

EEOC Strengthens Initiative Against Systemic Discrimination...

EEOC Strengthens Initiative Against Systemic Discrimination – Current Issues Presented

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The Equal Employment Opportunity Commission's ("EEOC") new strategic plan for the fiscal years 2012-2016 was approved on February 22, 2012. This plan renews and strengthens the EEOC's focus on systemic discrimination litigation. The EEOC filed a record 99,947 discrimination charges during the fiscal year 2011. Of these charges, the EEOC completed work on 235 systemic investigations with 96 cases resulting in "reasonable cause" determinations, leaving employers faced with the largest volume of systemic discrimination suits since the EEOC began this initiative in 2006. According to statistics reported by the EEOC, reasonable cause determinations are typically issued in only five percent of the charges it investigates. However, in 2011, an overwhelming 40% of the EEOC's systemic investigations resulted in a cause determination. Further, in 2011, the EEOC filed 23 lawsuits alleging systemic discrimination, with each case involving 20 or more individuals, representing 14% of its litigation docket.

These statistics coupled with the EEOC's recently approved strategic plan clearly show that an attack on systemic discrimination will be one of the EEOC's primary objectives over the coming years. According to the strategic plan, "systemic cases are those that address a pattern, practice or policy of alleged discrimination and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area." As a part of the plan, the EEOC has targeted certain hiring practices as potentially discriminatory under the disparate impact theory, including criminal background checks, credit history checks, and refusal to hire unemployed applicants. In previous years, the EEOC's general counsel indicated that the EEOC may even go so far as to challenge hiring practices involving online searches and social media. The EEOC claims that it is seeking to identify discriminatory hiring practices and policies that are excluding people from the workplace, particularly in the current economic climate. Other potential areas of systemic discrimination under scrutiny by the EEOC include equal pay, age discrimination, and discrimination based on pregnancy and child care.

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The EEOC's initiative against systemic discrimination has presented several legal issues that have been addressed by the courts in recent years and is certain to continue to push these legal boundaries in the courtrooms. Some notable issues with systemic discrimination litigation have stemmed from the similar, yet very distinguishing elements of §706 and §707 actions filed by the EEOC. Other legal issues recently litigated include: the scope and authority of the EEOC's systemic practice investigations, specifically regarding overly broad requests for information; the statute of limitations for pattern or practice lawsuits; and the EEOC's duty to conciliate on behalf of all claimants involved in a systemic discrimination suit in order to satisfy the statutory administrative remedies requirements.

While the EEOC's initiative creates a heavy burden on employers, the courts have demonstrated a disapproval for a "sue first, ask questions later" approach. Some courts have shown willingness to compensate employers where the EEOC pursued claims that clearly lacked merit or where the litigation strategy of the EEOC was questioned by the Court. In several recent decisions such as *EEOC v. CRST Van Expedited, Inc.*, *EEOC v. Peoplemark, Inc.*, and *EEOC and Serrano v. Cintas Corp., Inc.*, the courts awarded significant attorney's fees and costs to employers and sent a strong message that the aggressive litigation strategy recently adopted by the EEOC is not condoned by the Courts.