The EEOC's Enforcement Priorities: What Municipalities Need to Know

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In many ways, the City of Haberdash is emblematic of a modern and upwardly mobile urban or suburban America. It has nice homes, good schools, well-kept streets and parks, and a strong sense of community. Haberdash is also a diverse and integrated city—women and minorities are active participants in the workforce, and occupy positions of power and influence. The local government prides itself on serving and keeping happy all of its residents, and on being reflective of the overall community.

Nonetheless, the City has incurred a recent rash of discrimination and harassment claims from its workers. In fact, Haberdash has six separate and distinct Charges of Discrimination against it from either current or prospective city employees.

The first Charge is brought under the ADEA by a 60 year-old employee in its Information Technology Department based on an alleged "pattern and practice of ageism." The employee alleges that despite being fully qualified and highly experienced, the City did not give him full and fair consideration for various higher-level positions in IT. The employee further alleges that the City instead only seriously considered younger applicants straight out of school for open IT positions. Finally, Haberdash improperly disqualified older applicants for computer-based positions because of their age and the inaccurate perception that more mature information technology workers were too old to be up-to-date with the latest trends and technologies.

The second Charge is against the Haberdash's Maintenance Department. One of the City's employees, a Hispanic male who legally immigrated to Haberdash five years ago, claims that he is being segregated from other non-Hispanic workers, being assigned the least-desirable job tasks, and denied opportunities for advancement. His complaint alleges that despite having received positive performance reviews, Haberdash's Maintenance Department is taking advantage of his limited language skills and familiarity with employment laws to deny him the same opportunities it affords its non-Hispanic employees.

The third Charge alleges religious discrimination. The employee at issue is a Sikh who, for religious reasons, wears a turban each day. The employee alleges that his direct supervisor and several of his coworkers have made disparaging and harassing comments about his head covering.

The fourth Charge against Haberdash alleges violations of the Equal Pay Act and Title VII based on gender. The complaint, brought by a female deputy police chief, asserts that the City is purposely paying her less than a similarly situated male deputy police chief. She believes that she and her male counterpart are comparably qualified and that Haberdash should pay them equally.

The fifth Charge pending against Haberdash concerns the ability of an employee to bring a claim against the City. Several years ago, Haberdash implemented an aggressive complaint policy that sought to limit the type and number of civil rights claims its employees could assert. To achieve that end, the City required its employees to sign various waivers, releases, and arbitration agreements. Thus, in addition to mandating that employees go through the standard administrative procedures before bringing a lawsuit in federal court, Haberdash added additional legal protections for itself that sought to limit some of its employees' substantive rights.

Haberdash now faces a lawsuit challenging the legality of these waivers, releases, and arbitration agreements.

Lastly, a sixth Charge brought by a gay employee includes a claim of pattern and practice of discrimination concerning opportunities for advancement and promotion. The employee asserts failure to promote in a recent opportunity based on his sexual orientation. In addition to recovering monetary relief, the employee is seeking to force the City to engage in a holistic prevention program. He wants Haberdash to increase its training and outreach, with the hope that such action will improve the workplace culture and decrease prejudices that serve to discriminate against gay, lesbian, bisexual, and transgender employees.

As a City Attorney for Haberdash, you undoubtedly recognize the potential severity of these six Charges. All raise assertions that, if proven true, could be costly for the city. Moreover, there should be amplified cause for alarm. This is because these six claims all fall within categories of complaints that the Equal Employment Opportunity Commission (EEOC or Commission) has identified in its 2017-2021 Strategic Enforcement Plan (SEP) as areas of particular importance, and that it considers ripe for enhanced scrutiny and action.

New Strategic Enforcement Plan

In December 2012, the EEOC released a SEP covering fiscal years 2013 – 2016. In late October 2016, the EEOC announced that it had approved an updated SEP spanning fiscal years 2017 – 2021 that would reaffirm the Commission's commitment to identifying and prosecuting claims that would have a strategic impact on advancing equal opportunity in America's workplaces. The new SEP is a far-reaching instrument designed to guide and focus the Commission's resources and efforts. As the EEOC's Chair noted, the 2017 – 2021 update addresses persistent and developing issues by sharpening the agency's areas of focus and updating the SEP to recognize additional areas of emerging concern. The EEOC's intent is that the new SEP will lay a solid foundation that will permit the EEOC to concentrate on coordinating strategies and solutions for certain core subjects of workplace law.

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Implementation of the SEP

At the time of this writing, the EEOC has already approved and implemented its newly revised SEP by reallocating resources to prioritize the six areas. This means that the EEOC will shift some of its staff to provide additional support for investigation and prosecution of certain types of claims. The EEOC will also seek increased coordination and collaboration among its staff and among its field offices. The Commission will continually evaluate its progress toward addressing its priorities, and will adapt and reassign resources as necessary. As laid out in the SEP, this implementation effort encompasses proactive actions, careful use of charges, and focused investigative efforts. Although the Commission will, of course, continue to address claims unrelated to those identified in the SEP, the SEP's substantive area priorities will most likely take precedence.

