

'More Aggressive' EEOC Likely to Sue More Employers in 2022

Law.com | Trudy Knockless | January 28, 2022



(Photo: Andrew Harrer/Bloomberg)

The EEOC's priorities have been the same since 2012. But "all of these things are subject to interpretation based on who's making up the commission at the time and who are the lead attorneys at the EEOC," Seyfarth Shaw partner Matthew Gagnon said.

What You Need to Know

The Biden administration reversed policies adopted by the Trump administration.

Under Biden, the EEOC is likely to be more litigious.

In the latest fiscal year, the EEOC filed 114 lawsuits.

Discrimination cases filed by the U.S. Equal Employment Opportunity Commission against employers are expected to increase sharply in 2022 as the agency becomes more aggressive, a report released by Chicago-based law firm Seyfarth Shaw found.

Gerald Maatman, a Seyfarth Shaw partner who has been defending companies sued by the commission for about 40 years, said Biden administration appointments and other changes in 2022 will begin to shape the agency's litigation in 2022.

"I think ... you're going to see more cases, bigger cases and a more aggressive EEOC in terms of litigating these areas that the Biden administration has staked out as important things, like protecting vulnerable workers, age discrimination and harassment in the workplace," he said.

Several EEOC rule changes that the Trump administration put in place toward the end of its administration were rescinded after the Biden administration took over in early 2021, according to the report, which was cowritten by Maatman, Christopher Degroff and Matthew Gagnon.

For example, in June President Joe Biden signed a joint resolution narrowly passed by Congress to repeal a Trump-era rule that would have required the agency to share more information, such as the identity of witnesses, during conciliation, a process similar to mediation. Many employers had sought more EEOC disclosure during that process.

EEOC chairwoman Charlotte Burrows last June lauded the repeal, saying it “restores the commission’s flexibility to tailor the conciliation process to the facts and circumstances of each case, thus increasing the likelihood of a successful resolution.”

The new administration also eliminated a rule adopted in March 2020 that would have reined in the discretion of the EEOC general counsel and EEOC regional attorneys to make decisions on the types of lawsuits the EEOC would file and the legal positions it would take. The rule concentrated that power with the commission.

The Seyfarth Shaw report found that the EEOC filed 114 lawsuits in its latest fiscal year, which ended Sept. 30. That compares with 101 in fiscal 2020 and 149 in fiscal 2019.

The upturn in case filings began to show up late last year. The EEOC filed 59 lawsuits in September 2021, up from 33 in the same month a year earlier.

Gagnon said the EEOC’s official enforcement priorities have been the same since 2012. They are eliminating barriers in recruitment and hiring, protecting vulnerable workers, ensuring equal pay protections for all workers, preserving access to the legal system, preventing systemic harassment, and addressing emerging and developing issues.

The last category gives the EEOC leeway to go in a range of directions. In addition, Gagnon said, “all of these things are subject to interpretation based on who’s making up the commission at the time and who are the lead attorneys at the EEOC.”

The report calls pregnancy discrimination an emerging area.

“We just haven’t seen a lot of action and then, all of a sudden this year, we’ve got two big pregnancy discrimination cases out there, which means that something’s been going on in the background,” Gagnon said.

He said the activity could mean the EEOC is prioritizing pregnancy discrimination, but it is difficult to tell because there typically is a substantial lag between the launch of an investigation and the filing of a lawsuit.

“These processes can take years to play out, even before litigation happens,” he said.

Gagnon said he expects the Supreme Court’s 2020 Bostock decision, which declared that a major piece of civil rights legislation protects gay and transgender people from discrimination at work, to create tensions that might spawn EEOC cases.

In particular, some employers or employees may perceive that workplace changes stemming from that decision may conflict with their religious rights or beliefs, he said.

“It’s a cultural flashpoint in our country, so that contest between those LGBT issues and how they intersect with religious rights or freedom of religion issues is going to be a hot button issue,” he said.