to work off the clock and were denied overtime. The workers could potentially establish an "ostensible agency" relationship between their direct employer and the national franchisor, the court found. It rejected the national company's contention that it did not retain or exert direct or indirect control over the workers' hiring, firing, wages, or working conditions, noting that the franchise could exert pressure on the franchisee because it theoretically could withdraw its business. According to the court, being able to apply influence through a franchising relationship, standing alone, could be enough to establish vicarious liability. The court also found unconvincing the national chain's contention that an "ostensible agency" theory couldn't be adjudicated on a classwide basis, since it would require individualized inquiries into whether crew members reasonably relied on the belief there was an agency relationship.

According to the court, being able to apply influence through a franchising relationship, standing alone, could be enough to establish vicarious liability.

Settlements

- An international package delivery company will pay an estimated $240 million to resolve misclassification class action lawsuits that were brought by drivers in 20 different state jurisdictions and consolidated in a multidistrict litigation in a federal court in Indiana. Also, in a separate case in California, a federal court there granted final approval of a $226 million settlement between the courier and a class of west coast drivers resolving similar claims.
- Route sales managers who install, repair, and maintain leased commercial dishwashers and promote detergents, sanitizers and related products for an industrial employer will be entitled to more than $108,000 each under a $35 million settlement resolving claims that they were misclassified as overtime-exempt under state law. A federal court has granted preliminary approval to the agreement, which would end a lawsuit brought on behalf of 213 class members.
- A mobile technology company will pay $19.5 million to resolve allegations of systemic gender discrimination in pay and promotions affecting a class of 3,290 female Science, Technology, Engineering and Math (STEM) employees, including working mothers who were subjected to common practices such as a "24-7 responsiveness" policy, which penalized female employees with caregiving responsibilities, according to the claimants. The unusual settlement, reached before the lawsuit was formally filed, also provides programmatic relief worth about $4 million aimed at ensuring equal opportunity for women at the company. Individual class members stand to gain just under $4,000, on average, in pre-tax recovery.
- A federal court in California gave its preliminary approval to a $19 million settlement agreement resolving class litigation against major animation studios that were alleged to have engaged in a conspiracy not to solicit each other's employees in a wage suppression scheme. Numerous artists and engineers had filed a series of high-profile class-action complaints asserting violations of the Sherman Act and California law; the settlement class was estimated to include 10,000 individuals previously employed by the defendant studios.
- Financial advisors who were discharged following a major financial industry merger were granted their motion for preliminary approval of a $13 million settlement of their class claims alleging breach of contract, conversion, unpaid wages, unjust enrichment, fraud, and related violations. The dispute arose after the class members' plan balances and bonus

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payments from their long-term contingent incentive compensation program were forfeited as a result of their involuntary termination, ostensibly in violation of the plan's contractual requirements.

- In a $5 million settlement agreement, a class of 225 sales consultants will receive more than $14,000 each, on average, to resolve their California Labor Code claims against a medical device manufacturer for unpaid expense reimbursements, illegal deductions from earned wages (and Private Attorneys General Act penalties), and waiting time penalties.
- A retail beauty chain and salon will pay $3.65 million to a class of about 230 general managers to settle claims they were improperly classified as exempt employees under California law and were forced to work long hours performing mostly nonexempt duties at perennially understaffed stores.
- A coupon app company will pay about $2.5 million to resolve the wage claims of a putative class of about 2,024 account sales reps who were allegedly misclassified as exempt from overtime under federal and state law. The average settlement payment to each class member would be $777.92 under the deal, of which a court has granted preliminary approval.
- The U.S. Department of Labor announced it reached an agreement with oil company subsidiaries under which the employers would pay $1.5 million to 750 field workers following a Wage and Hour Division investigation into overtime violations. According to the DOL, the companies violated the FLSA by failing to pay hourly field operators for the hours they worked during mandatory pre-shift relief meetings, where they turned over their duties to employees on the next shift. The action was part of the DOL's industry-based enforcement strategy in the oil and gas industry, pursuant to which it has conducted more than 1,000 investigations and recovered more than $41.5 million in back wages for more than 29,000 workers since 2012, according to the agency.
- A plastic products manufacturer and its contract labor supplier were jointly liable for $1.4 million in back wages and liquidated damages under a consent judgment after an investigation by the DOL's Wage and Hour Division. The staffing agency systematically underpaid employees through a scheme in which employees who worked over 40 hours in a week would record those excess hours worked under a separate company name, so as to avoid the overtime liability. The manufacturer was also liable for the back wages to 566 employees, liquidated damages, and penalties, the DOL determined, deeming the case at hand an example of the "fissured workplace" that, in the DOL's estimation, serves to disadvantage workers.
- A national snack food manufacturer agreed to pay nearly $1 million to settle a nationwide Fair Credit Reporting Act class action alleging that it did not give proper notice to job applicants and employees before taking adverse action against them based on information obtained in their credit reports. A federal court granted preliminary approval of the proposed settlement agreement, which will provide approximately $200 in relief to nearly 3,000 class members.
- Former unpaid interns will take home about $495 each after reaching a settlement in a high-profile class action suit against a media company. The settlement was given preliminary approval by a federal court in New York, in one of the early litigations to raise the question of whether interns should in fact be deemed statutory employees under the FLSA (and New York law). The case ended up before the Second Circuit Court of Appeals, which created a new standard for determining whether interns are in fact "employees" entitled to statutory minimum wage and overtime pay. ■

Federal contractors, take note.

On August 25, the federal rule implementing President Obama's Fair Pay and Safe Workplaces Executive Order (EO 13673) was published. Among its provisions, employers with federal contracts of $1 million or more (as well as their subcontractors) may not require employees to sign pre-dispute arbitration agreements mandating arbitration of Title VII claims specifically, or of any tort claims related to allegations of sexual harassment or sexual assault. The rule does not affect federal contractors' ability to enforce mandatory arbitration agreements as to other workplace disputes, however.

On the radar

Class action waivers

As noted in our last issue of the *Class Action Trends Report*, the Seventh Circuit created a circuit split when it held that an employer who made an arbitration agreement with a class waiver a condition of employment violated the National Labor Relations Act (NLRA). In the decision, *Lewis v. Epic Systems Corp.* (May 26, 2016), the appeals court found that mandatory class action waivers interfere with employees' right to engage in protected, concerted activity within the meaning of Section 7 of the NLRA.

Several circuits, including the Second, Fifth (refusing to enforce the Labor Board's *D.R. Horton* decision itself), and Eighth Circuits, had reached the opposite conclusion, soundly rejecting the NLRB's stance. However, the Ninth Circuit has since deepened the split—falling in line with the NLRB and the Seventh Circuit. In *Morris v. Ernst & Young* (August 22, 2016), a divided panel found that it is a violation of the NLRA to require employees to sign, as a condition of employment, arbitration agreements precluding them from bringing class or collective actions.

Given the circuit split on the question, and its import, the U.S. Supreme Court will likely take up the matter. The NLRB has asked the High Court to do so; the employers in the adverse Seventh and Ninth Circuit decisions have filed petitions for *certiorari* as well. ■

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Up next...

In our next issue of the *Class Action Trends Report*, we will continue to discuss class action discrimination claims, as brought by private litigants under Rule 23 of the Federal Rule of Civil Procedure. How has the plaintiffs' bar adjusted its game plan in light of the Supreme Court's landmark *Wal-Mart Stores, Inc. v. Dukes* decision? How do the Rule 23 factors play out when bringing suit under Title VII or the other anti-discrimination statutes, federal and state? What unique considerations arise based on the particular type of discrimination allegations at issue?