Substantive Area Priorities

The Commission's actions regarding each area will include enforcement, education, outreach, research, and policy development. The EEOC's SEP identified the following six topics as its 2017 – 2021 substantive area priorities:

1. Eliminating barriers in recruitment and hiring;
2. Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination;
3. Addressing selected emerging and developing issues;
4. Ensuring equal pay protections for all workers;
5. Preserving access to the legal system; and
6. Preventing systemic harassment.

Although broad and perhaps seemingly all encompassing, the EEOC's SEP breaks down each substantive area priority and provides better-defined explanations for the types of claims it will be pursuing most vigorously.

1. Eliminating Barriers in Recruitment and Hiring

The Commission will first place a particular emphasis on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups; older workers; women; and people with disabilities. Included are exclusionary policies and practices; the channeling or steering of individuals into specific jobs due to their status in a particular group; job segregation; restrictive application processes (including online systems that are inaccessible to individuals with disabilities); and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).

The EEOC views increased focus in this area as necessary given the growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing. Although the EEOC notes that this priority will typically involve cases of systemic harassment or discrimination, individual or small-group claims may fall within the ambit of this priority if they raise evidence of a policy, practice, or pattern of discrimination.

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2. Protecting Vulnerable Workers

The EEOC will also focus on job segregation, harassment, trafficking, pay, retaliation, and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. This substantive area priority is a focus because the Commission believes that these workers are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. In the eyes of the Commission, their work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies. To help implement this priority, the EEOC has indicated that, where available, it will attempt to utilize local government resources to assist it.

3. Addressing Emerging and Developing Issues

The EEOC's new SEP identifies several trends and developments that, in its opinion, are ripe for increased enforcement. Given the emerging or expanding nature of these trends, the EEOC plans to devote additional resources to the following issues:

i. Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
ii. Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
iii. Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
iv. Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
v. Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

4. Equal Pay Protections

Under its 2017 – 2021 SEP, the EEOC will focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because, as the Commission notes, pay discrimination also persists based on race, ethnicity, age, disability, and other protected characteristics, the EEOC will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

5. Preserving Access to the Legal System

The fifth area that the EEOC is emphasizing focuses on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede the EEOC's investigative or enforcement efforts. More specifically, the EEOC will focus on:

i. Overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims);
ii. Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and
iii. Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights. For example, firing a senior director who reports a pattern of discrimination at the workplace sends a strong message to others not to complain about or to report discrimination.

Although claims alleging overly broad waivers, releases and arbitration typically involve systemic cases, the EEOC may prioritize an individual or small-group claim if such claim raises a policy, practice, or pattern of retaliation. Municipalities should have its employment counsel ensure that its administrative processes for internal complaints is prepared to take on this item that will be scrutinized by the Commission.

6. Preventing Systemic Harassment

Lastly, the new SEP makes combatting systemic harassment a priority. The Commission recognizes that harassment continues to be one of the most frequent complaints raised in the workplace. According to its statistics, over 30 percent of the charges filed with the EEOC allege harassment, and the most frequent bases alleged are sex, race, disability, age, national origin, and religion, in that order. The EEOC believes that strong enforcement with appropriate monetary and injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. Accordingly, the Commission believes a concerted effort to promote holistic prevention programs, which should include training and outreach, is also necessary, and will greatly deter future violations.

The Claims against Haberdash

Because the six pending Charges against Haberdash are the six types of claims that the EEOC's new SEP announced would be prioritized, thoroughly investigated, and if necessary prosecuted, what steps should Haberdash's employment counsel take? What impact, if any, will the EEOC's new SEP have on the Commission's actions? Regardless of whether an employee's claim of discrimination is meritorious, what should employers like the City of Haberdash do to both avoid high priority claims and effectively handle them once they arise?

The 2017 – 2021 SEP unquestionably provides a clear message to employers that these six substantive areas of the law will occupy a considerable amount of the Commission's attention and resources. Major investigations, enforcement actions, and lawsuits brought by the EEOC will likely encompass one or more of these areas. The new SEP further reinforces the fact that the Commission will place particular emphasis on systemic litigation and other cases that it believes will have a strategic impact on workplace laws and culture.

Accordingly, employers should anticipate that the EEOC will focus on high-impact and high-profile cases. When the EEOC has the opportunity to litigate such cases, employers should expect to face a determined and aggressive opponent. As stated in the SEP, the EEOC will attempt to marshal its resources, both locally and nationally, to achieve the results it desires.

To avoid facing an aggressive EEOC, employers should, generally speaking, ensure that their anti-discrimination policies and practices are robust and thorough enough to address any improper behavior that could occur in their workplaces. They will also want to ensure that their policies and pro-

cedures for hiring, firing, promoting, and taking other employment-related actions are structured to avoid actions premised on an individual's protected status, and are applied consistently to all employees.

First Charge: As to the discrimination claim by the potential Information Technology Department worker, the City should examine its hiring and recruiting techniques. If there is a formula used to determine a candidate's suitability for an IT position, the City should ensure that such formula does not have a disparate impact on older job applicants. More relevant, the City should train its IT Department supervisors to ensure that they do not hold unfair biases or prejudices. Even if such biases are common throughout the IT industry, the City needs to make sure that it does not fall prey to unfair stereotypes that improperly perpetuate discrimination.

