The Diverse Workforce

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EEOC Reports Record Highs in Intake, Relief and Charges

The U.S. Equal Employment Opportunity Commission (EEOC) finished fiscal year 2011 with a ten percent decrease in its pending charge inventory—the first such reduction since 2002, achieved the highest ever monetary amounts through administrative enforcement, and received a record number of charges of discrimination, the agency reported in its annual Performance and Accountability Report (PAR).

The EEOC received a record 99,947 charges of discrimination in fiscal year 2011, which ended Sept. 30, the highest number of charges in the agency's 46-year history. EEOC staff also delivered historic relief through administrative enforcement—more than $364.6 million in monetary benefits for victims of workplace discrimination. This is also the highest level obtained in the Commission's history. The fiscal year ended with 78,136 pending charges—a decrease of 8,202 charges, or ten percent. In previous years, the pending inventory had increased as staffing declined 30 percent between fiscal years 2000 and 2008.

"I am proud of the work of our employees and believe this demonstrates what can be achieved when we are given resources to enforce the nation's laws prohibiting employment discrimination," said EEOC Chair Jacqueline A. Berrien. "The EEOC was able to strategically manage existing resources and take full advantage of increased resources in the past two fiscal years to make significant progress towards effective enforcement of the nation's civil rights laws."

The agency continued to build a strong national systemic enforcement program. At the end of the fiscal year, there were 580 systemic investigations involving more than 2,000 charges under way. EEOC field legal units filed 261 lawsuits—23 of which involved systemic allegations affecting large numbers of people; 61 had multiple victims (less than 20); and 177 were individual lawsuits.

The EEOC's private sector national mediation program also achieved historic highs, obtaining more than $170 million in monetary benefits for complainants, and securing the highest number of

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EEOC Votes in Favor of "Reasonable Factors Other Than Age" Under ADEA

The EEOC has voted in favor of approving the "Final Regulation on Reasonable Factors Other than Age" under the Age Discrimination in Employment Act (ADEA). The regulation explains that the Reasonable Factors Other than Age (RFOA) defense applies only if the challenged practice is not based on age and that a neutral practice that disproportionately affects older workers can be justified by showing that the practice is objectively reasonable when viewed from the perspective of a reasonable employer under like circumstances. The regulation now goes to the U.S. Office of Management and Budget (OMB) for review. Upon OMB approval, the text of the regulation will be made public in the Federal Register.

The regulation emphasizes the need for an individualized, case-by-case approach to determining whether an employment practice is based on reasonable factors other than age. In addition, it provides lists of factors relevant to determining whether an employment practice is "reasonable" and whether it is based on a factor "other than age."

Under the regulation, a "reasonable" factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances, both in its design and in the way it is administered. To aid in assessing whether an employment practice is based on reasonable factors other than age, the proposed regulation provides a list of factors relevant to whether a factor is reasonable including:

- whether the employment practice and the manner of its implementation are common business practices;
- the extent to which the factor is related to the employer's stated business goal;
- the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- whether other options were available and the reasons the employer selected the option it did.

In addition to the employment practice's design, the way in which it is administered affects its reasonableness. For example, for purposes of the RFOA defense, it may be reasonable to consider factors such as job performance and skill sets when deciding whom to discharge during a reduction in force. It also may be reasonable to consider the extent to which an employee possesses a critical skill (i.e., one that is key to the employer's operations), or is flexible (i.e., has skills that can be used in various assignments or has the ability to acquire new skills). Use of such factors is reasonable under the ADEA if the employer has made reasonable efforts to administer its employment practice accurately and fairly and has assessed the age-based impact of the practice and taken steps to ameliorate unnecessary and avoidable harm. Steps such as training its managers to avoid age-based stereotyping, identifying specific knowledge or skills the employer wants to retain (e.g., familiarity with the company's filing system or ability to integrate different computer networks), and providing guidance on how to measure flexibility (e.g., whether an employee performs a variety of tasks or willingly accepts new assignments) are evidence of reasonableness.

