

Trump's pro-employer picks to reorient EEOC's priorities

By: Michael Joe, Reporter ◉ February 9, 2018 0

For the first time in a decade, the federal agency combating workplace discrimination will soon be run by a Republican majority, ushering in a period of transition and uncertainty surrounding its strategic priorities.

While it is always a good idea for employers to watch what's happening at the Equal Employment Opportunity Commission – to avoid becoming its next target – the agency's future majority leadership has already signaled some likely changes to come.

A year ago, President Donald Trump's newly appointed acting chair, Victoria Lipnic, said the EEOC would shift the agency's focus away from systemic discrimination cases involving patterns or practices in large organizations, professions and industries and instead redirect more resources toward individual employee cases.



Courtesy AP Images

"I am not of the view that we should be all systemic, all the time," Lipnic said in a panel discussion last February.

And the appointment of two new pro-employer commissioners now awaiting Senate confirmation to its five-member board is also likely to put the brakes on Obama-era efforts to aggressively address the gender pay gap and discrimination based on sexual orientation and gender identity.

Already, the Trump administration last August blocked an Obama-era rule from taking effect that would have required large employers to disclose wage data by gender and ethnicity, calling it "unnecessarily burdensome." Trump's pick to chair the agency, attorney Janet Dhillon, said at her confirmation hearing last fall that enforcing equal pay laws will be a priority, but many legal observers think the new majority will take a more limited approach that does not mandate data collection.

Before Trump's election, the EEOC in September 2016 issued a new strategic enforcement plan for fiscal years 2017 through 2021, reaffirming its focus on priorities in its previous plan. The priorities include eliminating barriers in recruitment and hiring, ensuring equal pay protections, preventing systemic harassment, preserving access to the legal system and protecting vulnerable immigrant and migrant workers from discrimination. But how the Trump administration and new EEOC leadership will interpret those priorities remains to be seen.

"What is unusual here is typically when you talk about the strategic enforcement plan there has been continuity in administrations. We obviously do not have that here," said Scott Schneider, a partner at Fisher Phillips in New Orleans. "I think there is an open question about the extent to which the current administration views that enforcement plan as being in line with whatever strategic initiatives it thinks are important."

The plan also identified two emerging and developing issues to address. One is "backlash discrimination" against "Muslims or Sikhs, or persons of Arab, Middle Eastern or South Asian descent ... as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities."

The second issue relates "to complex employment relationships and structures in the 21st-century workplace, focusing on temporary workers, staffing agencies, independent contractors relationships and the on-demand economy." Lipnic, who will become a commissioner when Dhillon becomes chair, has said evolving employer-

employee relationships will remain her emphasis.

"They are looking closely at the use of temps and at staffing agencies," said Magdalen Blessey Bickford, a member attorney at McGlinchey Stafford in New Orleans. "If they see people using temporary workers, there are flags that go up. Employers could be circumventing the law by not having employees or not calling them employees. Those are issues that are common in temp situations – that people are trying to avoid certain laws by not having regular employees."

Bickford also noted that employers should continue to monitor compliance with the Americans with Disabilities Act in the context of family and medical leave policies. Many employers have adopted inflexible leave policies under which employees face termination if they do not return to work within a specific amount of time, and the EEOC has said those policies can violate the ADA, which requires employers to engage in a dialogue with disabled employees to find a reasonable accommodation.

"The problem is if you are disabled and absence is a way to accommodate your disability, you are going to get fired for exercising your legally protected disability rights," Bickford said.

An Obama-era priority almost surely to be reversed or rolled back is the EEOC's position that workplace bias against sexual orientation and gender identity is a form of sex discrimination.

Trump's Justice Department has come out against the EEOC's stance in a Second Circuit of Appeals case, *Zarda v. Altitude Express*, over whether civil rights laws under Title VII protecting against discrimination extend to sexual orientation. Federal appeals court judges have split on the issue, which could set a path to the U.S. Supreme Court.

At her confirmation hearing, Dhillon refrained from endorsing the agency's current position, saying that while she is personally opposed to workplace discrimination based on sexual orientation and gender identity, "it is critical that the federal government ultimately speak with one voice on how this statute is appropriately interpreted." She pledged to review the issue and suggested that Congress should weigh in.

Twenty states have adopted statewide employment non-discrimination laws that cover sexual identity and gender identity in private workplaces – Louisiana has not – and many companies have adopted policies protecting gay and transgender workers. But LGBTQ and civil rights advocates worry that if the EEOC reverses its position, workers claims of discrimination and harassment will go unaddressed and people will be reluctant to come forward.

But Schneider noted that while the current administration has been skeptical that Title VII or broad prohibitions on sex discrimination extend to gay and transgender employees and students, there is clearly a cultural shift occurring that is breaking down historical impediments to coming forward with allegations.

"I can tell you from my own anecdotal experience that it's very clear to me that the influence of the past several months, the immediate influence is to increase the number of folks who feel comfortable coming forward and complaining. And inevitably, we are going to have a heck of lot more litigation in this space than we ever had before," Schneider said.

"And whether it's to guard against litigation or just to do the right thing, employers need to be dotting their i's and crossing their t's on policy, training, orientation, investigating, responding appropriately, culture issues and all of those sorts of things."

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