Second Charge: As to the Hispanic employee who alleges he is an easy target given his limited resources, Haberdash ought to review not only its general anti-discrimination policies, but also properly educate its employees about their rights and responsibilities. If the employee in this hypothetical believes that he is facing adverse employment actions because of his language skills or financial resources, then the City needs to make certain that the employee is not actually hindered in his ability to exercise his rights and seek protection.

Third Charge: The religious discrimination claim by the Sikh employee is, essentially, a run-of-the-mill harassment claim. However, the City should nonetheless seek to educate its employees so that they can understand or appreciate the Sikh employee's religious choices. Given that the EEOC will be on the lookout for discrimination against Sikhs, Muslims, and South Asians, employers should be especially vigilant for, and responsive to, discrimination or harassment against these groups.

Fourth Charge: A claim of equal pay violation should prompt the City of Haberdash to review its pay practices. The City through its employment counsel should conduct an audit and examination of its compensation system to ensure that the metrics used to determine pay or bonuses do not reflect discriminatory practices.

Fifth Charge: The claim challenging the City's use of waivers, releases, and arbitration agreements to limits its liability presents more of a challenge. A discussion of such instruments is beyond the scope of this article, and encompasses a complex and constantly evolving area of the law. Nonetheless, Haberdash would be wise to limit its use of such instruments, and to ensure that any use is clearly permitted by the applicable laws. Because the EEOC will be on the lookout for cases that involve onerous waivers, releases, and arbitration agreements, employers of all types should consider being judicious when asking or requiring employees to enter into such agreements.

Sixth Charge: Lastly, the City should work to address the concerns brought by the gay employee. A review of its discrimination policies, enhanced training and outreach programs, and more awareness on the part of managers and supervisors should help reduce the probability of such claims based on sexual orientation, and therefore reduce the probability that the EEOC, in accordance with its new SEP, will take aggressive action to address such charges. Although sexual orientation is not considered a protected class by Congress under Title VII, the Commission has filed federal lawsuits asserting that discrimination based on sexual orientation is akin to discrimination based on sex, and is therefore impermissible.

Although the six claims pending against Haberdash will undoubtedly attract the attention of the EEOC, and may require that the City consider early settlement negotiations to avoid EEOC litigation, Haberdash should be able to minimize any similar future occurrences if it adopts these recommendations. Accordingly, the City, through its employment counsel, should reevaluate its policies and practices to ensure that it, like the EEOC, is cognizant of and responsive to these types of claims. By ensuring up-to-date practices and keeping an eye out for the specific types of discrimination that the EEOC will be prioritizing, Haberdash ought to be able to serve its citizens, care for its workers, and avoid unwanted attention from the EEOC.

A Postscript on the Implications of a Trump Presidency for the New SEP

The election of Donald Trump as president will likely mean that sweeping changes are coming for many of America's laws, regulations, and enforcement priorities. The U.S. Department of Labor, the EEOC, and other employment-related agencies will not be immune from such changes. However, right now, at the end of 2016, uncertainty reigns supreme. It is simply impossible for lawyers to predict when, how, or to what extent the nation's laws will change.

Despite this, it seems probable that, at least in the immediate future, the EEOC's 2017 – 2021 SEP will remain intact and will guide enforcement efforts. The EEOC is an independent federal agency governed by five presidentially appointed Commissioners who serve until resignation or the conclusion of their term appointment. In addition to the five Commissioners, there is a General Counsel who supports the Commission and provides direction, coordination, and supervision for the EEOC's litigation program.

Currently, three of the Commissioners, including the Chair, are Democrats. The other two are Republicans. Although immediately upon taking office Mr. Trump will be able to appoint a new Chair and replace the soon-to-depart General Counsel, the overall political composition of the Commission will remain unchanged until at least the second half of 2017.

However, once President Trump has the ability to alter the political composition of the EEOC, substantive change will almost certainly follow. What those changes will entail remains unknown. It is possible that a newly directed EEOC will be less aggressive in pursuing litigation. It is also possible that the EEOC will significantly revise its 2017 – 2021 SEP to eliminate certain priorities or change enforcement goals. Other potential changes could affect the EEOC's funding and staffing. For example, a reduction to its budget or staff could impair the EEOC's ability to pursue vigorously the objectives laid out in the SEP. Additionally, there is the possibility that the EEOC will change its internal policies and procedures to slow down or delay the bringing and adjudication of charges of discrimination.

Regardless of what changes occur, they will not occur overnight. All employers across the country should plan on the new 2017 – 2021 SEP remaining in full force and effect for the immediate and near-term future. Moreover, it is possible that the EEOC will drastically increase its activity in the waning days of the Obama Administration in an attempt to bring claims that may eventually be harder for it to pursue. Irrespective of what the future may hold, it is our unsolicited suggestion that employers prepare for increased EEOC action on the six substantive areas named as priorities in the SEP. Mere speculation about future changes should not affect today's realities.