To aid in assessing whether an employment practice is based on a non-age factor, the regulation sets forth a list of factors relevant to the RFOA defense including:

- the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

It is not necessary that all factors be present in every case; the importance of various factors will vary according to the facts and circumstances of each situation. In addition, both lists are non-exhaustive, which means that an employer may present other factors relevant to whether an employment practice is "reasonable" or "other than age."

Employers who apply the considerations delineated in the regulations on the front end will likely find that they are better able to mitigate risk, make more sound decisions, and challenges are more likely to be resolved in their favor.

The determination of reasonableness includes consideration of whether other options were available and the reasons the employer selected the option it did. Employers who utilize the list of factors provided in the proposed regulations for determining what is "reasonable" as well as factors relevant to the RFOA defense, will protect themselves from potential claims of discrimination from disgruntled employees.

New Law Offers Incentives to Hire Veterans

With the passage of the Veterans Opportunity to Work to Hire Heroes Act of 2011 (VOW to Hire Heroes Act) on November 21, 2011, the Obama Administration stays on track with its plan to enact initiatives that decrease unemployment while fulfilling its obligation to our servicemembers and their families.

The new law is the latest good news for veterans seeking job help in recent weeks. While many VOW provisions will take months to implement, tax credits will go into effect immediately for employers who hire unemployed veterans and veterans with service-connected disabilities.

The Returning Heroes Tax Credit provides businesses that hire unemployed veterans with a maximum credit of $5,600 per veteran, and the Wounded Warriors Tax Credit offers businesses that hire veterans with service-connected disabilities with a maximum credit of $9,600 per veteran:

- The Returning Heroes Tax Credit is a new hiring tax credit that will provide an incentive for businesses to hire unemployed veterans.
  - o *Short-term unemployed:* A new credit of 40 percent of the first $6,000 of wages (up to $2,400) for employers who hire veterans who have been unemployed at least 4 weeks.
  - o *Long-term unemployed:* A new credit of 40 percent of the first $14,000 of wages (up to $5,600) for employers who hire veterans who have been unemployed longer than 6 months.
- *The Wounded Warrior Tax Credit* doubles the existing tax credit for long-term unemployed veterans with service-connected disabilities.
  - o Maintains the existing Work Opportunity Tax Credit for veterans with service-connected disabilities (currently the maximum is $4,800).
  - o A new credit of 40 percent of the first $24,000 of wages (up to $9,600) for firms that hire veterans with service-connected disabilities who have been unemployed longer than 6 months.

Earlier this year, the President also announced a series of executive actions to help get veterans back to work. These initiatives include:

Veteran Gold Card: Post-9/11 veterans can now download the Veteran Gold Card, which provides enhanced services including six months of personalized case management, assessments and counseling at One-Stop Career Centers located across the country.

My Next Move for Veterans: The Department of Labor has launched My Next Move for Veterans, a new online resource that allows veterans to enter their military occupation code and discover civilian occupations for which they are well qualified.

Creating a Veterans Job Bank: The Administration launched the Veterans Job Bank, an easy to use tool to help veterans find job postings from companies looking to hire them. In a few easy steps, companies can make sure the job postings on their own websites are part of this Veterans Job Bank (accessed at www.whitehouse.gov/vets).

Joining Forces: In August, the President challenged the private sector to hire or train 100,000 veterans or military spouses by the end of 2013. In just over 100 days, more than 1,500 private sector companies have stepped up and have already employed more than 18,000 veterans and spouses.

Challenging Community Health Centers to Hire 8,000 Veterans in Three Years: The Obama Administration challenged Community Health Centers to hire 8,000 veterans – approximately one veteran per health center site – over the next three years.

