



## EEOC TAKES A LOOK AT THE BIG PICTURE

Agency focuses on companies with systemic discrimination problems

By **MARY A. GAMBARDELLA**

The Equal Employment Opportunity Commission (EEOC) has signaled that it is renewing its emphasis on combating systemic discrimination.

In 2006, the EEOC adopted recommendations from an internal task force report that focused on strengthening the EEOC's nationwide approach to investigating and litigating systemic cases. The task force defined systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." These investigations and any attendant litigation would cover systemic discrimination in connection with hiring, termination, setting of compensation, and any other terms or conditions of employment.

The EEOC has taken steps to embolden its efforts in attacking systemic discrimination in employment, and thus to continue transitioning agency focus from individual discrimination cases to agency-driven charges attacking such suspected systemic discrimination practices. In early 2008, two regional attorneys, one in New York and one in Chicago, were engaged to develop and coordinate large systemic cases on a nationwide basis. Supervisors and investigators have been trained to identify and potentially litigate cases where practices have been viewed as having company-wide discriminatory effects. All 15 EEOC district offices have prepared strategic plans for sys-

temic initiatives. Finally, the EEOC had, as of early 2008, already filed approximately 14 actions naming in each 20 or more alleged victims of systemic discrimination.

### Top Priorities

In March 2009, the EEOC listed its "top priorities" as enforcing the Lilly Ledbetter Fair Pay Act, finalizing regulations for the Genetic Information Nondiscrimination Act, developing proposed regulations for the Americans with Disabilities Amendments Act, enforcing prohibitions against religious discrimination, and a systemic discrimination initiative. It has also been announced that this "systemic discrimination initiative" will focus on cases involving failure to hire; screening applicants on arrest and conviction records; pay discrimination and the Lilly Ledbetter Fair Pay Act; pre-employment testing policies; and other ADA amendment issues.

Several things could trigger the EEOC's investigation of a particular company. For example, the investigation of an individual charge might raise suspicions of a systemic problem company-wide. Where a number of charges are brought for the same or similar type of discrimination against the same company, irrespective of the merits of any one claim, the sheer number could raise red flags. Another reason could simply be the random selection of particular industries that have been identified by the EEOC as exhibiting a more significant history of, or potential for, systemic discrimination.

Aside from the obvious consequence of having to respond to potentially extensive, pervasive, costly and time-consuming inquiries, targeted employers can find themselves on the wrong end of litigation



Mary A. Gambardella

brought by numerous plaintiffs at one time, or by the EEOC on behalf of multiple claimants, including by way of the dreaded class action. In such cases, the plaintiffs must prove that discrimina-

tory treatment is the employer's "standard operating procedure." This burden of proof, although demanding, may in certain cases be met by statistical evidence alone.

### HR Review

There is no foolproof way to ensure company practices will not be placed under a microscope. But there is something that employers can do to reduce the likelihood of being targeted and thereby subjected to potential litigation, or, if the company is targeted, to manage the risk of liability by substantiating non-discriminatory business justifications for internal, human resources practices. Specifically, a planned, organized and thoughtful internal review of human resource practices.

Such a review should include the following categories:

- Status, adequacy, and accuracy of position descriptions; hiring and recruitment practices.
- Workforce demographics to ascertain diversity among candidates and employees.
- Criteria used for promotion decisions, salary levels, salary increases, and benefit eligibility.
- Criteria for termination decisions and statistics relating to terminations, volun-

Mary A. Gambardella is a partner in Wiggin and Dana's Labor, Employment and Benefits Department and works in the firm's Stamford office.

tary and involuntary.

- The adequacy of handbook policies and procedures; statistics on internal and external complaints of discrimination, harassment, and retaliation.
- Record retention policies and practices.
- Reviewing whether statutorily required training is conducted.
- For companies doing business with the federal government, compliance with Executive Order 11246, which prohibits government contractors from discriminating in terms or conditions of employment, and requires them to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

Further, while not falling specifically within the jurisdiction of the EEOC, internal audits should nevertheless include a review of any independent contractor relationships to ensure these individuals are indeed accurately classified; a review of exempt/non-exempt position classifications and commensurate pay practices; and a review of the internal complaint policies and procedures to include complaints falling within purview of wage and hour issues.

While any company should be applauded for undertaking what is obviously an overwhelming task, the audit will be of no consequence unless the company is prepared to rectify problems that are revealed.

For example, the company may determine a need to implement salary increases, promotions, or equalization of benefits. Control mechanisms may have to be crafted and implemented. Moreover, throughout this process, the company should ensure, to the maximum extent possible, that steps are taken to cloak its self-analyses with the protections of legal privileges.

Given the EEOC's renewed commitment to seek and remedy systemic discrimination, the internal audit should be viewed as an investment in the company's ability to withstand the potential scrutiny if targeted. The benefit to such a proactive step simply cannot be measured, but always outweighs the potential risks of inaction. ■