Helping Veterans Become Physician Assistants: To fast-track medics into jobs in community health centers and other parts of the health care system, the Health Resources and Services Administration (HRSA) pledged to open up career-paths beyond nursing and expand opportunities for veterans to become physician assistants.

Together, these initiatives and the tax credits will lower veteran unemployment through increased hiring, improve resources for veterans to translate their military skills for the civilian workforce, and provide veterans with new tools to aid their search for jobs. ◆

Take Aways

The new *Returning Heroes Tax Credit* provides businesses that hire unemployed veterans with a maximum credit of $5,600 per veteran, and the new *Wounded Warriors Tax Credit* offers businesses that hire veterans with service-connected disabilities with a maximum credit of $9,600 per veteran. Aided by the new tax credits, businesses have already hired more than 18,000 veterans and military families, with commitments to hire at least 135,000 more.

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resolutions in the history of the program—9,831. This is five percent more than the number of resolutions reported in fiscal year 2010.

In the federal sector, where the EEOC has different enforcement obligations, the Commission resolved a total of 7,672 requests for hearings, securing more than $58 million in relief for parties who requested hearings. It also resolved 4,510 appeals from final agency determinations.

This report should be a wakeup call to employers that the EEOC is more vigilant than ever about eradicating discrimination and harassment in the workplace. Employers need to make sure that they have a discrimination complaint process in place to address employee concerns before they create a hostile work environment resulting in a discrimination claim. Additionally, employers are encouraged to:

- Implement anti-discrimination/harassment policies
- Conduct both supervisor and employee trainings to educate workers about what actions constitute unlawful discrimination
- Conduct a thorough and unbiased investigation of all discrimination claims
- Keep documentation of all policy acknowledgements, claims, investigations, and resolutions, as well as supporting documentation for all decisions to hire, promote, demote or terminate employees

By consistently following unbiased policy and procedures, employers can mitigate behaviors that lead to claims of discrimination and violate the laws enforced by the EEOC. ◆

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Sears Settles EEOC Suit for Race, Age, Sex, and Retaliation

Sears, Roebuck & Co., one of the nation's largest retailers, will pay $100,000 and furnish other relief to settle a race, sex and age discrimination and retaliation lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC had charged that Sears subjected an African-American female employee over the age of 40 to race, age and sex discrimination as well as retaliation for complaining about it.

In its lawsuit filed in September 2010, the EEOC charged that Mary Johnson, who worked in loss prevention at several Sears stores in the Oklahoma City area, from 1982 until her termination in March of 2010, was passed over for promotion to supervisor several times beginning in 2007 in favor of younger, less experienced, white males. According to the agency, Sears retaliated against Johnson for her initial EEOC discrimination charge in September 2007 by subjecting her to worsening terms and conditions at work. Sears last passed over Johnson for promotion in early 2010, just prior to terminating her employment in March 2010 for complaining about its practices and participating in the EEOC's investigative process. Sears denies that it discriminated against Johnson.

Race, sex and age discrimination and retaliation violate the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964. The EEOC filed suit in U.S. District Court after first attempting to reach a pre-litigation settlement through its conciliation process.

In addition to the $100,000 payment, Sears agreed to take specified actions designed to prevent future discrimination, including the posting of anti-discrimination notices to employees, dissemination of its anti-discrimination policy and providing anti-discrimination training to employees. The settlement terms are set forth in a consent decree filed with the court.

"This decree will remind Sears and all large retailers to treat their employees equally as required by law, including older employees, women and people of color, who have too often been victims of job discrimination," said Barbara Seely, regional attorney of the EEOC's St. Louis District Office, which has jurisdiction over Oklahoma. "Corporate America must be more vigilant in guarding against discrimination and retaliation or risk action and exposure by the EEOC."

It generally is necessary for employers to establish, publicize, and enforce anti-discrimination and anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" (Ellerth, 118 S. Ct. at 2270). While the Court noted that this "is not necessary in every instance as a matter of law," failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct discrimination and/or harassment. ◆